
# Submission to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs: Inquiry into the *Native Title Amendment Bill 2012*

## January 2013

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Thank you for the opportunity to comment on the *Native Title Amendment Bill 2012 (*'the Bill) and future reforms of the native title process.

In responding to this Inquiry, ANTaR notes that the Senate Legal and Constitutional Affairs Legislation Committee is conducting a concurrent inquiry into the Bill. ANTaR has made a separate, submission to that inquiry which is attached as Appendix 1.

This submission addresses the broader terms of reference of the current House of Representatives Standing Committee Inquiry, namely:

- whether a sensible balance has been struck in the Bill between the views of various stakeholders, and/or
- proposals for future reform of the Native Title process.

**About ANTaR**

ANTaR is a national advocacy organisation working to educate, engage and mobilise a broad community movement to advocate for justice, rights and respect for Australia's First Peoples.

ANTaR was formed in 1997 to defend existing native title rights and promote the opportunities offered by native title for Aboriginal and Torres Strait Islander people to achieve some measure of justice, recognition, protection of culture and economic opportunity.

**Introduction**

The bill seeks to implement reforms announced by the former Attorney General, Nicola Roxon, at the National Native Title Conference on 6 June 2012 related to good faith requirements, historical extinguishment and Indigenous Land Use Agreement (ILUA) processes. The Conference marked 20 years since the Mabo decision (3rd June 1992), an anniversary which sparked calls from many Aboriginal and Torres Strait Islander leaders, organisations and advocates for fundamental reform of the system to deliver the promise of the historic decision.

At the time of the announcement, ANTaR joined national Aboriginal and Torres Strait Islander peak bodies and native title organisations in welcoming the modest reforms proposed, but expressing profound disappointment at their limited scope. ANTaR believes that the reforms contained in the Bill represent an improvement on the current situation but fail to address the major underlying inequities in the native title system: in particular, the onus of proof and requirement to prove continuity, the lack of clarity around commercial rights and the restrictive definition of 'traditional laws and customs'.

We have commented on the technical and procedural reforms contained in the Bill in our submission to the Senate Legal and Constitutional Affairs Committee, attached as Appendix 1 to this submission.

In this submission we make some general comments about the appropriateness of the balance struck between competing rights and interests and highlight the need for more far-reaching reforms as an urgent priority. Our comments are informed by the inequities in the current system, the fact that time is running out for many Community Elders to see land justice in their lifetimes and the obligations imposed on the Australian Government by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

**Background: Growing support for broader native title reform**

To put the current calls for future reform of the native title process in context, it is useful to consider the background to the Bill presently being considered as well as key developments in the last few years.

In February 2012, the Australian Greens introduced the *Native Title Amendment (Reform) Bill (No. 1) 2012* ('the Greens bill') into Federal Parliament. The reforms contained in the Greens Bill were intended to create a fairer native title system for recognising and adjudicating the rights of Aboriginal and Torres Strait Islander peoples.

In our submission to the parliamentary inquiry into the Greens Bill (see submission attached at Appendix 2), ANTaR welcomed the intention of the legislation and its key provisions, which we noted at the time were informed by recommendations of the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Native Title Report 2009.*

We argued that the time had come for major reform of the Native Title Act:

> "ANTaR strongly supports efforts to strengthen the existing *Native Title Act* so that it can more effectively deliver economic opportunity and greater legal, social and cultural recognition of the rights, identity and cultures of Aboriginal and Torres Strait Islander peoples.
>
> A growing number of Aboriginal and Torres Strait Islander leaders, native title peak and representative bodies and service providers, legal experts and others have been calling for reform of the Act. Australia's native title system has also attracted international criticism due to the high standard of proof required of Aboriginal and Torres Strait Islander applicants and the obstacles to securing recognition.
>
> ANTaR believes that social and political changes since the initial passage of the *Native Title Act* make this an opportune climate in which to achieve these important and necessary reforms. Many of the initial fears about the impact of native title expressed by certain sectors have proved to be unfounded. At the same time, the promise of native title as a vehicle for economic opportunity has not been realised due to impediments in the Act (including the onus of proof), which should be addressed.
>
> In recent years there has been a growing cross-party political consensus that we need to "close the gap" between Aboriginal and Torres Strait Islander Australians and the non- Indigenous community. Reforming our native title laws and adopting a more mature and informed understanding of the opportunities which native title can provide would be a valuable contribution to closing that gap.
>
> We urge the Committee to adopt an in-principle position supporting the overarching aims of the Bill including:
>
> a) strengthening the right to negotiate;
> b) reversing the current onus of proof;
> c) adopting a presumption of continuity;
> d) adopting a more realistic definition of traditional laws; and
> e) clarifying that native title rights and interests may be of a commercial nature."

While ANTaR's submission noted that the Greens Bill could be improved to enable it to better achieve its objectives, it recommended that the Bill be used as a vehicle to make such improvements.

The Parliamentary Committee Report on the Greens Bill recommended against the passage of the bill, despite high levels of support for its objectives.

As noted above, in June 2012, to mark the 20th anniversary of the historic Mabo decision, the Federal Attorney-General announced the reforms that are contained in the current Bill. This announcement was met with disappointment by many Aboriginal and Torres Strait Islander leaders, who recognised the need for far-reaching changes to enable justice to be delivered to native title claimants.

