



Australian
Human Rights
Commission

Native Title

Amendment Bill

2012

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE SENATE
LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

25 January 2013

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in its Inquiry into the Native Title Amendment Bill 2012 (the Bill).
2. The Bill contains amendments to:
 - enable parties to agree to disregard the historical extinguishment of native title over an area that has been set aside or vested to preserve the natural environment such as parks and reserves
 - clarify the meaning of good faith under the right to negotiate regime, and the conduct and effort required of parties in seeking to reach agreement
 - streamline processes for Indigenous Land Use Agreements (ILUAs).
3. According to the Explanatory Memorandum to the Bill, these amendments ‘aim to improve agreement-making, encourage flexibility in claim resolution and promote sustainable outcomes’.¹
4. The Commission notes that the Attorney-General’s Department has consulted with a wide range of stakeholders on the development of the Bill.

2 Summary

5. The Commission generally welcomes the Bill. The proposed amendments are compatible with the human rights to enjoy and benefit from culture and to self-determination contained in the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *United Nations Declaration on the Rights of Indigenous Peoples*.
6. The Commission makes four recommendations relating to the Bill – contained in the next section of this submission.
7. The Commission also notes that the *Native Title Act 1993* continues to impose significant burdens on Aboriginal and Torres Strait Islander peoples to prove their on-going connection to their lands, territories and resources. Some of the causes of these burdens are not addressed through the proposed amendments.
8. The Commission notes that the Bill has also been referred to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs (House Standing Committee) to ‘specifically examine and report on the benefits or otherwise of an amendment to the Bill that would reverse the onus of proof for claimants on on-going connection to land’.² The Commission is providing

a separate submission to that Committee recommending future reforms to the native title process – the Commission’s recommendations to that Committee are attached at Appendix A.

3 Recommendations

9. The Australian Human Rights Commission recommends that the Senate Legal and Constitutional Affairs Legislation Committee:
- Support the passage of the Native Title Amendment Bill 2012. [Recommendation no. 1]
 - Consider incorporating the changes outlined in paragraph 13 of this submission into the Native Title Amendment Bill 2012 – that is, expand the proposed section 47C in the following two ways:
 - i. alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter
 - ii. expand section 47C to allow historical extinguishment of native title to be disregarded over *any* areas of Crown land where there is agreement between the government and native title claimants. [Recommendation no. 2]
 - Consider the implications of the amendment outlined in paragraph 26 of this submission into the Native Title Amendment Bill 2012 – in particular, the implications of replacing section 24CK with a provision that removes the objection process for ILUAs certified by a native title representative body. [Recommendation no. 3]
 - Collaborate with the House Standing Committee on Aboriginal and Torres Strait Islander Affairs on an amendment to the Bill that would effectively reverse the onus of proof for native title claimants in relation to their on-going connection to their traditional lands, territories and resources, and to implement any other proposals recommended by that Committee for the future reform of the native title system. [Recommendation no. 4]

4 Amendments to disregard the historical extinguishment of native title in areas set aside to preserve the natural environment

10. The *Native Title Act 1993* does not currently allow parties to reach agreement about disregarding extinguishment of native title except in particular circumstances set out in section 47 (pastoral leases held by native title claimants), section 47A (reserves covered by claimant applications) and section 47B (vacant Crown land covered by claimant applications).
11. The Bill inserts section 47C, which allows historical extinguishment of native title over national, State and Territory parks and reserves to be disregarded where there is agreement between the relevant government party and the native title party. The intent of this amendment is to increase flexibility for parties to agree to disregard historical extinguishment of native title.
12. This amendment also:
 - enables the government party to include a statement in the agreement that it agrees to disregard extinguishment of native title over public works within the agreement area, if the public works were established or constructed by or on behalf of the relevant government party
 - provides notification requirements to give interested persons an opportunity to comment over a two month period on the proposed agreement
 - ensures the validity of other prior interests (such as licenses and leases) and maintains public access to the area
 - provides that the non-extinguishment principle applies, so that any current interests over the land will continue to exist but will suppress rather than extinguish any native title rights to the extent of any inconsistency
 - excludes Crown ownership of natural resources from the operation of section 47C.
13. The Commission welcomes this amendment to expand the areas where historical extinguishment of native title can be disregarded. The Commission is of the view that this proposed provision should be further expanded in the following two ways:
 - alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter
 - expand section 47C to allow historical extinguishment of native title to be disregarded over *any* areas of Crown land where there is agreement between the government and native title claimants.

