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The Native Title Amendment Bill 2012

2.1 This chapter reviews the evidence the Committee received in relation to the four schedules of the Bill.

Schedule one: reviving native title in parks and reserves

History and context

2.2 The Explanatory Memorandum of the Bill summaries the historical and jurisprudential context for the provisions outlined in Schedule one. It states that, by allowing parties to agree to revive native title over an area that has been set aside or vested to preserve the natural environment such as national, state and territory parks and reserves, 'the amendment could assist to partly ameliorate the effect of the decision in *Western Australia v Ward (2002)* 213 CLR 1'.[1]

2.3 In the *Ward* decision, the High Court found that the vesting of Crown reserves under the *Land Act* 1933 (WA) extinguished native title in those reserve areas under common law, despite the exclusion provision in subsection 23B(9A) of the *Native Title Act* 1993 (Cth).

2.4 Since *Ward*, Aboriginal and Torres Strait Islander people have been unable to claim native title over areas of Crown land such as national, State and Territory parks and reserves by way of native title determinations, because their native title had been in jurisprudential terms 'historically extinguished'.

2.5 According to the Explanatory Memorandum of the Bill, the proposed amendment in this schedule will overturn this legal precedent to provide

1 Native Title Amendment Bill 2012, *Explanatory Memorandum*, p. 8.

that native title can be recognised over parks and reserves 'where there is agreement between parties, even where the creation or vesting of the national, State or Territory park or reserve may otherwise extinguish native title'. [2]

2.6 Under the proposed provisions, for native title to be revived in a park or reserve set aside by the government for environmental purposes, registered native title groups must enter into an agreement with the applicable state or territory government to disregard historical extinguishment.

2.7 Third parties have the opportunity to object and express their concerns about any agreement reached, however it is for to the relevant government to authorise the agreement.

Issues and concerns

2.8 There was widespread support for the policy intent of this Schedule of the Bill, although there was some concern as to whether an appropriate balance of stakeholder interests had been achieved.

2.9 Professor Jon Altman and Francis Markham outlined a range of potential benefits if native title interests are 'formally recognised as stakeholders in national parks and reserves'.[3] These potential benefits include:

- Aboriginal and Torres Strait Islander people having an 'added incentive to actively engage in the environmental management of these conservation areas'[4]
- the 'possibility to encourage the deployment of Indigenous Knowledge alongside western science in management regimes', [5] and
- the possibility to 'deploy Indigenous labour in environmental management in places that are often regional and remote but where Indigenous people live'. [6]

2.10 The Minerals Council of Australia (MCA) supported the intent of this reform, with some reservations:

> insofar as it proposes a process for allowing native title to be recognised in areas that are currently reserved for the general public and protection of the natural environment despite the legal effect the dedication of those areas may have had. It also addresses

2 Native Title Amendment Bill 2012, *Explanatory Memorandum*, p. 8.

3 Jon Altman and Francis Markham, *Submission 25*, p. 11.

4 Jon Altman and Francis Markham, *Submission 25*, p. 11.

5 Jon Altman and Francis Markham, *Submission 25*, p. 11.

6 Jon Altman and Francis Markham, *Submission 25*, p. 11.

> historical anomalies that were not intended/foreseen at the time of the NTA development. However the MCA believes that some of the proposed amendments should be further considered to ensure a balance is achieved between the interests of all parties.[7]

2.11 The main objection to these proposed provisions was from the National Farmers Federation (NFF), which was concerned that the definition of 'park area' could potentially be broadened beyond the intent of the Bill. Mr John Stewart AM, said that 'while it says parks and reserves, it is terribly easy to move over into pastoral land'.[8]

2.12 The Explanatory Memorandum for the Bill states that:

> Subsection 47C(2) will not apply to land which has been set aside for purposes that do not specifically include the preservation of the natural environment of the area (for example, distinct purposes such as agriculture or grazing). [9]

2.13 The NFF favoured the inclusion of an 'exemption to specifically exclude all freehold and leasehold land, and require leasees of any parks and reserves to be included in any negotiations to disregard historical extinguishment'.[10]

2.14 Mr Matthew Storey from the National Native Title Council (NNTC) was of the view that such concerns were unfounded. Mr Storey said that:

> Even if there was a tortuous interpretation of section 47C, 'Definition of park area', to include pastoral lease—which, on its face, is counterintuitive—the proposed section 47C, as it stands, is framed in such a way as to provide no threat to the pastoral lease.[11]

2.15 Mr Kym Duggan from the Attorney-General's Department agreed and said that:

> In our view, legislation governing pastoral leases is unlikely to fall from the definition of park area. It is not intended to cover pastoral leases outside of park areas, and we clarify that in the explanatory memorandum.[12]

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7 Minerals Council of Australia (MCA), *Submission 13*, p. 6.

8 John Stewart AM, Chair, Native Title Taskforce, National Farmers Federation (NFF), *Transcript of Evidence*, Sydney, 8 February 2013, p. 5.

9 Native Title Amendment Bill 2012, *Explanatory Memorandum*, p. 10.

10 NFF, *Submission 4*, p. 2

11 Matthew Storey, Director, National Native Title Council (NNTC) and Chief Executive Officer, Native Title Services Victoria (NTSV), *Transcript of Evidence*, Sydney, 8 February 2013, p. 12.

12 Kym Duggan, First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, *Transcript of Evidence*, Sydney, 8 February 2013, p. 19.

2.16 The Committee received evidence that the provisions do not provide guidance on other issues which may arise, particularly in relation to:

- the impact of third-party grants over the park area, and
- proposed future acts over a park area that may have been planned based on the notion that native title had been extinguished.