In late June 2012, ANTaR launched a joint online petition with the National Native Title Council calling for major reform to create a fairer native title system to:

- lower the bar for the recognition of native title, including by introducing a rebuttable presumption of continuity;
- redefine 'traditional culture' to recognise the dynamic and living nature of Aboriginal and Torres Strait Islander cultures;
- raise the bar for proving extinguishment of native title rights;
- provide for recognition of commercial rights to land to support economic development; and
- ensure consistency with the UN Declaration on the Rights of Indigenous Peoples.

**Reform priorities and next steps**

ANTaR maintains its position that the substantive reforms identified above are necessary to deliver some measure of justice for Aboriginal and Torres Strait Islander peoples. Additional reforms may be required to achieve full compliance with the UNDRIP.

Further, we highlight the need for systemic reforms to be accompanied by additional resources to native title bodies, including Native Title Representative Bodies, Prescribed Bodies Corporate and the national peak body. We refer the Committee to the ANTaR Pre-Budget Submission 2013-14, which contains more detail about the inadequacy of current funding levels and makes the following recommendations:

**Additional funding for Native Title Representative Bodies (NTRBs)**

Provide additional resources to Native Title Representative Bodies to ensure they are adequately resourced to represent Aboriginal and Torres Strait Islander peoples in native title negotiations.

**$27 million in 2013-14 (recurrent)[1]**

**Increase resources for Prescribed Bodies Corporate (PBCs).**

Provide core operational funding for PBCs on a needs basis, ensuring resources to enable PBCs to fulfil their responsibilities to manage their lands.

**$16 million in 2013-14 ($32 million over 2 years)[2]**

[1] Figures based on a 30% increase in projected funding for the relevant financial year.
[2] Calculated on the basis of the 80 PBCs receiving $200,000 in core funding in each of 2013-14 and 2014-15.

**Increase funding for the National Native Title Council.**

The NNTC is a network alliance of member Native Title Representative Bodies (NTRB) and Native Title Service Providers (NTS) located across Australia. Additional funding would enable the NNTC to increase engagement with key and potential stakeholders, advocacy and lobbying activities and technical and structural policy advice.

**$100,000 in 2013-14 (recurrent)**

ANTaR notes the concerns expressed by this Committee in its report on the Native Title Amendment (Reform) Bill 2011 about amending native title laws (technical and complex as they are) in a piecemeal manner.[3] ANTaR suggests that a comprehensive review of the native title system should be undertaken to consider the efficacy and fairness of the native title system more comprehensively, with a view to achieving full compliance with UNDRIP. We refer the Committee to ANTaR's 2013-14 Pre-Budget Submission, which recommended an allocation of $1.56 million in the next financial year for the Federal Government to**:**

> "Commission and provide sufficient resources and funding for an independent inquiry, led by an appropriately qualified panel of experts, to consider reforms to the *Native Title Act 1993 (Cth),* related legislation, regulations and procedures, to remove barriers to the fair and equitable recognition of native title claims, and to reflect the principles of the UN Declaration on the Rights of Indigenous Peoples."[4]

[3] Commonwealth of Australia, Senate Legal and Constitutional Affairs Legislation Committee, *Native Title Amendment (Reform) Bill 2011 Report* (2011).

[4] See ANTaR, 'Pre-Budget Submission 2013-14' available for download at: http://antar.org.au/sites/default/files/pre_budget_submission_2013-14_final_21.12.12.pdf. Costs have been estimated by using the midpoint of the costs of the Independent Inquiry into Australian Media ($1.4 million, as announced in the 2011-12 Mid Year Economic and Financial Outlook) and the Commission of Inquiry into the Queensland Floods ($1 million, announced in the 2011-12 Federal Budget), with a 30% contingency to account for the increased complexity of an inquiry into the native title system, and the need to conduct more extensive regional and remote consultations.

**APPENDIX 1 – ANTaR Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Native Title Amendment Bill 2012* (Extract)**

## Introduction

This bill seeks to implement reforms announced by the Attorney General, Nicola Roxon, at the National Native Title Conference on 6 June 2012 related to good faith requirements, historical extinguishment and Indigenous Land Use Agreement (ILUA) processes. The Conference marked 20 years since the Mabo decision (3rd June 1992), an anniversary which sparked calls from many Aboriginal and Torres Strait Islander leaders, organisations and advocates for fundamental reform of the system to deliver the promise of the historic decision.

At the time of the announcement, ANTaR joined national Aboriginal and Torres Strait Islander peak bodies and native title organisations in welcoming the modest reforms proposed, but expressing profound disappointment at their limited scope. ANTaR believes that the reforms contained in the Bill represent an improvement on the current situation but fail to address the major underlying inequities in the native title system - in particular, the onus of proof and requirement to prove continuity, lack of clarity around commercial rights and the restrictive definition of 'traditional laws and customs'. These issues are the subject of further analysis in our Submission to the House of Representatives Inquiry referred to above and we urge the Committee to consider the current bill in the broader reform context.

In this submission, we focus on the procedural and technical amendments contained in the Bill. In our separate submission to the House of Representatives Standing Committee inquiry into the Bill and future reform of the native title system, we highlight the need for more far-reaching reforms as an urgent priority.

## Human Rights Compatibility Statement

ANTaR commends the Federal Government on the detailed nature of the Compatibility Statement, and in particular, on its consideration of human rights issues related to the United Nations Declaration on the Rights of Indigenous Peoples.