5 Amendments to clarify good faith requirements in the right to negotiate provisions

14. The Bill inserts section 31A, which sets out good faith criteria that establish the conduct expected of negotiating parties. The objective of this amendment is to 'encourage parties across the [resource] sector to focus on negotiated, rather than arbitrated, outcomes'.³
15. Section 31A establishes good faith requirements for parties in relation to negotiating a proposed agreement. These requirements are set out in section 31A(2) and include the negotiating parties:
 - attending and participating in meetings at reasonable times
 - disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
 - making reasonable proposals and counter proposals
 - responding to proposals made by other negotiation parties for the agreement in a timely manner
 - giving genuine consideration to the proposals of other negotiation parties
 - refraining from capricious or unfair conduct that undermined negotiation
 - recognising and negotiating with the other negotiation parties or their representatives
 - refraining from acting for an improper purpose in relation to the negotiations
 - any other matter the arbitral body considers relevant.
16. The Commission welcomes this amendment that clarifies the requirements for parties who need to demonstrate they have negotiated in good faith. This amendment seeks to address the uncertainty held by native title parties following the *FMG Pilbara Pty Ltd v Cox* Federal Court decision in 2009 that found the *Native Title Act 1993* does not require parties to reach a certain stage in negotiations before a party can apply to the arbitral body for a determination that the future act can proceed.⁴
17. The Bill amends paragraph 35(1)(a) that extends the time before a party may seek a future act determination from the arbitral body from six to eight months. The Commission agrees with this extension of time but is of the view that it is unlikely to create any substantial change to negotiation outcomes for native title parties.

18. The Bill replaces section 36(2), which specifies that where a negotiation party asserts that another negotiation party (the second negotiation party) has not satisfied the good faith requirements, it is the second negotiating party that must then establish that it has met the good faith negotiation requirements before seeking a determination from the arbitral body that the future act can proceed.
19. The Commission supports this amendment that requires the second negotiating party to demonstrate that good faith negotiation requirements have been met before seeking a determination that the future act can proceed. However, the Commission notes that the wording in subsection 36(2) is unnecessarily complex and the arbitral body (usually the National Native Title Tribunal) is in a more informed position to comment on the application and operation of this provision.

6 Amendments to Indigenous Land Use Agreement processes

20. Amendments to ILUA processes include provisions to:
 - broaden the scope of body corporate (Subdivision B) ILUAs
 - improve authorisation and registration processes for ILUAs
 - simplify the process for amending ILUAs.
21. The intention of these amendments is to ‘ensure parties are able to negotiate flexible, pragmatic agreements to suit their particular circumstances’.⁵

6.1 *Broaden the scope of body corporate (Subdivision B) ILUAs*

22. The Bill inserts subsection 24BC(2), which allows parties to make a body corporate ILUA over areas that are wholly determined but include areas where native title has been extinguished; and/or where an area has been excluded from a determination, and native title would have been held by the relevant native title group had native title not been extinguished over that particular area.
23. The Commission supports this amendment as it provides greater flexibility for the use of body corporate ILUAs.

6.2 *Authorisation and registration processes for ILUAs*

24. The Bill introduces a number of complementary amendments that aim to streamline authorisation, notification and registration processes for area agreement (Subdivision C) ILUAs.
25. The Commission’s view is that these amendments generally provide a balanced and pragmatic response to resolving uncertainty about

authorisation and registration processes of area agreement (Subdivision C) ILUAs.

26. However, the Commission notes that due to the complexities of native title matters that may need to be considered during the registration of ILUAs, some of these amendments may create unforeseen and/or unintentional outcomes. In particular, the Commission is concerned that replacing section 24CK with a provision that removes the objection process for ILUAs certified by a native title representative body will mean that persons who wish to object to a certified ILUA will only be able to seek judicial review.⁶ Removing the process of independent assessment and registration by the Registrar of the National Native Title Tribunal may lead to expensive and unnecessary litigation in the courts – most likely by Aboriginal and Torres Strait Islander peoples who do not believe their native title representative body or service provider represents their native title interests. While the Commission supports amendments that simplify the registration process, this should not occur at the expense of people being able to seek an inexpensive and independent review of the registration process.

6.3 Simplify the process for amending ILUAs

27. The Bill also provides for certain amendments to be made to ILUAs (whether body corporate, area agreement or alternative procedure) where:
- the amendment is specified in subsection 24ED(1) – amendments that can mostly be categorised as administrative amendments
 - the parties to the agreement have agreed to the amendment
 - the Registrar of the National Native Title Tribunal has been notified of the amendments in writing.
28. The Commission supports this amendment as it will provide flexibility to enable parties to make administrative amendments to ILUAs without requiring a new registration process.