2.17 With respect to third-party grants, Mr Duggan said that 'there may be some instances where a park or reserve has been declared over a pastoral lease. That is indeed possible, which would then potentially fall from the definition.' [13]

2.18 Dr Lisa Strelein from the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) agreed that it is likely that parks and reserves were granted over pastoral leases in the past. However Dr Strelein said that this should not be of concern, because 'there would be great inefficiency in trying to preserve a historical pastoral estate that no longer exists, in the sense that it is no longer taken up'. [14]

2.19 The MCA expressed concern that guidance for proposed future acts in park areas had not been built in to the provisions. In its submission, the MCA said:

> In order to provide more certainty to current and future interests the MCA seeks certainty on four matters:
>
> - the revival of native title will not incur the right to compensation to protect the interests of the third parties;
> - time parameters (commonly known as a 'sunset clause') for registering intent to have native title recognised be established so as to provide certainty third parties registered as having potential future interests;
> - known third party interests should be provided with more direct forms of notice (i.e. a letter) rather than the currently proposed public notice; and,
> - agreement to revive native title is required to be reached between all relevant agreement parties – the proposed right of third parties to comment is inadequate.[15]

2.20 Mr Duggan from the Attorney-General's Department clarified the intention of the proposed measures:

13 Kym Duggan, First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, *Transcript of Evidence*, Sydney, 8 February 2013, p. 19.

14 Lisa Strelein, Director of Research, Indigenous Country and Governance, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Transcript of Evidence*, Sydney, 8 February 2013, p. 20.

15 MCA, *Submission 13*, p. 6

> the amendment only operates by agreement between the native title party and the relevant government party. Third parties are given an opportunity to comment on that agreement. Third parties are also given an opportunity become a party to the native title claim. [16]

2.21 The National Congress of Australia's First Peoples expressed concern that any agreement to set aside historical extinguishment would 'depend on the goodwill and political complexion of the government parties with the undesirable result that outcomes are likely to vary across the States and Territories'.[17] The Congress submitted that:

> s 47C will require an agreement from the Commonwealth, State or Territory before extinguishment can be disregarded. We submit that s 47C should be put on the same footing as the other companion sections, all of which require that extinguishment "must be disregarded" where the section is engaged (ss 47(2), 47A(2) & 47B(2)). [18]

2.22 Similarly, the Carpentaria Land Council Aboriginal Corporation (CLCAC) said:

> The success of the amendment will simply depend on the willingness of Government to agree to disregard prior extinguishment. Interests on part of the Government will vary depending on political interests and the government of the day and are unlikely to be firmly set out in government policy. This may lead to vastly different, uncertain and inequitable native title outcomes for native title claimants within the same jurisdiction, while also increasing the time and costs of mediation. Providing governments with the opportunity to exercise greater discretion to agree or disagree extinguishment in a process already heavily weighted against native title claimants is therefore opposed.[19]

2.23 The Western Australian government questioned the need for the proposed amendments. In its submission, the government stated:

> In 2012, the WA Government amended its *Conservation and Land Management Act* (WA) (1984) and *Wildlife Conservation Act* 1950 (WA) to enable Aboriginal people to carry out customary activities in the conservation estate, regardless of whether there has been a

16 Kym Duggan, First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, *Transcript of Evidence*, Sydney, 8 February 2013, p. 19

17 National Congress of Australia's First Peoples, *Submission 24*, p. 10.

18 National Congress of Australia's First Peoples, *Submission 24*, p. 10.

19 Carpentaria Land Council Aboriginal Corporation (CLCAC), *Submission 20*, p. 3.

> determination of native title. The amendments also facilitate shared management of the conservation estate with traditional owners.[20]

2.24 Similarly, the Queensland government pointed to measures that were already in place at the state level for recognising native title over areas set aside for environmental purposes. It its submission, the government said

> Generally speaking, Queensland legislation that sets aside or dedicates land for "park" purposes is considered to have the effect of extinguishing exclusive native title rights and interests, so that nonexclusive native title can exist over national parks etc, subject to investigations about possible prior extinguishing acts. As a result, Queensland routinely recognises non-exclusive native title over areas set aside for purposes which might be termed 'preserving the natural environment'. With regard to national parks, non-exclusive native title is commonly recognised, and the Queensland government has developed Protected Areas ILUAs to regulate the exercise of native title rights and interests in these circumstances.[21]

2.25 The Queensland government were concerned that the proposed measures would create uncertainty because of these existing arrangements and could lead to 'raised expectations of native title parties that may well not be met' about the recognition of exclusive native title in parks and reserves. [22] The Queensland government flagged other potential consequences of the proposed measures, including increased costs and delays in consent determinations.

2.26 Mr Storey from the NNTC gave evidence that the requirement for the agreement of the relevant state or territory government was a sensible measure. Mr Storey said:

> This is allowing a state to sit down with the native title party and frame an agreement that is going to allow for sensible land management of that area. If there were unreasonable demands coming—for example, the native title party was saying, 'We want exclusive possession, amounting essentially to fee simple, of this park' and the state was not inclined to agree with that, then

20 Western Australian Government, *Submission 9*, p. 15.

21 Queensland Government, *Submission 23*, p.2.

22 Queensland Government, *Submission 23*, p.3.

> obviously the state would not enter into a section 47(c) agreement.[23]

2.27 Other witnesses gave evidence that measures to disregard historical extinguishment should be extended to include all crown land. For example, the National Congress of Australia's First Peoples said that 'that further reform is needed to expand the circumstances in which historical extinguishment can be disregarded so as to include all Crown land'.[24]

2.28 ANTaR supported this sentiment, and said that:

> The scope of the current tenures that give rise to the operation of s 47C should be broadened to include:
>
> - Any tenure that does not fully extinguish native title; and
> - 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.[25]

2.29 Similarly, the Tasmanian Aboriginal Centre said that:

> the provision should exclude historical extinguishment regardless of the cause of extinguishment on crown land reserve areas. The current amendment is restricted to exclusion of historical extinguishment only where the vesting of crown land reserves had the effect of extinguishment.[26]

Schedule two: codifying the meaning of negotiating in good faith

History and context

2.30 The concept of good faith, a common law concept, had its origin in American workplace relations law where it was utilised to ensure that employers fully participated in workplace negotiations. An issues paper by AIATSIS' Native Title Research Unit stated:

23 Matthew Storey, Director, NNTC and Chief Executive Officer, NTSV, *Transcript of Evidence*, Sydney, 8 February 2013, p. 16.