**Discussion of proposed amendments to the *Native Title Act 1993***

In this section, we make brief comments in relation to key provisions of the Bill. According to the Explanatory Memorandum, the amendments contained in the Bill are designed to "improve the operation of the native title system, with a particular focus on agreement-making, encouraging flexibility in claim resolution and promoting sustainable outcomes."

***Schedule 1: Historical Extinguishment***

1. The changes in this Schedule, according to the Explanatory Memorandum, "will ensure that native title can be recognised over parks and reserves where there is agreement between the parties, even where the creation or vesting of the national, State or Territory park or reserve may otherwise extinguish native title."[5]
2. These amendments represent an improvement on the current law, which does not allow parties to disregard extinguishment in these circumstances. For this reason, ANTaR welcomes these reforms, though we are concerned that the reforms do not go far enough.
3. ANTaR believes that, given the structure of the *Native Title Act 1993* ('*NTA*') and judicial decisions in relation to that Act, all native title determinations should aim to recognise native title to the greatest extent possible, i.e., for native title to fill the tenure gap. That is, native title rights and interests should be recognised over all land and waters not currently subject to other interests in land and to the extent that the land and waters are not subject to such other interests.
4. In our view, the *NTA* should be structured to allow native title applicants to achieve this aim to the greatest extent possible.
5. This aim is currently achieved through mechanisms such as the non-extinguishment principle (s 238) and sections 47, 47A and 47B, which allow prior extinguishment to be disregarded in some circumstances. Proposed s 47C should be seen in this context as a further attempt to enable native title applicants to fill the tenure gap.
6. The Explanatory Memorandum indicates that the proposed s 47C is in part designed to ameliorate the effects of the High Court's decision in *Western Australia v Ward (2002)* 213 CLR1, which found that the vesting of reserves under the *Land Act 1933* (WA) extinguished all native title rights and interests because the vesting amounted to the conferral of a freehold title in the vestee. ANTaR submits that, rather than addressing this problem specifically through the proposed provision, it would be preferable to amend the *NTA* to reduce 'the tenure gap'.
7. Further, ANTaR submits that the section should have broader application and not be subject to agreement with State Governments and other relevant parties.

*Limited scope of operation*

8. Proposed s 47C is limited in its operation to 'park areas', which are areas set aside for the use of the public in general. There are relatively few other interests of a private nature that would have to co-exist with native title rights and interests if native title was recognised through the operation of s 47C.
9. However, there is no reason why the interests of private individuals in respect of public land that would otherwise be subject to native title should not co-exist with native title rights and interests. For example, there is no apparent reason why such private interests holders should be treated any differently from pastoral lease holders, whose pastoral interests must co-exist with native title (see *Wik*, *Ward*).

[5] Explanatory Memorandum at page 8.

10. The scope of the current tenures that give rise to the operation of s 47C should be broadened to include:
    a. Any tenure that does not fully extinguish native title; and
    b. Any otherwise fully extinguishing tenure, under which the land is to be used for a public purpose (such as freehold grants under which the land is to be used for a public purpose, e.g. freehold granted to a State or Territory conservation authority). In effect, this would cover all Crown land, including unallocated Crown or State land and land reserved for a public purpose.

*Need for agreement with the Commonwealth, State or Territory*

11. ANTaR submits that agreement should not be a pre-requisite for the operation of the provision. This is likely to create uncertainty and inconsistency between jurisdictions and governments. Rather, such agreement should instead be required as part of the operation of the provision, and be directed to finding means by which the various private, public and native title rights can co-exist. Therefore, s 47C should be drawn in similar terms to ss 47, 47A and 47B so that prior agreement is not required. In this respect, ANTaR notes that *Native Title Amendment (Reform) Bill (No 1) 2012,* introduced by Senator Siewert ('the Greens Bill') provides that extinguishment must be disregarded when the section is engaged. ANTaR believes this is a more equitable approach.

*Other comments*

12. The provision allowing the extinguishing effect of the construction or establishment of public works to be disregarded should be extended to ss 47, 47A and 47B.
13. It should also be extended to public works constructed or established by or on behalf of statutory authorities and local government bodies, not just those constructed or established by or on behalf of the Crown (see s 47C(10)).
14. The provision should also be extended to provide for the disregarding of historic extinguishment by grants that would be caught by ss 47 and 47A if they were current when the native title application is made. These include grants of freehold or the vesting of reserves for the use and benefit of Aboriginal or Torres Strait Islander peoples. At present, such grants or vestings, which are not current, totally extinguish native title.

### *Schedule 2 Negotiations*

Schedule 2 contains amendments to clarify good faith negotiation requirements, extends the timeframe before a party may seek a future act determination and shifts the onus of proof where one party alleges that another party has not negotiated in good faith. The Explanatory Memorandum explains the Government's objectives in the following terms:

> "These amendments will encourage parties across the whole sector to focus on negotiated, rather than arbitrated, outcomes and will promote positive relationship-building through agreement-making."[6]

*Consideration of the effect of the act on native title rights and interests*

15. The inclusion of proposed s 31(1)(c) is useful. However, ANTaR submits that there should be a direct link between the requirement that the negotiations include consideration of the effect of the act on native title rights and interests and the ability for the proponent to seek a determination from the arbitral body.

