SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
AUSTRALIAN HUMAN RIGHTS COMMISSION

Question No. 1

Senator Cash asked the following question at the hearing on 12 March 2013:

Senator CASH: Can you justify for me or explain to the committee why the commission supports the introduction of the codification of good faith principles that are being imported from the Fair Work Act as opposed to using, if you want to go down the path of codification, what many other submissions would say if you go down that path, which is Njamal indicia. If you cannot answer the question I am happy to put it on notice to perhaps give you an opportunity to have a look at why you say importing conditions from the Fair Work Act is a better proposition than what is the currently accepted practice, and is certainly being used by the native title tribunal.

The answer to the honourable senator's question is as follows:

Section 31A(1) of the Native Title Amendment Bill 2012 establishes 'good faith negotiation requirements' which are that 'negotiation parties use all reasonable efforts to reach agreement about the doing of an act'. Section 31A(2) sets out criteria to which the decision-maker must have regard when considering if the negotiations have been undertaken in accordance with the 'good faith negotiation requirements'. These amendments provide welcome clarification regarding the requirements to negotiate in good faith.

These factors are 'broadly consistent' with the *Njamal indicia.*[1] The *Njamal indicia* are the current judicial interpretation of the existing good faith requirement and set out behaviours which may indicate that negotiations were not undertaken in good faith.

I believe the legislative guidance will be more effective when set out as positive, rather than negative criteria. The criteria in s31(A)(2) provide guidance to parties as to what they should do to ensure negotiation is undertaken in a manner most likely to satisfy the good faith requirements. The positive criteria will provide negotiating parties with a better understanding and greater clarity as to what is required for negotiations to be undertaken in good faith. The more general nature of the criteria in s31(A)(2), as compared to the *Njamal indicia*, means they will be more conducive to creative solutions in negotiations between parties.

[1] Native Title Amendment Bill 2012, *Explanatory Memorandum*, para 69.