24 National Congress of Australia's First Peoples, *Submission 24*, p. 10.

25 Australians for Native Title and Reconciliation (ANTaR), *Submission 22*, p. 8.

26 Tasmanian Aboriginal Centre, *Submission 27*, p. 1.

> The adoption of good faith bargaining in industrial relations law represented both an attempt to address the often substantial power imbalance between the contracting parties and recognition of the public interest in 'industrial peace'.[27]

2.31 The *Native Title Act* 1993 (Cth) requires that actions that may affect native title, called future acts, are negotiated in good faith with the relevant registered native title party. Future acts include the grant of exploration licences, mining leases and some compulsory acquisitions.

2.32 The *Native Title Act* 1993 (Cth) does not define good faith, however an understanding around negotiating in good faith has developed from the decisions of the National Native Title Tribunal (NNTT) and the Federal Court.

2.33 Despite this, there has been uncertainty about the meaning and extent of the good faith requirement.[28]

2.34 The Explanatory Memorandum of the Bill states that the amendments describe the good faith criteria which establish the conduct expected of negotiating parties. Further it extends the time available before a party may seek a future act determination from the arbitral body.[29]

2.35 The Explanatory Memorandum outlines that the proposed amendments will act to encourage all parties to focus on negotiated, rather than arbitrated, outcomes and to promote positive relationship-building through agreement-making. These requirements will apply to all negotiating parties.[30]

The right to negotiate

2.36 The 'right to negotiate' (RTN) in the *Native Title Act* 1993 (Cth) allows Aboriginal and Torres Strait Islander people to negotiate benefits for their communities in return for their consent to certain activities on their lands. These benefits include monetary compensation, employment opportunities, enterprise development, and education and healthcare services. The RTN does not provide registered native title parties with the

27 AIATSIS. Native Title Research Unit, *Negotiation in Good Faith under the Native Title Act: A Critical Analysis,* 2009

28 CLCAC, *Submission 20*, p. 4.

29 Native Title Amendment Bill (2012) , *Explanatory Memorandum*, p. 16

30 Native Title Amendment Bill (2012) , *Explanatory Memorandum*, p. 16

right to stop or veto projects from going ahead. However it does give registered native title parties a right to engage in project negotiations.

2.37 According to the NNTT, the RTN applies to:

> certain future acts if either the area they relate to is covered, wholly or partly, by a registered native title claimant application (one that has satisfied all the conditions of the registration test), or if the Federal Court has determined that native title exists in the area concerned and there is a registered native title body corporate for that area. The registered native title claimant or the registered native title body corporate is the native title party that has the right to negotiate. [31]

Negotiating 'in good faith'

2.38 Through the NNTT and Federal Court decisions, a set of indicia have been developed as a guide to project proponents to assist them when negotiating in 'good faith' under the *Native Title Act* 1993 (Cth). These 18 indicia are referred to as the Njamal indicia.

2.39 If an agreement is not achieved after six months of negotiations, parties can apply to the NNTT for arbitration about whether a proposed tenement can proceed. If one of the parties is of the view that another party has not negotiated in good faith, the NNTT will consider the matter based on the Njamal indicia.

2.40 The Bill proposes a new section 31A which will clarify the conduct expected of parties in future act negotiations. The time before a party may seek a determination from the arbitral body is to be extended from six to eight months.

2.41 The proposed measures specify that where a negotiation party asserts that another negotiation party (the second negotiation party) has not satisfied the good faith negotiation requirements, the onus is on the second negotiation party to establish that it has met the good faith negotiation requirements.

2.42 The Explanatory Memorandum states that these proposed measures are necessary because there is a lack of clarity about what constitute 'good faith' in the RTN process, and an imbalance in bargaining power in favour of proponents of future acts.

31 National Native Title Tribunal (NNTT), The right to negotiate, 2007, <http://www.nntt.gov.au/Future-Acts/Pages/reading.aspx>, viewed 14 February 2013.

2.43 It is proposed that the NNTT will determine whether a negotiating party has negotiated in 'good faith' based on the following requirements, which are broadly consistent with the Njamal indicia:

- the party has made all 'reasonable' efforts to reach agreement
- the party has recognised and negotiated with other parties or their representatives
- the party has attended and participated in meetings at reasonable times
- the party has disclosed relevant information in a timely manner
- the party has made reasonable offers and counter offers
- the party has responded to proposals in a timely manner
- the party has given genuine consideration to other parties' proposals, and
- the party has refrained from capricious or unfair conduct that undermines negotiation, and from acting for an improper purpose in relation to the negotiations.[32]

2.44 The impetus for codifying these 'good faith' requirements in legislation is set out in the Explanatory Memorandum to the Bill:

> The [current] Act does not contain a definition of good faith. Despite numerous decisions of courts and the National Native Title Tribunal, there remains a lack of clarity about what constitutes good faith negotiations. This lack of clarity means it is difficult for Indigenous parties in particular to prove a lack of good faith. This was illustrated in FMG v Cox where the court held that parties could satisfy the good faith requirements, notwithstanding that the parties did not substantially discuss the actual doing of the future act in question.[33]

2.45 In addition to increasing the minimum negotiation timeframe and codifying 'good faith requirements', the proposed measures reverse the onus of proof to show 'good faith'. This means that good faith must be demonstrated and considered by the arbitral body in making a determination.