[6] Explanatory Memorandum at 16.

16. Proposed s 36(2) should be amended by adding 'and that s 31(1)(c) has been complied with' at the end.

*The good faith negotiation requirements*

17. ANTaR welcomes reforms to clarify the content of the requirement to negotiate in good faith. The proposed reform is intended to address the current difficulty in proving an absence of good faith (due to lack of clarity) and the inequities in the current system.
18. We believe that the list of negotiation requirements in s 31A(2) should be expanded by reference to the content of the Greens Bill, which required a broader range of activities and would go further towards levelling the playing field. Additions should include:
    a. That participation should be 'active';
    b. 'Where reasonably practicable, participated in meetings at a location where most of the members of the native title parties reside, if requested by them'; and
    c. 'Given responses to proposals in a detailed manner, including providing reasons'.
19. ANTaR supports the extension of the negotiation period in s 35(1)(a), but submits that it is likely to make little difference, given that negotiation in accordance with the good faith negotiation requirements is likely to take more than 8 months.
20. We welcome the changes proposed in the new s 36(2) and 36(2A) which would place the onus of proof on the second negotiating party to establish it has met the good faith requirements, where the first party alleges a failure to do so. This is a substantial change from the current provision, which places the onus on the party asserting lack of good faith.
21. Finally, ANTaR suggests that the Government's stated objective of levelling the playing field between native title negotiating parties will not be achieved without adequate resourcing for native title representative bodies ('NTRBs'). We refer the Government to the relevant recommendation in our 2013-14 Pre-Budget Submission to this effect (see ANTaR's Submission to House of Representatives Standing Committee for further detail).

***Schedule 3 ILUAs***

The Bill contains amendments to the Indigenous Land Use Agreement (ILUA) process to broaden the scope of body corporate agreements, reform authorisation and registration processes and simplify the process for amendments to ILUAs.

*One month notice period*

22. The reduction of the period within which objections may be made to the registration of area ILUAs from three months to one month may have the effect of unreasonably limiting the ability of potential native title holders to object to its registration.

*Prima facie case that people may hold native title*

23. The proposed changes to s 251A mean that:
    a. The only native title parties who can make an ILUA are registered claimants, PBCs, and people who can establish a *prima facie* case that they may hold native title; and
    b. Effectively, these are the only people or entities that can reasonably object to the registration of an ILUA, as one of the ways of resolving an objection is by ensuring that the objector is a party to the ILUA. If they cannot become a party, effectively, they cannot sustain an objection.
24. This change is problematic because:

a. People who may hold native title must provide evidence before they can gain the capacity to make a contract (the ILUA);
b. The need to provide evidence will add to the cost, time and complexity of the ILUA process;
c. It is not certain who will assess the evidence provided (though presumably it is the NNTT); and
d. It potentially reduces the capacity for matters to be resolved by ILUA rather than litigation, since ILUAs will become less flexible.

**APPENDIX 2 – ANTaR Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Native Title Amendment Bill 2011***

**Introduction**

ANTaR is a national advocacy organisation dedicated to promoting the rights of Aboriginal and Torres Strait Islander peoples and working to eliminate inequality and disadvantage.

ANTaR was formed in 1997 to defend existing native title rights and promote the opportunities offered by native title for Aboriginal and Torres Strait Islander people to achieve some measure of justice, recognition, strengthening of culture and economic opportunity.

The reforms proposed in this bill are primarily based on recommendations of the Aboriginal and Torres Strait Islander Social Justice Commissioner in the *Native Title Report 2009.* They are intended to create a fairer native title system for recognising and adjudicating the rights of Aboriginal and Torres Strait Islander peoples.

We congratulate Senator Siewert for introducing this Bill into the Australian Parliament and welcome the Senate's decision to examine this legislation. Further, we encourage the Committee to ensure thorough consideration is given both to the overall objectives of the legislation and the specific measures proposed within it.

It is important to note that the current Preamble in the *Native Title Act 1993* (Cth) (the Act) specifically states the intention "to rectify the consequences of past injustices by the special measures contained in this Act". Given that this statement has remained unchanged, despite other changes being made to the Act by governments of both persuasions, it is reasonable to assert that all parties in the Parliament continue to believe that the Act can and should operate in a way which assists to rectify the consequences of past injustices.

It is clear that the Act can be improved to enable it to better implement this clearly expressed intention of successive Parliaments. ANTaR encourages this Committee to urge that the current Bill be used as a vehicle to make such improvements.

**Overview: the case for reform**

ANTaR strongly supports efforts to strengthen the existing *Native Title Act* so that it can more effectively deliver economic opportunity and greater legal, social and cultural recognition of the rights, identity and cultures of Aboriginal and Torres Strait Islander peoples.

The stated overarching object of the Bill is to "implement reforms to the *Native Title Act 1993* to improve the effectiveness of the native title system for Aboriginal and Torres Strait Islanders". ANTaR believes that all Senators should support this objective.

A growing number of Aboriginal and Torres Strait Islander leaders, native title peak and representative bodies and service providers, legal experts and others have been calling for reform of the Act. Australia's native title system has also attracted international criticism due to

the high standard of proof required of Aboriginal and Torres Strait Islander applicants and the obstacles to securing recognition.[7]

ANTaR believes that social and political changes since the initial passage of the *Native Title Act* make this an opportune climate in which to achieve these important and necessary reforms. Many of the initial fears about the impact of native title expressed by certain sectors have proved to be unfounded. At the same time, the promise of native title as a vehicle for economic opportunity has not been realised due to impediments in the Act (including the onus of proof) which should be addressed.