7 Implications of the Native Title Amendment Bill 2012 on human rights

29. Overall, the Commission welcomes the Bill as it is compatible with the human rights to enjoy and benefit from culture and to self-determination contained in the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *United Nations Declaration on the Rights of Indigenous Peoples*.
30. While the Bill seeks to achieve a sensible balance of interests between parties involved in the native title system, it is the Commission's view that further reforms are required to achieve substantive native title outcomes for Aboriginal and Torres Strait Islander peoples. In particular, the Commission

refers the Committee to Article 27 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which articulates that:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

31. The Commission sets out recommendations for future reforms to the native title system in its submission to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs (see Appendix A).

8 Appendix A – The Commission's recommendations to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry⁷

32. The Commission makes the following recommendations to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the Native Title Amendment Bill 2012 and proposals for future reform of the native title process:

- Support the passage of the Native Title Amendment Bill 2012. [Recommendation no. 1]
- Consider incorporating the changes outlined in paragraph 15 of this submission into the Native Title Amendment Bill 2012 – that is, expand the proposed section 47C in the following two ways:
 - i. alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter
 - ii. expand section 47C to allow historical extinguishment of native title to be disregarded over *any* areas of Crown land where there is agreement between the government and native title claimants. [Recommendation no. 2]
- Consider the implications of the amendment outlined in paragraph 28 of this submission into the Native Title Amendment Bill 2012 – in particular, the implications of replacing section 24CK with a provision that removes the objection process for ILUAs certified by a native title representative body. [Recommendation no. 3]
- Collaborate with the Senate Legal and Constitutional Affairs Legislation Committee on their Inquiry into the Native Title Amendment Bill 2012. [Recommendation no. 4]

- Consider the following outstanding recommendations in the *Native Title Report 2012* in relation to implementing the *United Nations Declaration on the Rights of Indigenous Peoples*:
 - i. That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* are given full effect.
 - ii. That the Australian Government ensures that the *Native Title Act 1993* (Cth), the *Native Title (Prescribed Bodies Corporate) Regulations 1999* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) are consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*.⁸ [Recommendation no. 5]
- Consider the following outstanding recommendations in the *Native Title Report 2009* in relation to shifting the burden of proof for native title:
 - i. That the *Native Title Act 1993* be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test.
 - ii. That the *Native Title Act 1993* provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society.⁹ [Recommendation no. 6]
- Consider repealing section 26(3) of the *Native Title Act 1993* to allow procedural rights in relation to offshore areas. [Recommendation no. 7]
- Consider amending section 223(2) of the *Native Title Act 1993* to specify that native title rights and interests include the 'right to trade and other rights and interests of an economic nature'. [Recommendation no. 8]
- Consider the following outstanding recommendation in the *Native Title Report 2012* in relation to Prescribed Bodies Corporate:
 - i. That the Australian Government provides Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternate legislation in relation to their lands, territories and resources. [Recommendation no. 9]

- Recommend that the Australian Government establish an independent inquiry to review the operation of the native title system and explore options for native title reform, with a view to aligning the system with the *United Nations Declaration on the Rights of Indigenous Peoples*. The terms of reference for this inquiry should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Participants in this inquiry should include representatives from Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate, Aboriginal and Torres Strait Islander peoples, Australian, State and Territory governments, and respondent stakeholders including mining and pastoral interests. [Recommendation no. 10]

¹ Hon N Roxon, Attorney-General, *Explanatory Memorandum to the Native Title Amendment Bill 2012*, p 3.

² House of Representatives Selection Committee, *Report No. 73 – Private Members’ business and referral of bills to committees*, (2012), p 3.

³ Hon N Roxon, Attorney-General, *Explanatory Memorandum to the Native Title Amendment Bill 2012*, p 16.

⁴ *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141. This decision was profiled in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009*, (2010), pp 31–35. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 4 January 2013).

⁵ Hon N Roxon, Attorney-General, *Explanatory Memorandum to the Native Title Amendment Bill 2012*, p 20.

⁶ Hon N Roxon, Attorney-General, *Explanatory Memorandum to the Native Title Amendment Bill 2012*, p 22, para 97.

⁷ The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the Native Title Amendment Bill 2012 is specifically examining ‘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.’ At http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/native%20title%20bill/index.htm (viewed 4 January 2013).

⁸ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2012* (2012), p 14. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport12/index.html (viewed 10 January 2013).

⁹ T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (2009), p xv. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 15 January 2013).