2.46 While many of the administrative functions of the NNTT have been shifted to the Federal Court, it is proposed that the NNTT retain its future act functions and remain the arbitral body in making a determination on whether a party to a future act negotiation has negotiated in good faith.

32 Native Title Amendment Bill 2012, pp.9-10.

33 Native Title Amendment Bill 2012, *Explanatory Memorandum*, p. 17.

Issues and concerns

2.47 Concerns were raised querying the necessity of codifying 'good faith' negotiations, and whether the approach proposed will provide clarity or result in greater litigation.

Codifying 'good faith'

2.48 The NNTT submitted that 'if it was decided to codify the indicia going to show good faith, then the Tribunal's preference was that the indicia it had developed over the years be used' (the Njamal indicia).[34]

2.49 The Chamber of Minerals and Energy Western Australia (CME) shared this preference and suggested that introducing new terminology into the native title system will 'lead to uncertainty and consequently, litigation'.[35]

2.50 Similarly, the Minerals Council of Australia (MCA) said that 'this new obligation will undoubtedly generate litigation to clarify what 'reasonable' means as the new provisions do not provide sufficient clarity or certainty'.[36]

2.51 Mr Michael Owens, an independent native title lawyer, supported the changes and commented that, from his experience, proponents of future acts were taking a minimalist approach to the RTN process:

> In some states and with some companies best practice goes on, but in Queensland you have companies, and I will also say that you have a group of professional lawyers, advisers and consultants who advise their clients on taking a deliberately minimalist and positional approach—absolutely deliberately. I make no bones about that.[37]

2.52 Mr Owens said that this occurs because of an imbalance, under current arrangements, in the bargaining power native title parties bring to negotiations over future acts:

> You have a group of Indigenous people there, and some of the most intelligent people I have ever met are Indigenous people, but they usually—not always—have low education, low levels of commercial sophistication and low levels of health. They are usually elderly, because they are the decision makers, so they are

34 NNTT, *Submission 17*, p. 3.

35 Chamber of Minerals and Energy Western Australia (CME), *Submission 7*, p. 2.

36 MCA, *Submission 13*, p. 3.

37 Michael Owens, private capacity, *Transcript of Evidence*, Sydney, 8 February 2013, p.10.

> put up as applicants. So they are the people who I take into a negotiation. Sometimes they do not like each other; that happens all the time in a large group of people. So that is what they are dealing with. They then go in and they are pitted against sometimes the most sophisticated and powerful companies in this world, who have all the resources. The companies have everything that is available to them, and on top of that they have the law on their side. They have the narrow construction of the good faith obligation on their side.[38]

2.53 The MCA cited figures demonstrating that the vast majority of future acts were being granted through the RTN process:

- the overwhelming majority of tenements granted from 1 January 2000 to 11 October 2012 (greater than 98.5%) were granted through negotiated outcomes (agreement between the parties) not arbitrated determinations, or are continuing in the negotiation process (or are no longer being pursued)
- whether a party has negotiated in good faith has only been challenged 31 times which is less than 1%, and only 3 determinations found that the grantee had failed to negotiate in good faith, and
- the average negotiation period is 39 months demonstrating that a significant amount of time is invested in the process - much longer than the current minimum 6 month period. This supports the view that proponents and State Governments are not simply complying with a process for the sake of it. They are investing considerable time before resorting to the determination process. [39]

2.54 Based on this data, 'the MCA considers that the Government has provided no clear rationale for the proposed changes and the available data does not support the need for these reforms'.[40]

2.55 Citing the same figures, Mr Owens agreed that the high proportion of tenements were negotiated, but said that, in many cases, the native title parties were mistreated. Mr Owens said that, in his experience, native title parties are:

> bullied and coerced. This is one of the areas in which they are able to bully and coerce. I have had to give this advice on many occasions: people say, 'We've been treated appallingly here,' and I say, 'Hey, if you take it to court, you're going to lose.' There have

38 Michael Owens, private capacity, *Transcript of Evidence*, Sydney, 8 February 2013, p.10.

39 MCA, *Submission 13*, p. 2.

40 MCA, *Submission 13*, p. 2.

> been four or five successful challenges. I ran one, and it was despicable conduct that went on within the negotiation. They got rolled—absolutely rolled—in the tribunal. I could not believe it. Even industry people say it is a disgraceful decision. One of the reasons that these negotiations are successful—they have a 98.5 per cent success rate—is that the Aboriginal parties know that they are going to get thumped if they go court; they are not going to win; they are not going to succeed.[41]

2.56 Mr Michael Meegan from Yamatji Marlpa Aboriginal Corporation (YMAC) agreed with this position, saying that native title parties will generally decline from challenging a company on the basis of 'good faith', because 'we know that in the vast majority of cases we will lose and we do not have the resources. That highlights the inequity of the situation and the need for this legislation to go through'.[42]

2.57 Mr Meegan called for the mining and exploration companies to support the Bill:

> We have to concentrate our efforts to demonstrate that they really are acting in bad faith, which is difficult to do under the current legislation. This diversion of attention penalises the good guys—the people who are not only prepared to fund us but also prepared to negotiate properly. From our perspective, some of the people around the room today and other good companies that negotiate in good faith should support these amendments, because they are even below the efforts that they bring to the table. But this will force the bad guys to the table to negotiate, at least to a measure of good faith, which, as we know, was a compromise because a right of veto could not be obtained in relation to the native titles bill.[43]