In recent years there has been a growing cross-party political consensus that we need to "close the gap" between Aboriginal and Torres Strait Islander Australians and the non-Indigenous community. Reforming our native title laws and adopting a more mature and informed understanding of the opportunities which native title can provide would be a valuable contribution to closing that gap.

We urge the Committee to adopt an in-principle position supporting the overarching aims of the Bill including:

a) strengthening the right to negotiate;
b) reversing the current onus of proof;
c) adopting a presumption of continuity;
d) adopting a more realistic definition of traditional laws; and
e) clarifying that native title rights and interests may be of a commercial nature.

**Recommendation 1**

That the Committee clearly express its support for the stated object of the Bill, that is, to reform the *Native Title Act 1993* to improve the effectiveness of the native title system for Aboriginal and Torres Strait Islander people, and express support for the passage of legislation that would achieve this reform.

**Recommendation 2**

That the Committee ensure there is wide support amongst Aboriginal and Torres Strait Islander people and their representative organisations for any specific changes to this Bill that the Committee wishes to recommend.

[7] See, for example, the Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia,* UN Doc CERD/C/AUS/CO/14 (2005), para 16 and Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia,* UN Doc CCPR/C/AUS/CO/5 (2009), para 16.

**Comments on Specific Provisions of the Bill**

***Objects of the Act***

ANTaR supports inserting an additional object into the Act to provide that governments in Australia should "take all necessary steps" to implement certain principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

While we support the full implementation of the Declaration into domestic legislation and policy (which is beyond the scope of the current Bill) and are aware that the proposed amendment may have limited legal effect, we believe it would be a considerable improvement on the current situation.

Should the Bill be enacted, each person exercising a power or performing a function under the Act would be required to apply these Declaration principles. Given Australia has indicated formal support for the Declaration, it is important that our laws and practices start to more explicitly reflect this.

The Committee should also be aware that all parties in the Senate supported a resolution in 2010 which "affirms the view that 'free, prior and informed consent' is a fundamental human rights principle for Indigenous peoples; and calls on all current and future Australian governments to ensure this principle is taken into account in developing, implementing and administering their laws and programs".[8] ANTaR welcomed the commitment expressed by all parties in that Senate resolution and believes this item would assist in ensuring those words are transformed into action.

***Future acts amendments***

ANTaR supports efforts to strengthen the future acts regime to better protect the rights of Aboriginal and Torres Strait Islander peoples.

The Bill proposes several positive amendments in this regard. This includes amendments to:

- strengthen the freehold test with respect to non-legislative acts by allowing decision-makers and courts to consider the effectiveness of heritage laws when considering whether the elements of s 24MB have been met,[9] and
- provide that the non-extinguishment principle applies to a compulsory acquisition.[10]

These amendments have the potential to strengthen the protection of sites of significance and reduce unnecessary extinguishment, thus increasing the opportunities of Aboriginal and Torres Strait Islander people to benefit from native title.

In particular, as detailed below, ANTaR welcomes the proposals in the Bill to reform the right to negotiate. Weaknesses in the right to negotiate are a key area of frustration for many Aboriginal and Torres Strait Islander people. These weaknesses are often identified as a

[8] Commonwealth, *Parliamentary Debates*, Senate, 24 June 2010, 4375.
[9] Native Title Amendment (Reform) Bill 2011, Sch 1, Item 2.
[10] Native Title Amendment (Reform) Bill 2011, Sch 1, Item 3.

reason why native title has not delivered as many opportunities and benefits as had been initially envisaged and hoped. ANTaR believes that reforms to this area are necessary.

***Application of procedural rights to offshore areas***

Schedule 1, Item 4 of the Bill would repeal s 26(3) of the Act to allow the right to negotiate to apply in relation to offshore areas. This is an important measure which more properly reflects the reality of traditional and continuing connections of Aboriginal and Torres Strait Islander people to both land and waters. As this has been recognised by the courts and the Attorney General, the right to negotiate should reflect this reality.

***Clarifying and strengthening the meaning of negotiation 'in good faith'***

Schedule 1, Item 5 of the Bill would amend the Act to require negotiation parties to negotiate in good faith for a period of *at least six months* and, importantly, to use "*all reasonable efforts* to come to an agreement" about the doing of the act or the conditions under which each of the native title parties might agree to the doing of the act.

ANTaR supports reform to strengthen and clarify the good faith negotiation requirements. The proposed amendment appears to provide a higher standard than the existing requirement that the parties "negotiate in good faith with a view to obtaining the agreement of each of the native title parties".[11] ANTaR supports moves to strengthen the right to negotiate such that the "doing of the act" cannot be assumed to be a foregone conclusion.

The Bill proposes, in schedule 1, item 6, to insert into the Act non-exhaustive criteria to clarify the requirement to "negotiate in good faith using all reasonable efforts". In its *Discussion paper: Leading practice agreements: maximising outcomes from native title benefits*, the Australian Government indicated an intention to amend the Act to clarify "what negotiation in good faith entails and to encourage parties to engage in meaningful discussions about future acts under the right to negotiate provisions".[12] The Government has already undertaken consultations on this matter and we refer the Committee to ANTaR's submission to that process.[13] ANTaR encourages the Committee to take into account the views of Aboriginal and Torres Strait Islander peoples, and their representatives, as expressed during these consultations when considering this item of the Bill.

