

21 December 2012

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

**RE: Exposure Draft of Human Rights and Anti-Discrimination Bill 2012**

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to provide input to the Committee in its inquiry into the Draft of Human Rights and Anti-Discrimination Bill 2012. We offer these comments in our capacity as the leading proponent of legal and policy research in the native title sector. A key focus of the Native Title Research Unit (NTRU) at AIATSIS is to promote the recognition and protection of the native title of Aboriginal and Torres Strait Islander peoples through independent assessment of the impact of policy and legal developments.

The draft Bill achieves the desired objectives of consolidating the Commonwealth's anti-discrimination laws and providing for a streamlined complaints process. AIATSIS offers our broad support for the Federal Government's efforts to strengthen human rights and advance equality.

We draw attention to a number of important issues concerning the interaction of the existing *Racial Discrimination Act 1975* (Cth) with the *Native Title Act 1993* (Cth), and urge the Committee to ensure that existing arrangements that protect native title rights and interests and enable compensation for the extinguishment of native title are also provided for by the proposed Bill.

AIATSIS would like to thank you for the opportunity to provide input to this inquiry. If you would like further information on this submission, please contact Dr Lisa Strelein, AIATSIS Director of Research,

Yours sincerely,

Dr Lisa Strelein  
Director, Research, Indigenous Country and Governance

## 1. Introduction

The Native Title Research Unit (NTRU) of the Australian Institute of Aboriginal and Torres Strait Islander Studies makes this submission to the Senate Legal and Constitutional Affairs Committee in its Inquiry regarding the exposure draft of the Human Rights and Anti-Discrimination Bill 2012. This submission concerns the operation of s 10 of the *Racial Discrimination Act 1975* (Cth) (RDA) on acts occurring after 31 October 1975 that extinguish or impair native title.

The interaction between the RDA, state, territory and other Commonwealth Acts in relation to the protection of native title rights and interests is a complex area of law. The jurisprudence regarding compensation for the extinguishment of native title by operation of the RDA is currently unresolved. The following submission draws attention to a number of legal issues that the Committee may wish to consider in more detail during the course of inquiry. In particular, we make recommendations that consider the interaction of the proposed new law with the *Native Title Act 1993* (Cth) (NTA).

The NTRU notes that a key principle of the Human Rights and Anti-Discrimination Bill 2012 (the Bill) is that there will be no reduction in existing protections.<sup>1</sup> The NTRU welcomes the protection of native title rights and interests from arbitrary deprivation by virtue of the right to racial equality contained in proposed s 60 of the Bill.

## 2. Equality before the law for people of all races

We draw attention to the right to racial equality currently under s 10 of the RDA and its significance to the protection of native title rights and interests. We recommend that the same level of protection is afforded under the proposed s 60 of the Bill.

Section 10(1) of the RDA provides:

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

This subsection is directed to the equal enjoyment of rights for all persons irrespective of race, colour or national or ethnic origin.

The rights upon which s 10 of the RDA operates are defined in s 10(2) to include rights of a kind referred to in Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination. Relevant to the extinguishment of native title rights and interests,

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<sup>1</sup> Attorney-General's Department, *Fact Sheet: Exposure Draft of Human Rights and Anti-Discrimination Bill 2012*, p. 1.

Article 5 includes the right to own and inherit property.<sup>2</sup> Property in this context extends to native title rights and interests.<sup>3</sup> This was the basis upon which the majority in *Mabo [No 1]* determined that the Queensland law that deprived only Torres Strait Islanders of their traditional rights to the land was invalid.<sup>4</sup> This case also dismissed the contention that as native title has different characteristics from other forms of title and derives from different sources it can legitimately be treated differently.<sup>5</sup> The impairment of the right to own or inherit property by operation of a state law was again considered by the majority in *The Native Title Act Case*:

Security in the right to own property carries immunity from arbitrary deprivation of the property. Section 10(1) thus protects the enjoyment of traditional interests in land recognised by the common law.<sup>6</sup>

It is unfortunate that *Mabo v Queensland [No 2]* has been interpreted as finding that, prior to the instruction of the RDA, discrimination against native title holders was lawful under the common law.<sup>7</sup> Australian parliaments and executive government were therefore free to arbitrarily deprive Aboriginal and Torres Strait Islander peoples of their property without compensation. This underscores the centrality of the RDA to the protection of native title.