2.58 The Association of Mining and Exploration Companies (AMEC) do not support the proposed measures because it viewed codifying 'good faith' in legislation as unnecessary:

> The proposed amendments to the 'Negotiations in Good Faith' (NIGF) are based on FMG Pilbara Pty Ltd v Cox and Others (2009) ("FMG v Cox") on the basis that the decision had a detrimental effect on the value of the Right to Negotiate (RTN).
>
> Based on AMEC`s understanding and analysis of the decision in FMG v Cox, there is no evidence to demonstrate that the test for

41 Michael Owens, private capacity, *Transcript of Evidence*, 8 February 2013, p. 10.

42 Michael Meegan, Principal Legal Officer, Yamatji Marlpa Aboriginal Corporation (YMAC), *Transcript of Evidence*, 8 February 2013, p. 11.

43 Michael Meegan, Principal Legal Officer, YMAC, *Transcript of Evidence*, 8 February 2013, p. 11.

> good faith negotiations is incorrect, or that systemic problems are prevalent.[44]

2.59 Conversely, Yamatji Marlpa Aboriginal Corporation (YMAC) said that it was precisely the *FMG v Cox* decision that made the proposed provisions necessary because they 'will assist in ensuring considerations around good faith are an integral part of doing business with native title parties'.[45]

2.60 YMAC's in-house legal counsel, Ms Carolyn Tan, said that the RTN had been eroded by the *FMG v Cox* decision, however she paid credit to companies who were already negotiating in 'good faith':

> at the moment the FMG decision has basically meant that the right to negotiate is worthless, and that is the only certainty—the certainty that there are no rights. The result is that there does not have to be all reasonable efforts used, which is what is proposed in this amendment. There only has to be a negotiation with a view to arriving at an agreement. You can have a negotiation in good faith about the logistics, and that could satisfy the test—and there are mining companies that are using this. That is the problem. Most of the good companies will easily satisfy the test, and have. It is a question about those who really do not want to do anything.[46]

2.61 Mr Meegan gave praise to the mining and exploration companies that were already negotiating at a high standard with native title parties to achieve fair and sustainable agreements. With reference to BHP and Rio Tinto, Mr Meegan said:

> their intention to seek a good social licence in Australia and around the world has resulted in some good agreements. The agreements in the Pilbara, which represent substantial short-term and long-term benefits, are as a result of those companies that demonstrate willingness to negotiate in good faith.[47]

2.62 Fortescue Metals Group (FMG) proposed that the bar for best practice set by the big multinational corporations (such as BHP and Rio Tinto) was too high to be practicable for smaller miners. Mr Tom Weaver from FMG said that:

> I think the expectations need to be different as to what is expected in terms of negotiation time frames and negotiation processes. If Fortescue had negotiated for four or five years five or six years

44 Association of Mining and Exploration Companies (AMEC), *Submission 15*, p. 13.

45 YMAC, *Submission 1*, p. 2.

46 Carolyn Tan, In-house Legal Counsel, YMAC, *Transcript of Evidence*, 8 February 2013, p. 22

47 Michael Meegan, Principal Legal Officer, YMAC, *Transcript of Evidence*, 8 February 2013, p. 12.

> ago, there would be no Fortescue now, and we are now the world's fourth-largest iron ore miner. Consideration needs to be given to the fact that it is not rational to expect a consistent approach to negotiation from multinational corporations and start-ups or exploration companies.[48]

Increasing the minimum negotiation window

2.63 Several witnesses gave evidence that the extension of the RTN window of negotiation (prior to seeking arbitration) was an improvement to the RTN process. For example, in referring to the current six month time period as a 'pressure cooker', Professor Jon Altman and Francis Markham said that 'while the extension of the window for negotiation from six to eight months is small it is commendable because it potentially heightens the possibility of good faith negotiation and equitable agreement making'.[49]

2.64 Similarly, Native Title Services Victoria (NTSV) welcomed the change, stating that under certain circumstances the existing six month timeframe 'will be insufficient to allow for adequate negotiation'.[50]

2.65 AMEC did not support the proposed measures on the following basis:

> it is unnecessary and unwarranted and can severely disadvantage companies who have made every attempt to negotiate in good faith. AMEC is extremely concerned that should this amendment be implemented it will be used inappropriately by native title parties, and therefore not achieve any benefit. AMEC considers that emphasis should be given to the quality of the negotiations, rather than the length of the relevant negotiation periods. The proposed amendment provides no incentive to facilitate negotiations in a timely manner.[51]

2.66 Similarly, the MCA that:

> the 'intent to negotiate in good faith' from both parties needs to exist in order for agreements to be negotiated successfully. When this is not the case it becomes apparent very quickly, making the establishment of minimum negotiation periods a seemingly arbitrary exercise. When the 'intent' is non-existent it may be in the interests of both parties to seek arbitration earlier rather than later

48 Tom Weaver, Native Title Manager, Fortescue Metals Group Limited, *Transcript of Evidence*, 8 February 2013, p. 21.

49 Jon Altman and Francis Markham, *Submission 25*, p. 12

50 NTSV, *Submission 3*, p. 6.

51 AMEC, *Submission 15*, p. 14.

> to avoid further relationship deterioration that becomes needlessly irreparable.[52]

2.67 Although native title parties have a right to negotiate, they do not have a right to veto a proposed project on the basis of environmental or heritage concerns even if they have been granted exclusive possession of the area in question.[53] Professor Altman and Mr Markham suggested that this situation opens the system up to a situation of 'moral hazard', with the possibility of:

> strategic behaviour by resource developers who may look to delay negotiation so as to ensure more commercially favourable arbitration. But such strategic behaviour can also be exercised by native title groups, especially if they are vehemently opposed to the development. For example, delay might allow the mobilization of broad public opinion against a development proposal; or a delay might jeopardise the commercial viability of a project.[54]

Changing the onus of proving good faith

2.68 The Bill proposes that where a negotiation party asserts that a second negotiation party has not satisfied the good faith negotiation requirements, then the onus of proving good faith is on the second negotiation party.