ANTaR encourages the Committee to support the recommendation of the Australian Human Rights Commission regarding the development of a formal code or framework to provide further guidance for negotiating parties.

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[11] *Native Title Act 1993* (Cth), s 31(1)(b).
[12] Australian Government, *Leading practice agreements: maximising outcomes from native title benefits* (July 2010), 14.
[13] The ANTaR submission is available at: http://www.antar.org.au/sites/default/files/Final%20submission%20to%20native%20title%20discussion%20papers%20November%202010.pdf

***Onus of proving good faith***

Schedule 1, Item 7 of the Bill would insert a new s 31(2A) into the Act to provide that the party asserting good faith has the onus of proving that it negotiated in good faith. A negotiation party would not be able to apply to an arbitral body for a determination unless it had complied with the proposed good faith negotiation requirements (proposed s 35(1A)). These amendments would be consistent with recommendations contained in the former Aboriginal and Torres Strait Islander Social Justice Commissioner's *Native Title Report 2009*[14] and are supported by ANTaR.

***Profit-sharing conditions***

The Bill would amend the Act to enable an arbitral body to determine profit-sharing conditions. Currently, s 38(2) of the Act provides that an arbitral body cannot determine such conditions. The *Native Title Report 2009* recommended that this provision "should be reconsidered"[15] due to the concern that the inability of the National Native Title Tribunal to determine profit-sharing conditions strengthens the negotiating position of proponents.

ANTaR shares the concerns identified in the *Native Title Report 2009* and supports the amendment proposed in this item. However, we believe it is important to also ensure that the National Native Title Tribunal has the expertise and capacity to analyse profit projections and impose acceptable profit-sharing conditions.

***Disregarding prior extinguishment***

The Bill proposes to amend the Act to enable an applicant and a government party to agree to disregard the prior extinguishment of native title rights and interests. This proposal is based on French CJ's suggestion that parties be able to agree to disregard extinguishment.[16]

In January 2010, the Australian Government released draft legislation proposing an amendment to the Act to enable applicants (among others) and the relevant government parties to agree to disregard extinguishment over areas "set aside or vested by a Government law for the purpose of preserving the natural environment of the area, such as a State or Territory park or reserve".[17] The amendment proposed by this Bill is not limited to such areas, and should therefore be supported as a more wide-ranging, beneficial provision.

Like the Government's draft legislation, the amendment proposed in the Bill would require that there be an agreement before extinguishment is disregarded. As the current Aboriginal and Torres Strait Islander Social Justice Commissioner has stated in relation to the Government's draft, "[t]he proposed amendment would therefore have the most impact where government parties are truly prepared to be flexible".[18]

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[14] Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), 124 (recommendation 3.15).
[15] Ibid 108.
[16] R S French, "Lifting the burden of native title: Some modest proposals for improvement" (2009) 93 *Reform* 10, 13. Available at http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/.
[17] The Hon R McClelland MP, Attorney-General, "Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances" (undated), 1.
[18] Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011) 40-41.

Whilst ANTaR supports this item, we believe the Committee should expressly acknowledge the importance of government parties engaging constructively in all negotiating processes.

***Onus of proof and presumptions of continuity***

The Bill proposes to reverse the onus of proof in native title claims and to introduce specific presumptions of continuity into the Act.

Calls to reverse the onus of proof have long been made by native title peak and representative bodies, service providers and other Aboriginal leaders and spokespersons. More recently, they have been supported by other prominent public figures, notably Chief Justice French, Justice North, the then Aboriginal and Torres Strait Islander Social Justice Commissioner and former Prime Minister Paul Keating and Aboriginal leader Noel Pearson.[19]

According to the Explanatory Memorandum, the Bill implements the amendments suggested by Chief Justice French.[20] Under this model, the members of the claim group must "reasonably believe" their laws and customs to be traditional. It has been suggested that this bar is still too high, and that the presumptions should apply once the registration test is passed.[21] ANTaR supports as low a bar as practicable, taking into account the stated intent of the Act and the clear public benefit which can derive from any formal acknowledgement or recognition of native title.

This amendment would also enable the courts to take into consideration whether a disruption in continuity was caused by a State, a Territory or non-Indigenous person. This would improve the fairness of the current system. ANTaR welcomes this proposal and suggests the Committee consider whether the Commonwealth could also be named in this provision.

***Definition of traditional laws and customs***

The Bill would amend the Act to clarify that the expressions "traditional laws acknowledged" and "traditional customs observed" in s 223 of the Act include such laws and customs as remain identifiable through time, regardless of whether there is a change in those laws and customs or in the manner in which they are acknowledged or observed. This would be an improvement on the current situation which requires that laws and customs remain 'largely unchanged'.

The Bill would also amend the Act to clarify that it is not necessary for a "connection with the land or waters" referred to in s 223(1)(c) to be a physical connection, thereby clarifying that a spiritual connection is adequate to attract legal recognition and bringing the Act into line with existing case law on this issue.[22]

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[19] See French, above note 10; Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009); Calma, above note 8, 123 (recommendation 3.2); Paul Keating, 'Time to revisit native title laws to redress the past', *The Australian* (1 June 2011) 16; Elks, above note 1.