**Recommendation 1:** The NTRU recommends that the *Native Title Act 1993* (Cth) be read and construed subject to the proposed provisions of the Human Rights and Anti-Discrimination Bill 2012, significantly the protection of equality before the law for people of all races under the proposed s 60.<sup>8</sup>

### 3. Native title as compensable property through operation of the RDA

Owing to the specialist nature of native title law, any claim for compensation for extinguishment of native title by operation of the RDA is determined in accordance with the NTA. We would seek to ensure that the proposed Bill preserves this arrangement.

Native title is protected from acts that extinguish or impair native title where they occur after 31 October 1975 by operation of the *Racial Discrimination Act 1975* (Cth). The precise way in which the *Racial Discrimination Act 1975* (Cth) operates in relation to native title depends upon characterisation of the racially discriminatory legislation under question. Most acts affecting native title will be attributable to a state or territory.<sup>9</sup>

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<sup>2</sup> *Mabo v Queensland [No 1]* (1988) 166 CLR 186; *Western Australian v The Commonwealth Native Title Act Case* (1995) 183 CLR 373; *Western Australia v Ward* (2002) 213 CLR 1

<sup>3</sup> *Mabo v Queensland [No 1]* (1988) 166 CLR 186 (*Mabo [No 1]*) at [110]

<sup>4</sup> *Mabo v Queensland [No 1]* (1988) 166 CLR 186

<sup>5</sup> *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at [113]; *Western Australia v Ward* (2002) 213 CLR 1 at [117]

<sup>6</sup> *Western Australia v The Commonwealth Native Title Act Case* (1995) 183 CLR 373 (*The Native Title Act Case*) at [103]

<sup>7</sup> (1992) 175 CLR 1

<sup>8</sup> Section 7 of the *Native Title Act 1993* (Cth) currently requires that the Act be read and construed subject to the provisions of the *Racial Discrimination Act 1975* (Cth).

<sup>9</sup> Sturt Glacken, 'Some aspects of native title as compensable property', *Public Law Review*, Vol. 23, Part 3, p. 1

Section 10 may operate on discriminatory state laws by invalidating them or the acts which they authorise, as in *Mabo v Queensland [No 1]* and *Western Australia v The Commonwealth Native Title Act Case*.<sup>10</sup> A state law may be characterised as discriminatory if it only extinguishes native title but leaves other titles intact.<sup>11</sup> Section 10 may also operate to confer upon native title holders the right or interest which has been denied them. Where a state law provides for compensation only to non-native title holders, s 10 operates to extend the right to all on the same terms irrespective of race.<sup>12</sup>

Section 10 of the RDA cannot operate to prevent the enactment of a discriminatory Commonwealth law after 31 October 1975 if the Act in question expressly or impliedly repeals or suspends the operation of the RDA.<sup>13</sup> However, acts attributable to the Commonwealth affecting native title, where they occur after the enactment of the RDA, may engage the s 51(xxxi) constitutional guarantee to prevent the acquisition of property other than on just terms. This possibility is acknowledged by s 18 and s 53 of the NTA.<sup>14</sup>

Note that as the territories are subordinate legislatures they are not competent to pass laws inconsistent to Commonwealth laws. Any discriminatory territory law may therefore be treated as ineffective to the extent of the inconsistency with the right to equality before the law as protected by the right to equality in the RDA.<sup>15</sup>

Section 45 of the NTA provides that if compensation is payable to native title holders by operation of the RDA, it is to be determined in accordance with Part 2, Division 5 of the NTA.<sup>16</sup> Section 50 of the NTA stipulates that an application for a compensation determination is to be made to the Federal Court under Part 3 of the Act.<sup>17</sup>

**Recommendation 2:** The NTRU recommends that where compensation is payable to native title holders by operation of the proposed s 60 of the Human Rights and Anti-Discrimination Bill 2012, it is determined in accordance with Part 2, Division 5 of the *Native Title Act 1993* (Cth).<sup>18</sup>