2.69 AMEC claimed that this measure implied that it is 'only non-native title parties who fail to negotiate in good faith is incorrect. Many AMEC members have confirmed that it is the native title parties that fail to negotiate in good faith'.[55]

2.70 The Committee received evidence that the proposed reversal of the onus of proving good faith could result in an increase in the number of cases in which the good faith point is raised by native title parties. For example, the MCA said that:

> as a result of the proposed change the NNTT will nevertheless be required to arbitrate more NIGF [Negotiation in Good Faith] cases. It is therefore important that the NNTT has the resources required to continue to seek input from all parties in order to make an objective and transparent assessment.[56]

52 MCA, *Submission 13*, p. 4.

53 See for example Michael Meegan, Principal Legal Officer, YMAC, *Transcript of Evidence*, 8 February 2013, p. 12; Jon Altman and Francis Markham, *Submission 25*, p. 9.

54 Jon Altman and Francis Markham, *Submission 25*, p. 12.

55 AMEC, *Submission 15*, p. 13.

56 MCA, *Submission 13*, p. 5.

2.71 The NNTT agreed that it may have to arbitrate more cases, and submitted that:

> experience indicates that it may have a significant impact on the Tribunal's financial and human resources, and on its capacity to deliver timely determinations within the period specified in s 36 of the NTA. Therefore, it might be appropriate to extent the period specified in s 36 in circumstances where the Tribunal is required to deal with an assertion under proposed s 36(2).[57]

2.72 Native Title Services Victoria (NTSV) and the National Native Title Council (NNTC) supported the proposed measures, asserting that they would promote good negotiating behaviour. NTSV said:

> this is an important measure in improving the fairness of the right to negotiate procedure. It is hoped that this amendment will have a positive effect in terms of altering the behaviour of negotiating parties, for instance by discouraging the premature termination of negotiations and leading to more beneficial negotiated agreements.[58]

Schedule three: streamlining process for Indigenous Land Use Agreements

History and context

2.73 In 1998 amendments to the *Native Title Act* 1993 (Cth) introduced a detailed scheme for Indigenous Land Use Agreements (ILUAs).

2.74 An ILUA is a voluntary agreement which includes the use and management of an area of land or waters made between one or more native title groups and other parties, such as mining companies. A register of ILUAs is required to be established under section 199A of the *Native Title Act* 1993 (Cth). A registered ILUA is legally binding on the people who are party to the agreement and all native title holders for that area.

2.75 Under current arrangements, once negotiations between parties to a proposed ILUA are completed, an application is lodged with the Native Title Registrar. The Registrar then notifies the government, relevant stakeholders and the public that the ILUA has been lodged, and objections can be made to the registration of the ILUA.

2.76 There are three types of ILUAs:

57 NNTT, *Submission 17*, p. 9.

58 NTSV, *Submission 3*, p. 6.

- Area Agreements: an ILUA which is made when there is no Registered Native Title Body Corporate (RNTBC) or Prescribed Body Corporate (PBC) for the entire agreement area
- Alternative Procedure Agreements: an ILUA which is made when there is no RNTBC or PBC for the entire agreement area, but where a representative Aboriginal/Torres Strait Islander body exists for part of the agreement area, and
- Body Corporate Agreements: An ILUA made where there exists a RNTBC or a PBC for the entire agreement area. There must exist at least one native title determination in the entire agreement area.

2.77 According to the Explanatory Memorandum for the Bill, the proposed measures will 'broaden the scope of body corporate agreements', 'improve authorisation and registration processes for ILUAs and simplify the process for amendments to ILUAs'.[59]

2.78 The intention of the proposed provisions is to 'ensure parties are able to negotiate flexible, pragmatic agreements to suit their particular circumstances'. [60]

Issues and concerns

2.79 There was widespread support for the policy intent of the proposed measures to streamline ILUA processes. The main concerns from stakeholders centred around:

- opportunities for objections to registrations of ILUAs, and
- identification and authorisation of area agreements by Indigenous representative bodies, and other native title parties.

Objection to an ILUA

2.80 Several witnesses expressed their concern about the proposed changes to processes available for parties to either express their opposition or formally object to the registration of an ILUA.

2.81 For example, the descendants of Waanyi ancestor Minnie (Mayabuganji) said that:

- (a) There would be no longer be any ability for individuals to object to the registration of an ILUA which has been certified by the relevant native title representative body ("ntrb");

59 Native Title Amendment Bill 2012, *Explanatory Memorandum*, p. 20.

60 Native Title Amendment Bill 2012, *Explanatory Memorandum*, p. 20.

- (b) The ability of a competing group of putative native title holders to prevent registration of an ILUA by lodging their own application for a determination of native title would be narrowed from four months to one single month; and
- (c) The window for an objection to be made to the registration of an uncertified ILUA would be reduced from three months from the notification date for the ILUA to one month.[61]

2.82 The National Congress of Australia's First Peoples shared similar concerns, and said:

> The proposed new s 24CK removes the objection process for ILUAs that are certified by a native title representative body. This new requirement will mean that persons who object to a certified ILUA will only have access to judicial review and therefore Traditional Owner groups who are not represented by a NTRB or a Native Title Service Provider could face additional expenses and complexities.[62]