[20] Explanatory Memorandum, Native Title Amendment (Reform) Bill 2011, 7. See R S French, "Lifting the burden of native title – some modest proposals for improvement" (Speech delivered to the Native Title User Group, Adelaide, 9 July 2008). Available at: http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj35.html.

[21] North Queensland Land Council, *Submission: Inquiry into the Native Title (Reform) Bill 2011* (27 May 2011).

[22] See *De Rose v South Australia No 2* (2005) 145 FCR 290, 319.

ANTaR supports these proposals as setting a more realistic threshold for claimants to meet, which recognises cultural adaptation.

***Commercial rights and interests***

In Schedule 1, Item 14, the Bill would amend the Act clarify that native title rights and interests may be of a commercial nature. This amendment was also explored in the *Native Title Report 2009*.[23] ANTaR believes it is very important that Aboriginal and Torres Strait Islander people have the ability to derive maximum benefit and opportunity from native title rights and interests. The barriers to deriving direct commercial or other economic benefits from these rights have been a source of ongoing frustration for many Aboriginal and Torres Strait Islander people and communities.

The right to have maximum control over how to use rights and interests in land and waters is a pivotal one that lies at the heart of the Act's stated intent to rectify the consequences of past injustices. It can also provide an important mechanism to achieve a more fully reconciled Australia into the future and contribute to closing the economic and social gap.

**Summary and Recommendations**

ANTaR believes this Bill provides an important opportunity to increase economic opportunity for many Aboriginal and Torres Strait Islander people and communities, to reduce delay, unfairness and expense in native title determination processes and to advance reconciliation.

The inability of past Australian Parliaments to ensure maximum economic, cultural and social opportunities for today's descendants of the First Peoples was a source of serious disillusionment amongst many Aboriginal and Torres Strait Islander people who derived great hope from the High Court's *Mabo* and *Wik* decisions. It was also a missed opportunity for our nation.

ANTaR encourages this Committee to make the most of the opportunity presented by consideration of this legislation and the issues it seeks to address. We urge the Committee to send a message of broad political support for strengthening the native title system to increase the ability of Aboriginal and Torres Strait Islander people to use native title for economic and social empowerment.

This Bill is to be commended as an important first step towards identifying solutions to the difficulties faced by Aboriginal and Torres Strait Islander peoples in seeking justice through the native title system. ANTaR urges the Committee to ensure that the views of Aboriginal and Torres Strait Islander peoples are seriously considered in developing its recommendations. We urge the committee to ensure that any uncertainty about the legal effects of the Bill not undermine the important opportunity to make significant advances in this important area but instead signal the need for a broader review of the native title system to ensure it delivers justice and maximum social and economic benefit to Aboriginal and Torres Strait Islander peoples.

[23] Calma, above note 8, 108-110

**Recommendation 1**

That the Committee clearly express its support for the stated object of the Bill, that is, to reform the *Native Title Act 1993* to improve the effectiveness of the native title system for Aboriginal and Torres Strait Islander people, and express support for the passage of legislation that would achieve this reform.

**Recommendation 2**

That the Committee ensure there is wide support amongst Aboriginal and Torres Strait Islander people and their representative organisations for any specific changes to this Bill that the Committee wishes to recommend.

**APPENDIX 3 – Extract: ANTaR Pre-Budget Submission 2013 -14 - 'Native Title'**

## 4. NATIVE TITLE

### 4.1 Native title reform

There were a number of important native title developments in 2012-13 including:

- A renewed push for major native title reform on the 20th anniversary of the Mabo decision;
- Government announcement of reforms to good faith requirements, historical extinguishment and a range of other procedural reforms;
- The introduction by the Greens of a second Native Title Amendment Bill to effect reforms to the burden of proof, rights to commercial use and a range of other issues;
- Institutional reforms related to the respective roles of the Federal Court and the National Native Title Tribunal (with redirected funding of $24.4 million announced in the 2012-13 Budget); and
- The Carbon Farming Initiative.

ANTaR strongly believes that the *Native Title Act 1993 (*Cth*)* remains in need of reform in order to address significant obstacles it creates to Aboriginal and Torres Strait Islander peoples' realisation of land rights.

ANTaR supports the recommendation of the Aboriginal and Torres Strait Islander Social Justice Commissioner for an independent inquiry into the native title system to explore options for reform and better align the system with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The Federal Government should commission and fund such an inquiry within the forthcoming Federal budget. While a Senate Inquiry into the Government's native title amendment legislation is currently underway, ANTaR submits that its limited focus will not enable a comprehensive inquiry across the breadth of the native title system.

**Recommendation: Funding for an independent inquiry into the reform of the native title system**

Commission and provide sufficient resources and funding for an independent inquiry, led by an appropriately qualified panel of experts, to consider reforms to the *Native Title Act 1993 (*Cth*),* related legislation, regulations and procedures, to remove barriers to the fair and equitable recognition of native title claims, and to reflect the principles of the UN Declaration on the Rights of Indigenous Peoples.

**$1.56 million in 2013-14[24]**

[24] Costs have been estimated by using the midpoint of the costs of the Independent Inquiry into Australian Media ($1.4 million, as announced in the 2011-12 Mid Year Economic and Financial Outlook) and the Commission of Inquiry into the Queensland Floods ($1 million, announced in the 2011-12 Federal Budget), with a 30% contingency to account for the increased complexity of an inquiry into the native title system, and the need to conduct more extensive regional and remote consultations.