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<sup>10</sup> *Mabo v Queensland [No 1]* (1988) 166 CLR 186; *Western Australian v The Commonwealth Native Title Act Case* (1995) 183 CLR 373

<sup>11</sup> Lisa Strelein, *Compromised jurisprudence: Native title cases since Mabo*, ed. 2, Aboriginal Studies Press, Canberra, p. 61

<sup>12</sup> *Ibid*

<sup>13</sup> For example, s 132(2) *Northern Territory National Emergency Response Act 2007* (Cth), s 4(2) *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s4(3) and 6(3) *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) provided that acts done under or for the purposes of those Acts were excluded from the operation of Part II of the RDA (prohibition on racial discrimination).

<sup>14</sup> Sturt Glacken, 'Some aspects of native title as compensable property', *Public Law Review*, Vol. 23, Part 3, p. 3

<sup>15</sup> *Western Australia v Ward* (2002) 213 CLR 1, 108 at [129]

<sup>16</sup> Note that the amount of compensation payable under the NTA for extinguishment is an issue discussed in *Jango v Northern Territory of Australia* [2006] FCA 318.

<sup>17</sup> Section 50 *Native Title Act 1993* (Cth)

<sup>18</sup> Section 45 of the *Native Title Act 1993* (Cth) currently requires native title compensation applications by operation of the *Racial Discrimination Act 1975* (Cth) be determined in accordance with the *Native Title Act 1993* (Cth)

#### 4. Litigated compensation determinations

We draw attention to the need for transitional provisions to be in place to ensure any unresolved native title compensation applications are not disadvantaged by the proposed consolidation of anti-discrimination laws.

The NTA includes a scheme for the validation of 'past acts' that would otherwise have been invalid because of the presence of native title.<sup>19</sup> As stated by Dr Lisa Strelein:

Part 2, Division 2 of the NTA provides for the validation of 'past acts' that would have been invalid at common law according to the formulation of the High Court in *Mabo v Queensland [No. 2]* by the operation of the *Racial Discrimination Act 1975* (Cth) (RDA). That is, interests were granted or created after the commencement of the RDA on 31 October 1975 without equal treatment in relation to the rights of property holders.<sup>20</sup>

A 'past act' is a legislative act occurring before 1 July 1993 or any other act occurring before 1 January 1994 that would have been valid but for the presence of native title.<sup>21</sup> *Western Australia v Ward* confirmed that grants occurring after the commencement of the RDA, and validated under the NTA as a past act, may nonetheless be subject to compensation by operation of s 10 of the RDA. Compensation is payable to native title holders for the effects of past acts in accordance with Part 2, Division 5 of the NTA.

The case of *Jango v Northern Territory of Australia* was the first litigated case on the question of compensation for the extinguishment of native title.<sup>22</sup> *Jango* involved a claim for compensation over the township of Yulara near Uluru under s 61(1) of the NTA. In order to demonstrate their entitlement to compensation the claimant group were required to establish, as a threshold issue, that they had native title rights and interests over the area at the time the compensation acts occurred.<sup>23</sup> The Court ultimately found that the case failed as no native title rights and interests were held by the claim group. Although it was unnecessary to further consider the issue of compensation, Justice Sackville did comment in obiter on the elements that are likely to be required for success in a litigated case. As highlighted in the *Native Title Report 2007*, 'The difficulties in pleading the case are themselves an indication of the complexity of the law and the difficulty in pursuing native title determinations.'<sup>24</sup>

The native title holders for De Rose Hill, an area in the north-west of South Australia, made a compensation application for their native title rights which were held to be extinguished. The application, filed on 9 June 2011, covers some 1850 square kilometres. The applicants have only claimed compensation in respect of acts that have damaged their native title

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<sup>19</sup> Part 2, Division 2 *Native Title Act 1993* (Cth)

<sup>20</sup> Lisa Strelein, *Compromised jurisprudence: Native title cases since Mabo*, ed. 2, Aboriginal Studies Press, Canberra, p. 57

<sup>21</sup> Section 228(2) *Native Title Act 1993* (Cth)

<sup>22</sup> [2006] FCA 318 ('*Jango*')

<sup>23</sup> Under section 13(2) of the *Native Title Act 1993* (Cth) the claimants must establish that they actually possessed native title rights and interests as defined by s 223 (1) of the *Native Title Act 1993* (Cth).