2.83 The Law Council of New South Wales had concerns about the reduction of timeframes for people who may object to ILUAs that are certified by a native title representative body:

> There is no reason why the time for objection should be limited in this way. Given the potential adverse consequences for Aboriginal people, it is unreasonable, particularly given that the majority of Aboriginal peoples subject to the native title process live in remote or rural regions.
>
> The people who may wish to object to the registration of an Area Agreement may include family groups who feel they have been inappropriately excluded from the negotiation and authorisation process, or potential claim groups who believe the Area Agreement covers land and waters which belong to them.[63]

2.84 Similarly, Central Desert Native Title Services said that:

> The reduction on the period for lodging an objection against an application to register an ILUA from 3 months to 1 month is not acceptable. It is often the case that those who hold or may hold native title live in remote areas, speak languages other than English and can be unavailable due to cultural reasons or weather events; all of which makes seeking advice from or providing instructions to representatives extremely difficult. Imposing a 1

61 The descendants of Waanyi ancestor Minnie (Mayabuganji), *Submission 14*, p. 1.

62 National Congress of Australia's First Peoples, *Submission 24*, p. 11.

63 Law Society of New South Wales, *Submission 19*, p. 5.

> month limitation period on objections is unduly harsh. It is Central Desert's submission that, for the purposes of procedural fairness, the 3 month objection period remains.[64]

2.85 However Clayton Utz gave evidence that the proposed measures would expedite what it termed 'quasi-objections' by:

- reducing the s.24CH "notice period" to one month;
- removing the right of persons who claim to hold native title in the area of a certified ILUA to object to the registration of the agreement;
- providing to persons who claim to hold native title in the area of a non-certified ILUA a new right to object to the registration of the agreement on the basis that the "identification" and "authorisation" requirements were not met; and
- amending s.24CL of the NT Act to require, relevantly, only that persons who become RNTCs before the end of the new one-month notice period be parties to non-certified ILUAs in order for such agreements to be registered. [65]

Authorisation and registration processes for ILUAs

2.86 Concerns were raised that the proposed amendments could complicate the authorisation and registration processes for ILUAs. For example, several witnesses said that the Bill did not provide clarity on what would constitute a prima facie case for holding native title for the purposes of registering ILUAs.[66]

2.87 In general the MCA supported the proposed ILUA reforms as they 'simplify process requirements for amendments and simplify registration processes'.[67] Similarly AMEC generally supported the measures because they 'will establish a threshold which will determine whether or not a new registration is required'.[68]

2.88 However the MCA expressed concern that a definition of a prima facie case for holding native title is needed for the ILUA process:

> Without a definition of "prima facie case", however, it is unclear whether, in the area of a registered claim, people other than the native title claim group for that claim should be considered capable of showing a prima facie case. As a result, it will remain

64 Central Desert Native Title Services (CDNTS), *Submission 16*, p. 6.

65 Clayton Utz, *Submission 27*, p. 9.

66 See, for example, Queensland Government, *Submission 23*, p. 17; Just Us Lawyers, *Submission 2*, p. 6.

67 MCA, *Submission 13*, p. 7.

68 AMEC, *Submission 15*, p. 14.

> unclear whether the "authorising group" for an ILUA in a registered claim area is limited to the native title claim group for that claim or if it includes others who can show a prima facie case (whatever that is). If it is the latter, there is no assistance as to whether the various groups need to authorise that ILUA separately.[69]

2.89 The MCA added that:

> the issue of separate authorisation would similarly arise both where there are overlapping registered claims in an ILUA area and where, in the case of an ILUA covering an unclaimed area, there is more than one group that can show a prima facie case to holding native title in the area. The Bill should include amendments to s.251A clarifying what would be required in these circumstances.[70]

2.90 Just Us Lawyers took issue with the proposed amendments and said that the measures undid the effects of *QGC Pty Ltd V Bygrave* (2011) 199 FCR 1019 (*Bygrave 3*) by:

> deleting the words relied upon by Justice Reeves in S251A (a) and (b) for arriving at his conclusion. As we commented in relation to the exposure draft, not only will this render the provisions for area ILUA's unworkable by swinging the balance back in favour of individuals as opposed to collective or group native title interests, it will mean that legislative policy for the authorisation of area ILUA's will be different from that required by the NTA for the authorisation of Native Title claims.

2.91 The Law Council of New South Wales shared similar concerns and said:

> As amended, the NTA will provide that an Area Agreement will need to be authorised by persons who can establish a prima facie case that they may hold native title, regardless of whether there is a registered claim. Section 251A(3) may be interpreted inconsistently with that approach to the extent it suggests that people who prima facie hold native title only authorise a "designated area" where there is a no registered body corporate or registered native title claim.

2.92 Mr Colin Hardie, from Just Us Lawyers, was critical of the proposed measures and said that:

> The main problem with this legislation is that the ill that Bygrave sought to address in relation to areas where there are native title

69 MCA, *Submission 13*, p. 7.

70 MCA, *Submission 13*, p. 7.

> claims was this: it was trying to stop groups from taking advantage by having more bites at the one cherry than is warranted. It achieved that by saying, 'If you go to the trouble to get a native title claim registered, you have the right to make the decision as to who should be looked after in an ILUA.'[71]

2.93 On balance, YMAC supported the proposed measures regarding changes to ILUAs:

> YMAC broadly supports the proposed amendments to streamline and improve the processes around the authorisation of ILUAs. We do have some reservations in relation to the proposed amendment to s 251A designed to overcome the effect of the QGC v Bygraves {2011] FCA 1457 decision, but note that this should not delay the passage of what is a beneficial piece of legislation and can be the subject of further work in future.[72]

2.94 While being concerned about some aspects of the technical implementation of the proposed measures, Clayton Utz particularly supported:

- the proposed provision to enhance body-corporate agreements, considering it 'capable both of greatly simplifying the ILUA-making process and of giving effect to what would frequently be the wishes of all the parties to the ILUA'.[73]
- changes to the preliminary assessment of ILUAs by the Registrar because it would provide 'that the Registrar will only be required to notify an area agreement if satisfied that the agreement clears the preliminary hurdle of having complied with the requirements of ss.24CB-24CE of the NT Act'. [74]

Schedule four: minor technical amendment

2.95 Schedule four proposes a technical amendment to clarify 'who may claim the benefit of section 47 of the Act, which relates to historical extinguishment over pastoral leases held by native title claimants'. [75]

2.96 The Committee did not receive evidence indicating substantive issues or concerns in relation to Schedule four of the Bill.

