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Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

Via email: legcon.sen@aph.gov.au

Dear Ms Dennett,

Native Title Amendment Bill 2012

1. Australian Lawyers for Human Rights ("**ALHR**") thanks the Committee for the opportunity to comment on the *Native Title Amendment Bill 2012*.

2. ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2000 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

3. In October 2012 ALHR provided the Attorney-General's Department with a response to the exposure draft legislation that preceded this Bill (attached). Disappointingly, the recommendations made in that submission have not been reflected in the current state of the Bill. In this current submission, we reiterate those recommendations and the reasoning for them.

4. In summary, ALHR supports the substance of most of the proposed amendments and sees them as positive steps towards remedying some concerning problems in the current

native title legislation. Nevertheless, the proposed changes fall short of what is required to remedy significant shortcomings in Australia's treatment of the rights of Aboriginal and Torres Strait Islander peoples in relation to land and cultural survival. ALHR recommends that the Bill be amended so as to:

- Strengthen the proposed changes to the 'right to negotiate' procedure by:
    - specifying that the National Native Title Tribunal ("**the Tribunal**") cannot consider an arbitration application until substantive negotiations have reached an unsuccessful conclusion;
    - requiring the Tribunal to give greater weight to the wishes of the native title party in determining whether a future act may be done;
    - allowing the Tribunal to impose financial conditions based on the profits, income or production; and
- Expand the provisions for disregarding historical extinguishment by:
    - removing the requirement of government agreement for national parks and conservation reserves;
    - removing the exclusion of marine areas; and
    - allowing disregarding of extinguishment by consent for land areas not covered by the other provisions.

Government commitments and the *Native Title Amendment Bill 2012*

5. In addition to the propositions set out in the attached submission, it is relevant to raise a further point in relation to the currently proposed Bill.

6. The Commonwealth Attorney-General recognised the shortcomings of the current legislation in June 2012 in a speech to the National Native Title Conference in Townsville. The Attorney-General indicated that parties are currently able to '[pay] little more than lip service' to the need to negotiate in good faith'.[1] In response, the Attorney-General promised to 'legislate criteria to outline the requirements for a good faith negotiation'.

7. Unfortunately, the current Bill does not follow through with the Attorney-General's commitments. Other than introducing the 'all reasonable measures' requirement, the amendments do not substantially alter the current law.[2]

8. **The Bill does not legislate criteria for good faith negotiations.** Instead, it specifies factors to be considered by the Tribunal in determining whether the parties have

[1] Attorney-General Nicola Roxon, 6 June 2012, http://resources.news.com.au/files/2012/06/06/1226385/856700-aus-na-file-nicola-roxon-on-mabo.pdf.

[2] Cf *Walley v Western Australia* [1999] FCA 3 at [16].

negotiated in good faith, such that a party may fail to meet one or more of the indicia and yet still be held to have negotiated in good faith. That is the approach of the current law, and none of the factors specified in the Bill are new.[3]

9. If (as the Attorney-General has said) the current law allows parties to 'sit back and wait for the clock to tick down until an arbitrated outcome is available to them',[4] then they will likely be able to do the same thing after the proposed amendments are passed.

Historical extinguishment and the interests of other parties

10. Further to the attached submission, it is necessary to say something about how the proposed s 47C might interact with the rights interests of other private actors and the public at large.

11. ALHR notes that the Bill would exclude off-shore areas from the reach of s 47C. It may be that this exclusion is intended to take into account concerns about the potential effect of native title on fishing interests or exploration for oil and gas. **Such concerns have no legitimate place in a consideration of the law on historical extinguishment, for three reasons.**

12. Firstly, the fortuitous existence of historical tenures must not be used as technical loopholes to circumvent the spirit of negotiation and compensation provisions in the *Native Title Act 1993*. It must be remembered that the issue of disregarding extinguishment only arises in instances where traditional owners had established that they have ongoing and vital connection to the area, and where they can demonstrate rights in the area according to their own traditional laws and customs. That is, it only arises where traditional owners have proved their native title. Australian law undertakes to recognise these rights and interests except where they come into conflict with existing (ie pre-1993) private and public interests. The scheme set up by the *Native Title Act 1993* mandates that the creation of *new* interests in native title lands and waters must be done in accordance with the future act regime. So, if a company without an existing interest in a particular marine area wishes in future to conduct activities in that area, the intent of the legislation is for that company to negotiate in good faith with the traditional owners. The merely accidental fact that some previous (and completed) dealing with the area may have been temporarily inconsistent with the exercise of native title rights should not be allowed to provide such a company with an arbitrary exemption from that process.

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[3] See *Minister for Lands, State of Western Australia/Strickland (Maduwongga) & Ors*, NNTT WF97/4, [1997] NNTTA 31; *Marjorie May Strickland & Ors v Minister for Lands & Anor* [1998] FCA 868; *Brownley v Western Australia* [1999] FCA 1139 at [35]-[36]; *Western Australia/Arthur Dimer & Ors (Ngadju People)/Barnes & Ors (Central East Goldfields People)/Equs limited*, NNTT WF99/10, [2000] NNTTA 290; *Holocene Pty Ltd/Western Australia/Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu)*, NNTTA WF08/27, [2009] NNTTA 8; *Mr Kevin Cosmos & Ors (Yaburara Mardudhunera People)/Mr Jack Alexander & Ors (Kuruma Marthudunera People)/Western Australia/Mineralogy Pty Ltd,* [2009] NNTTA 35; *FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia*, NNTT WF08/31, [2009] NNTTA 38; *FMG Pilbara Pty Ltd v Cox and Others* [2009] FCAFC 49.

[4] Attorney-General Nicola Roxon, 6 June 2012, http://resources.news.com.au/files/2012/06/06/1226385/856700-aus-na-file-nicola-roxon-on-mabo.pdf.

13. Secondly, unless the Bill is amended to remove the requirement for government consent to disregard extinguishment in parks and reserves, the question of s 47C's application will in every case be dependent on decisions of State or Territory and/or Commonwealth governments. If the economic interests of commercial fishers or explorers are to be preferred over the recognition of native title, it may be done on a case-by-case basis. There is no need for the legislation to preclude willing governments from agreeing to disregard historical extinguishment

14. Finally, unless the Bill is amended to remove s 47C's limitation to parks and reserves, then the relevant fishing and exploration interests must be seen within the context of fishing and hydrocarbon exploration *within protected marine parks*. The protected status of such areas necessarily places limits on the significance of any potential economic gains to be made, and so the interests of potential investors in such activities should not be regarded as strong enough to outweigh the rights and interests of the areas' traditional owners.

Conclusion

15. ALHR hopes that the Committee will appreciate the seriousness of the need for real changes to the *Native Title Act 1993*.

16. The recommendations made in this submission are not radical, onerous or novel. They have been under consideration for some years, and are directed towards remedying serious deficiencies in Australia's human rights record.

17. By making these relatively minor adjustments to the Native Title Act, the Government would be taking large steps towards delivering a fairer deal for Aboriginal and Torres Strait Islander peoples. A better future acts process would create economic opportunities and social benefits that governments are still struggling to provide. More sensible rules about extinguishment in parks and reserves would increase opportunities to care for country and engage in carbon abatement and sequestration initiatives. And, on the international stage, Australia would be able to demonstrate that it is making real progress in improving its protection and promotion of the human rights of Aboriginal and Torres Strait Islander peoples.

Best regards,

Stephen Keim SC
President
Australian Lawyers for Human Rights

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