<sup>24</sup> Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission, p. 145

rights and interests where they occurred after the commencement of the RDA on 31 October 1975.<sup>25</sup> This matter is currently the subject of confidential mediation between the applicants and the South Australian government. If the claim is successful it will clarify the relevant legal principles for establishing and calculating compensation.

Although the issue of compensation for extinguishment of native remains unresolved, it is nonetheless important that the consolidation of Commonwealth anti-discrimination laws preserves the right to compensation for the extinguishment or impairment of native title.

**Recommendation 3:** The NTRU recommends that the Committee consider transitional provisions to account for compensation applications for acts affecting native title which may remain unresolved upon the commencement of any new Act affecting human rights and anti-discrimination.

## 5. Conclusion

As outlined above, the RDA provides the basis for the protection of native title rights and interests against extinguishment and compensation on just terms where native title rights and interests have been extinguished or impaired after 1975. The NTRU therefore emphasises the importance of preserving this protection and the referral to the compensation scheme under the NTA to ensure the enjoyment of the right to own and inherit property and not to be arbitrarily deprived of that property extends to all people in Australia irrespective of race.

We are concerned that these matters be considered in relation to the proposed Bill and make the following recommendations:

**Recommendation 1:** That the *Native Title Act 1993* (Cth) be read and construed subject to the proposed provisions of the Human Rights and Anti-Discrimination Bill 2012, significantly the protection of equality before the law for people of all races under the proposed s 60.<sup>26</sup>

**Recommendation 2:** That where compensation is payable to native title holders by operation of the proposed s 60 of the Human Rights and Anti-Discrimination Bill 2012, it is determined in accordance with Part 2, Division 5 of the *Native Title Act 1993* (Cth).<sup>27</sup>

**Recommendation 3:** That transitional provisions account for compensation applications for acts affecting native title which may remain unresolved upon the commencement of any new Act affecting human rights and anti-discrimination.

*Prepared by:*

Dr Lisa Strelein  
Gabrielle Lauder

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<sup>25</sup> Michael Pagsanjan, South Australian Native Title Services, 'The De Rose Hill native title compensation application', *Native Title Conference 2012: Echoes of Mabo: Honour and Determination*, Townsville, p. 8.

<sup>26</sup> Section 7 of the *Native Title Act 1993* (Cth) currently requires that the Act be read and construed subject to the provisions of the RDA.

<sup>27</sup> Section 45 of the *Native Title Act 1993* (Cth) currently requires compensation applications by operation of the RDA be determined in accordance with RDA.

## About AIATSIS

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) was established in 1964, under Commonwealth legislation and over the last 48 years AIATSIS has gained a reputation as Australia's premiere Indigenous research institute. AIATSIS manages world class collections of cultural and research material, houses the Aboriginal Studies Press and engages in numerous partnerships with research and government institutions and Indigenous communities.

Located within the wider AIATSIS Research program, the Native Title Research Unit (NTRU) was established through collaboration between the Aboriginal and Torres Strait Islander Commission and AIATSIS in 1993 in response to the High Court decision in *Mabo v Queensland (No.2)*, which recognises Indigenous peoples' rights to land under the legal concept of native title. The NTRU's activities are currently supported through a funding agreement with the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).

The NTRU aims to provide ongoing monitoring of outcomes and developments in native title; independent assessment of the impact of policy and legal developments; longitudinal research and case study research designed to feed into policy development; ethical community based and responsible research practice; theoretical background for policy development; recommendations for policy development; and policy advocacy designed to influence thinking and practice.

The NTRU continues to monitor developments in legal reform affecting native title through our Native Title Jurisprudence Research Project. This project involves the analysis of native title jurisprudence including the publication of detailed case notes and engagement with legislative review and reform processes.