71 Colin Hardie, Just Us Lawyers, *Transcript of Evidence,* 8 February 2013, p. 9.

72 YMAC, *Submission 1*, p. 6.

73 Clayton Utz, *Submission 27*, p. 8.

74 Clayton Utz, *Submission 27*, p. 8.

75 Native Title Amendment Bill 2012, *Explanatory Memorandum*, p. 25.

Committee comment

2.97 The proposed revival of native title in parks and reserves that have been set aside for environmental purposes represents a major reform in the operation of native title. There is strong support for this policy, although some minor concerns were raised regarding its practical implementation.

2.98 The Committee notes concerns that the relevant government party must agree to allow for native title to be revived in certain areas under the proposed measures. The Committee calls on all state and territory governments to support the policy intent of these measures, and to ensure that government agreement is given, where practicable, to revive native title in parks and reserves set aside for environmental purposes.

2.99 The Committee notes the concerns raised by the NFF that the definition of 'park area' may be too broad, and could be interpreted to extend to freehold or leasehold land. The Committee has reviewed the evidence and considers that the relevant provisions are clear in their scope and should be progressed as currently drafted.

2.100 Further, the Committee does not accept that third parties should be included in negotiations to revive native title in parks and reserves which have been set aside by governments for environmental purpose. These agreements are inherently between the relevant government and native title parties, and negotiations should reflect this.

2.101 In regards to good faith negotiations, the Committee acknowledges that many major mining and exploration companies are already employing stringent corporate social responsibility values in their negotiations with native title parties. The Committee notes that the tenor of the negotiations set by some of these companies represents industry best practice. The evidence presented to this inquiry is that, in many instances, these companies already exceed the standards of negotiating in good faith that this Bill seeks to codify.

2.102 However, the Committee is concerned by evidence received indicating some smaller companies and possible rogue elements in the industry who may not be negotiating in good faith, and who may be exploiting power imbalances in the negotiating position.

2.103 In terms of smaller companies and explorers, the Committee is of the view that negotiating in good faith should be incorporated into projected expenditure as 'business as usual' for *all* companies – it is not and should not be considered an optional extra.

2.104 The Committee does not accept the argument that the codification of good faith arrangements will create uncertainty in the negotiation process.

Rather, the Committee endorses the proposed measures because the codification of these arrangements in legislation will create absolute certainty that negotiating with integrity with native title parties is an integral part of doing business in Australia.

2.105 The Committee notes that the majority of stakeholders welcome the proposed measures to streamline the process for ILUAs. The Committee considers that the alternative agreement-making process provided by ILUAs will positively assist the process of native title determinations.

2.106 The Committee notes the need to ensure adequate resourcing of the NNTT to appropriately fulfil its functions in relation to expediting native title processes. In a recent advisory report on the Courts and Tribunals Legislation Amendment (Administration) Bill 2012, it is noted that:

2.107 The [Social Policy and Legal Affairs] Committee recommends that the Attorney-General, in accordance with section 209(2) of the Native Title Act 1993, direct the Aboriginal and Torres Strait Islander Social Justice Commissioner to include in the yearly reports on the operation of the Native Title Act 1993 consideration of the functioning of the National Native Title Tribunal, and in particular:

2.108 the adequacy of tribunal resourcing to effectively fulfil its functions, and

2.109 its effect on the exercise of the human rights of the Aboriginal and Torres Strait Islander peoples.[76]

2.110 The Committee supports this recommendation, and calls on the Attorney-General to take note of the Aboriginal and Torres Strait Islander Social Justice Commissioner's reports and recommendations to ensure that the NNTT is adequately resourced to perform its functions.

2.111 Regarding the changes proposed to ILUAs, the Committee notes concerns that little guidance is provided in the Bill about who may authorise the making of an ILUA. However the Committee supports the prima facie case approach of the Bill in section 51A which sets who may hold native title'.[77] Ultimately, it is for the tribunal and the courts to determine what constitutes a legitimate prima facie case and the Committee notes that a considerable body of case law exists in this area.

2.112 In addition the Committee notes that, in some cases, individuals and groups who claim native title over an area where an ILUA has been registered may have a legitimate prima facie case to object to the ILUA, or claim to enter into an alternative agreement. Registered Native Title

76 Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Courts and Tribunals Legislation Amendment (Administration) Bill 2012*, p. 23.

77 Native Title Amendment Bill 2012, p. 23.

Representative Bodies have resources available to assist them in pursuing their rights and interests. It may be that consideration should be given to providing support or an alternative means for other native title party claimants to establish a prima facie case within the one month period. This is an issue beyond the scope of the Bill inquiry and could be investigated in the context of possible future reforms, as outlined in the following chapter.

2.113 In summary, the Committee concludes that the Bill represents positive reforms to the native title process and effectively achieves its stated objectives.

Recommendation 1

The Committee recommends that the House of Representatives pass the Native Title Amendment Bill 2012.