



**Australian
Human Rights
Commission**

**Aboriginal and Torres Strait Islander Social
Justice Commissioner**

June Oscar AO

27 November 2019

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

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

Dear Secretary

Submission to the Legal and Constitutional Affairs Legislation Committee regarding the Native Title Legislation Amendment Bill 2019

The Australian Human Rights Commission (the Commission) makes this submission in response to the Native Title Legislation Amendment Bill 2019 (the Bill).

The Commission welcomes the opportunity to provide further comment, taking into account its previous submission on the Options Paper on reforms to the Native Title Act 1993 (Cth) (Native Title Act) in February 2018 (Options Paper)¹ (**Appendix A**), and its submission in response to the Exposure Draft of the Native Title Legislation Amendment Bill 2018 (the Exposure Draft) in January 2019² (**Appendix B**).

The Commission maintains that the recommendations made in these previous two submissions should be incorporated into an amended version of the Bill. In particular, the Commission reiterates that amendments should address the operation of s 223 of the Native Title Act in order to ensure a just and equitable native title system, which is consistent with international human rights standards, in particular the United Nations Declaration on the Rights of Indigenous Peoples.

The purpose of this submission is to address key differences between the Exposure Draft and the Bill and makes comment on the implications of these for the enjoyment of human rights by Aboriginal and Torres Strait Islander Peoples.

1. Applicant decision-making and the majority default rule

The Commission notes that the Bill applies amendments to:

- section 24CD(2) – area agreement ILUAs;
- section 24CL(2) – uncertified area agreement ILUAs;
- section 24DE – alternative procedure ILUAs; s31 agreements;

and inserts:

- section 62C which specifies that the persons in the majority must notify the other persons who comprise the registered native title claimant within a reasonable period after becoming parties to the agreement with a failure to comply with this does not invalidate the agreement.

As stated in its submission to the Exposure Draft,³ the Commission does not oppose these amendments (aside from in relation to section 31 agreements) on the grounds that an authorisation process agreed by the native title group should be respected. Legislation should not provide an avenue to subvert an agreement made by the whole group, where that decision reflects the free, prior and informed consent of the group.

Unlike ILUAs, the Native Title Act does not provide for a formal authorisation process for section 31 agreements. The Commission maintains its view⁴ that the majority default rule should not be extended to section 31 agreements until the authorisation requirements in the Native Title Act are the same for ILUAs and section 31 agreements. There should be no difference in the level of control that a native title group has over the validation of ILUAs and section 31 agreements.

2. Minor amendments to ILUAs without needing reauthorisation

The Commission notes that item 7 inserts a new s 24ED, which sets out a process to allow minor amendments to be made to an ILUA without requiring an entirely new ILUA to be agreed by the parties and registered on the Register of ILUAs.

The Commission maintains its position on these amendments as per its submission on the Exposure Draft.⁵ Furthermore, the Commission notes that the Bill deletes the new s 24ED(e) in the Exposure Draft which stated that an update to 'administrative processes relating to the agreement' constituted a minor amendment for which reauthorisation of the ILUA is not required. The Bill's Explanatory Memorandum does not provide a rationale for this deletion, and the Commission recommends

reincorporating the content of s 24ED9(e) as it appears in the Exposure Draft, into s 24ED of the Bill.

3. Historical extinguishment

The Commission maintains its position on historical extinguishment as per its submission regarding the Exposure Draft.⁶ The Commission welcomes the amendments in the Bill, which will allow historical extinguishment to be disregarded, in some circumstances, including areas of national, state or territory parks, where the parties agree, and pastoral leases controlled or owned by native title corporations.

The Commission, however, notes the variance between s 47C of the Exposure Draft, and s 47C of the Bill, which inserts:

- section 47C(1)(c), which specifies that the agreement area is:
 - (i) Crown land; or
 - (ii) covered by a freehold estate held by the Crown, or a statutory authority of the Crown, in any of its capacities.

- section 47C2, which clarifies that for the purposes of paragraph (1)(c), it is immaterial whether the land is:
 - (a) subject to a lease or licence; or
 - (b) covered by a dedication, reservation, proclamation, condition or declaration made or conferred by the Commonwealth, a State or a Territory; or
 - (c) covered by legislation of the Commonwealth, a State or a Territory under which the whole or a part of the land is to be used for a public purpose or public purposes; or
 - (d) held on trust for the benefit of another person; or
 - (e) subject to native title.

The Commission opposes any reforms which may restrict the situations where historical extinguishment can be disregarded. The Commission has previously recommended that reforms to the Native Title Act should be expanded to allow historical extinguishment of native title to be disregarded over any areas of Crown land where there is agreement between the relevant parties concerned.

4. CATSI Registrar oversight

Item 25 of Part 3 of Schedule 8 inserts subsection 487-5(1)(c) to provide that the ORIC Registrar may determine that a Registered Native Title Body Corporate (RNTBC)

is to be under special administration if 'there has been a serious failure, or a number of failures, by the corporation to comply with its Native Title legislation obligations'. The Commission notes that this section is an improvement to the new paragraph 487-5(1)(e) in the Exposure Draft, which stated that the CATSI Registrar has the ability to appoint a special administrator to a RNTBC if they are of the view that the corporation is conducting its affairs 'in a way that is contrary to the interests of the common law holders or a class of common law holders.'

The Commission supports, in principle, the enhanced transparency and accountability for RNTBCs. However, the Commission also wishes to emphasise that the capacity of RNTBCs to effectively discharge their statutory obligations and fulfil the cultural, social and economic aspirations of native title holders can be hindered by limited financial resources and governance capacity, including a lack of understanding by directors of the regulatory and legislative obligations of RNTBCs. The Commission reiterates its view that the capacity of RNTBCs to comply with their native title legislation obligations would be enhanced through an increase in the Government provision of technical and financial resources to RNTBCs.⁷

Yours sincerely

June Oscar AO
**Aboriginal and Torres Strait Islander
Social Justice Commissioner**

Endnotes

¹ Australian Human Rights Commission, *Submission to the Options paper on reforms to the Native Title Act 1993 (Cth)*, February 2018

² Australian Human Rights Commission, Submission to the Attorney-General's Department Exposure Draft Native Title Legislation Amendment Bill 2018, 31 January 2019

³ Australian Human Rights Commission, Submission to the Attorney-General's Department Exposure Draft Native Title Legislation Amendment Bill 2018, 31 January 2019

⁴ Australian Human Rights Commission, Submission to the Attorney-General's Department Exposure Draft Native Title Legislation Amendment Bill 2018, 31 January 2019

⁵ Australian Human Rights Commission, Submission to the Attorney-General's Department Exposure Draft Native Title Legislation Amendment Bill 2018, 31 January 2019

⁶ Australian Human Rights Commission, Submission to the Attorney-General's Department Exposure Draft Native Title Legislation Amendment Bill 2018, 31 January 2019

⁷ See: Australian Human Rights Commission, Submission to the Options paper on reforms to the Native Title Act 1993 (Cth), February 2018; M Gooda, Native Title Report 2011, Australian Human Rights Commission, p.187