

MINORITY REPORT BY THE AUSTRALIAN LABOR PARTY

1.1 Labor Senators consider that the majority report's recommendations do not go far enough in relation to a number of issues raised during the committee's inquiry.

Alternative State regimes

1.2 Labor is disappointed that the majority report did not adequately address the proposed amendments relating to alternative state regimes.

1.3 Items 62 and 63 of Schedule 1 purportedly seek to 'clarify' the scope of alternative state regimes under section 43 of the Native Title Act.¹ According to the Explanatory Memorandum, the amendments would 'put beyond doubt' the validity of certain South Australian determinations in relation to mining and opal mining.²

1.4 However, as the Human Rights and Equal Opportunity Commission (HREOC) stated in its submission, these amendments 'cannot be called technical amendments'. HREOC was concerned that these provisions would 'retrospectively validate actions done in contravention of the provisions of the Act.'³

1.5 Labor agrees with HREOC that such retrospective validation of invalidly done future acts could undermine Indigenous confidence in the Native Title Act.⁴ For that reason, Labor considers that the items in the Bill relating to alternative state regimes should be delayed, pending consultation with native title holders regarding validation of any relevant determinations or acts, and negotiation of just compensation where appropriate.

Additional Recommendation 1

1.6 Labor recommends that amendments in relation to alternative state regimes in items 62, 63, 127, 138 and 139 of Schedule 1 should be delayed, pending consultation with native title holders regarding validation of any relevant invalid determinations or acts.

Default Prescribed Bodies Corporate

1.7 Labor Senators agree that a mechanism is needed for the determination of 'default' Prescribed Bodies Corporate (PBCs) in certain circumstances. However,

1 EM, p. 7; see also items 127, 138 and 139 of Schedule 1.

2 EM, p. 36.

3 *Submission 10*, p. 5.

4 *Submission 10*, p. 6.

HREOC persuasively outlined its concerns in relation to the default PBC provisions in Schedule 3 of the Bill.⁵

1.8 As the majority report outlines, HREOC's primary concern is that the Federal Court would not necessarily make the choice as to the appropriate body to be the default PBC. Rather, this choice could be made by the regulations, or another person or body. Indeed, HREOC described the proposed amendments to the PBC regulation-making powers as a 'radical shift in the current policy embedded in the Act'.⁶

1.9 During the committee's hearing, a representative of FaCSIA acknowledged that the intention was that the Court would continue to determine PBCs:

Practically speaking...we cannot currently foresee circumstances in which a body other than a court might determine the body. But we thought it useful to put a little bit of scope in this regulation-making power, in case that should prove necessary.⁷

1.10 Labor Senators consider that, if the intention is that the Federal Court would be the body responsible for determining default PBCs, then the regulation-making powers in the Native Title Act should be restricted to reflect this intention. This is simply good legislative policy.

1.11 Labor therefore recommends that the regulation-making powers in items 1, 2, 5 and 6 of Schedule 3 be limited, in line with the government's intention, to ensure that the Federal Court continues to determine prescribed bodies corporate.

Additional Recommendation 2

1.12 Labor recommends that the regulation-making powers in items 1, 2, 5 and 6 of Schedule 3 be restricted to ensure that the Federal Court continues to determine prescribed bodies corporate.

Reasonable fees for PBCs

1.13 Item 7 of Schedule 3 of the Bill implements a fee-for-negotiation scheme which would allow PBCs to charge a fee for expenses it incurs in certain types of negotiations and (as prescribed by regulations) for certain other functions.

1.14 This item was opposed by a number of groups, for different reasons. Ergon Energy was generally supportive, but wanted an exception for bodies that are negotiating with a PBC to build infrastructure for the benefit of the local community. The National Native Title Council (NNTC) stated that the scheme is discriminatory and that registered native title bodies corporate (RNTBCs) should be able to charge

5 HREOC, *Submission 10*, pp 7-11.

6 HREOC, *Submission 10*, p. 9.

7 *Committee Hansard*, 2 May 2007, p. 25.

fees as they wish. The Minerals Council of Australia strongly argued that the core funding of PBCs and RNTBCs should be provided by the government.

1.15 Labor acknowledges that FaCSIA indicated a need to provide statutory authority for the PBC fee regime, because statutory bodies are not entitled to charge fees for services unless they have explicit or implied authority under the statute.

1.16 However, Labor is generally opposed to the operation of the fee scheme as it presently stands because it does not allow for enough flexibility for RNTBCs. Labor recommends that proposed section 60AB be amended to give PBCs a wide berth to charge fees that are reasonable for the services provided.

Additional Recommendation 3

1.17 Labor recommends that item 7 of Schedule 3 be amended to allow PBCs to charge fees that are reasonable for the services provided.

Non-Indigenous members of PBCs

1.18 In its submission, the NNTC raised a concern that non-Indigenous people could be members of PBCs. The NNTC pointed out that, under the new *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, non-Indigenous people can now be included as members of Aboriginal corporations. Under the proposed new PBC Regulations, PBCs are likely to be Aboriginal and Torres Strait Islander corporations under that Act. The NNTC felt that it would be 'entirely inappropriate' for non-Indigenous people to be members of native title bodies such as PBCs, given that native title is based upon Aboriginal traditional law and customs.⁸

1.19 The NNTC therefore recommended that the regulation-making power in proposed subsection 59(1) (as amended by item 5 of Schedule 3) should be restricted by stating that bodies that may be PBCs must not be bodies that have members who are not Indigenous.⁹

1.20 Labor Senators agree that it would be inappropriate for PBCs, whose primary purpose is to administer native title rights and interests on behalf of native title holders, to have non-Indigenous members. We therefore recommend that the Native Title Act be amended to prevent non-Indigenous people being members of a PBC.

Additional Recommendation 4

1.21 Labor recommends that the Native Title Act be amended to prevent non-Indigenous people being members of a prescribed body corporate.

8 *Submission 5*, p. 4.

9 *Submission 5*, pp 4-5.

Authorisation processes

1.22 Labor Senators are also concerned with aspects of proposed section 84D of the Native Title Act (see item 88 of Schedule 1). Proposed section 84D seeks to clarify the powers of the Federal Court in relation to authorisation issues. While Labor Senators support the move to allow the Court to hear and determine an application despite a defect in authorisation, we believe the proposed amendments need refining.

1.23 In particular, the committee received evidence from the NNTC that proposed paragraphs 84D(2)(b) and (c) could be open to abuse because they would allow applications for the production of evidence to be made by any party to the proceeding, without showing cause as to why such an order should be made.¹⁰ Labor Senators agree with the NNTC's suggestion that the proposed provision should require the party seeking the order for production of evidence of authorisation to show cause why the Court should make such an order.¹¹

Additional Recommendation 5

1.24 Labor recommends that item 88 of Schedule 1 (proposed section 84D) be amended so that the party seeking an order for the production of evidence of authorisation is required to show cause why the court should make the order.

Senator Patricia Crossin

Senator Linda Kirk

Deputy Chair

Senator Joseph Ludwig

10 *Submission 5*, p. 3.

11 *Submission 5*, p. 3.