### 4.2 Native Title Representative Bodies and Prescribed Bodies Corporate

Native Title Representative Bodies ("NTRBs")[25]and Prescribed Bodies Corporate ("PBCs") are central to the recognition, management and administration of native title claims.[26]

NTRBs currently receive very limited funding and there is currently no specific Commonwealth Government funding provided directly to PBCs, though some limited funding has been provided on an emergency basis from time to time.

Indeed, for more than a decade now, increased funding for NTRBs and PBCs has been consistently recommended by a range of reports and reviews from Government agencies, Commonwealth Parliamentary Committees, State Governments and industry groups – a point made by the Aboriginal and Torres Strait Islander Social Justice Commissioner seven years ago in his 2005 *Social Justice Report.*[27]

In 2006, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account found that:

> Evidence to the inquiry indicated that NTRBs are central to the native title process and as such inadequate resourcing of these bodies can have a significant impact on the extent of progress being made in native title processes. Most importantly, insufficient resources prevent NTRBs being active players in the native title process, thereby creating backlogs and causing significant delays.[28]

[25] NTRBS represent native title groups and have a range of functions including researching and preparing native title applications, assisting native title groups in mediations, negotiations, consultations, proceedings and dispute resolution and entering Indigenous Land Use Agreements (ILUAs) on behalf of native title holders.

[26] PBCs hold in trust or manage native title on behalf of native title holders. They have statutory duties and obligations under the *Aboriginal Councils and Associations Act 1976* and provide a variety of functions including administrative functions.

[27] Reports cited by the Social Justice Commissioner in his *2005 Social Justice Report* include: G Parker & o'rs, *Review of Native Title Representative Bodies*, ATSIC, Canberra, 1995; Senatore Brennan Rashid & Corrs Chambers Westgarth, *Review of Native Title Representative Bodies*, ATSIC, March 1999; Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Report on the Effectiveness of the National Native Title Tribunal*, December 2003, paras 4.19-4.44 and recommendation 6. See also the House of Representatives Standing Committee on Industry and Resources report, *Inquiry into resources exploration impediments*, August 2003, paras 7.42-7.51 and recommendation 19; and Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Report on Indigenous Land Use Agreements*, September 2001, para 6.83 and recommendation 4, *Ministerial Inquiry into Greenfields Exploration in Western Australia*, Western Australian Government report November 2002, recommendations 8-12; and *Technical Taskforce on Mineral Tenements and Land Title Applications* , Government of Western Australia, November 2001, pp103-106. More recently, see the Minerals Council of Australia 2010-11 Pre-Budget Submission at 43 and the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the operation of Native Title Representative Bodies,* March 2006.

[28] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the operation of Native Title Representative Bodies,* March 2006 at [3.20] at page 34.

The Committee also recognised the chronic under-funding of PBCs, concluding that:

> The Committee considers that PBCs need to be adequately funded and resourced so that they can fulfil their important role in the native title system. Currently, many PBCs are unable to function effectively because of a lack of financial assistance from the Commonwealth. The Committee believes that the Commonwealth should examine appropriate ways of resourcing the core functions of PBCs. The Committee does not have a view as to whether this assistance should be provided directly to the PBC or via NTRBs.[29]

The Office of Indigenous Policy Coordination (OIPC) within the Department of FaHCSIA currently provides resources to representative bodies. In 2009-10, the Commonwealth Government allocated an additional $50.1 million to the Department of Families, Communities, Housing and Indigenous Affairs for the native title system, in addition to $73 million included in forward estimates. This included $69.3 million in funding for NTRBs and other native title service providers. In 2011-12, this amount increased to $84.3 million, and was projected to increase to $87 million and $88.6 million in 2012-13 and 2013-14 respectively. Taking growth and indexation into account, ANTaR recommends an increase of 30% above current funding levels as justifiable and necessary, having regard to the central role of NTRBs in native title agreement-making.

**Recommendation: Additional funding for Native Title Representative Bodies (NTRBs)**

Provide additional resources to Native Title Representative Bodies to ensure they are adequately resourced to represent Aboriginal and Torres Strait Islander peoples in native title negotiations.

**$27 million in 2013-14 (recurrent)[30]**

**Recommendation: Increase resources for Prescribed Bodies Corporate (PBCs).**

Provide core operational funding for PBCs on a needs basis, ensuring resources to enable PBCs to fulfil their responsibilities to manage their lands.

**$16 million in 2013-14 ($32 million over 2 years)[31]**

**Recommendation: Increase funding for the National Native Title Council.**

The NNTC is a network alliance of member Native Title Representative Bodies (NTRB) and Native Title Service Providers (NTS) located across Australia. Additional funding would enable the NNTC to increase engagement with key and potential stakeholders, advocacy and lobbying activities and technical and structural policy advice.

**$100,000 in 2013-14 (recurrent)**

[29] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the operation of Native Title Representative Bodies,* March 2006 at [5.82] on page 80.
[30] Figures based on a 30% increase in projected funding for the relevant financial year.
[31] Calculated on the basis of the 80 PBCs receiving $200,000 in core funding in each of 2013-14 and 2014-15.