



**Submission to the Senate Legal and Constitutional Affairs
Legislation Committee:**

Inquiry into the Native Title Amendment (Reform) Bill 2011

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About ANTaR

ANTaR is a national advocacy organisation dedicated specifically to the rights - and overcoming the disadvantage - of Aboriginal and Torres Strait Islander people. We do this primarily through lobbying, public campaigns and advocacy.

ANTaR's focus is on changing the attitudes and behaviours of non-Indigenous Australians so that the rights and cultures of Aboriginal and Torres Strait Islander people are respected and affirmed across all sections of society.

ANTaR is a non-government, not-for-profit, community-based organisation.

ANTaR has been working with Aboriginal and Torres Strait Islander organisations and leaders on rights and reconciliation issues since 1997.

Introduction

ANTaR is a national advocacy organisation dedicated to promoting the rights of Aboriginal and Torres Strait Islander peoples and working to eliminate inequality and disadvantage.

ANTaR was formed in 1997 to defend existing native title rights and promote the opportunities offered by native title for Aboriginal and Torres Strait Islander people to achieve some measure of justice, recognition, strengthening of culture and economic opportunity.

The reforms proposed in this bill are primarily based on recommendations of the Aboriginal and Torres Strait Islander Social Justice Commissioner in the *Native Title Report 2009*. They are intended to create a fairer native title system for recognising and adjudicating the rights of Aboriginal and Torres Strait Islander peoples.

We congratulate Senator Siewert for introducing this Bill into the Australian Parliament and welcome the Senate's decision to examine this legislation. Further, we encourage the Committee to ensure thorough consideration is given both to the overall objectives of the legislation and the specific measures proposed within it.

It is important to note that the current Preamble in the *Native Title Act 1993* (Cth) (the Act) specifically states the intention "to rectify the consequences of past injustices by the special measures contained in this Act". Given that this statement has remained unchanged, despite other changes being made to the Act by governments of both persuasions, it is reasonable to assert that all parties in the Parliament continue to believe that the Act can and should operate in a way which assists to rectify the consequences of past injustices.

It is clear that the Act can be improved to enable it to better implement this clearly expressed intention of successive Parliaments. ANTaR encourages this Committee to urge that the current Bill be used as a vehicle to make such improvements.

Overview: the case for reform

ANTaR strongly supports efforts to strengthen the existing *Native Title Act* so that it can more effectively deliver economic opportunity and greater legal, social and cultural recognition of the rights, identity and cultures of Aboriginal and Torres Strait Islander peoples.

The stated overarching object of the Bill is to "implement reforms to the *Native Title Act 1993* to improve the effectiveness of the native title system for Aboriginal and Torres Strait Islanders". ANTaR believes that all Senators should support this objective.

A growing number of Aboriginal and Torres Strait Islander leaders, native title peak and representative bodies and service providers, legal experts and others have been calling for reform of the Act. Australia's native title system has also attracted international criticism due to the high standard of proof required of Aboriginal and Torres Strait Islander applicants and the obstacles to securing recognition.¹

ANTaR believes that social and political changes since the initial passage of the *Native Title Act* make this an opportune climate in which to achieve these important and necessary reforms. Many of the initial fears about the impact of native title expressed by certain sectors have proved to be unfounded. At the same time, the promise of native title as a vehicle for economic opportunity has not been realised due to impediments in the Act (including the onus of proof) which should be addressed.

In recent years there has been a growing cross-party political consensus that we need to "close the gap" between Aboriginal and Torres Strait Islander Australians and the non-Indigenous community. Reforming our native title laws and adopting a more mature and informed understanding of the opportunities which native title can provide would be a valuable contribution to closing that gap.

We urge the Committee to adopt an in-principle position supporting the overarching aims of the Bill including:

- a) strengthening the right to negotiate;
- b) reversing the current onus of proof;
- c) adopting a presumption of continuity;
- d) adopting a more realistic definition of traditional laws; and
- e) clarifying that native title rights and interests may be of a commercial nature.

Recommendation 1

That the Committee clearly express its support for the stated object of the Bill, that is, to reform the *Native Title Act 1993* to improve the effectiveness of the native title system for Aboriginal and Torres Strait Islander people, and express support for the passage of legislation that would achieve this reform.

Recommendation 2

That the Committee ensure there is wide support amongst Aboriginal and Torres Strait Islander people and their representative organisations for any specific changes to this Bill that the Committee wishes to recommend.

¹ See, for example, the Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), para 16 and Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), para 16.

Comments on Specific Provisions of the Bill

Objects of the Act

ANTaR supports inserting an additional object into the Act to provide that governments in Australia should “take all necessary steps” to implement certain principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

While we support the full implementation of the Declaration into domestic legislation and policy (which is beyond the scope of the current Bill) and are aware that the proposed amendment may have limited legal effect, we believe it would be a considerable improvement on the current situation.

Should the Bill be enacted, each person exercising a power or performing a function under the Act would be required to apply these Declaration principles. Given Australia has indicated formal support for the Declaration, it is important that our laws and practices start to more explicitly reflect this.

The Committee should also be aware that all parties in the Senate supported a resolution in 2010 which “affirms the view that ‘free, prior and informed consent’ is a fundamental human rights principle for Indigenous peoples; and calls on all current and future Australian governments to ensure this principle is taken into account in developing, implementing and administering their laws and programs”.² ANTaR welcomed the commitment expressed by all parties in that Senate resolution and believes this item would assist in ensuring those words are transformed into action.

Future acts amendments

ANTaR supports efforts to strengthen the future acts regime to better protect the rights of Aboriginal and Torres Strait Islander peoples.

The Bill proposes several positive amendments in this regard. This includes amendments to:

- strengthen the freehold test with respect to non-legislative acts by allowing decision-makers and courts to consider the effectiveness of heritage laws when considering whether the elements of s 24MB have been met,³ and
- provide that the non-extinguishment principle applies to a compulsory acquisition.⁴

² Commonwealth, *Parliamentary Debates*, Senate, 24 June 2010, 4375.

³ Native Title Amendment (Reform) Bill 2011, Sch 1, Item 2.

These amendments have the potential to strengthen the protection of sites of significance and reduce unnecessary extinguishment, thus increasing the opportunities of Aboriginal and Torres Strait Islander people to benefit from native title.

In particular, as detailed below, ANTaR welcomes the proposals in the Bill to reform the right to negotiate. Weaknesses in the right to negotiate are a key area of frustration for many Aboriginal and Torres Strait Islander people. These weaknesses are often identified as a reason why native title has not delivered as many opportunities and benefits as had been initially envisaged and hoped. ANTaR believes that reforms to this area are necessary.

Application of procedural rights to offshore areas

Schedule 1, Item 4 of the Bill would repeal s 26(3) of the Act to allow the right to negotiate to apply in relation to offshore areas. This is an important measure which more properly reflects the reality of traditional and continuing connections of Aboriginal and Torres Strait Islander people to both land and waters. As this has been recognised by the courts and the Attorney-General, the right to negotiate should reflect this reality.

Clarifying and strengthening the meaning of negotiation ‘in good faith’

Schedule 1, Item 5 of the Bill would amend the Act to require negotiation parties to negotiate in good faith for a period of *at least six months* and, importantly, to use “*all reasonable efforts* to come to an agreement” about the doing of the act or the conditions under which each of the native title parties might agree to the doing of the act.

ANTaR supports reform to strengthen and clarify the good faith negotiation requirements. The proposed amendment appears to provide a higher standard than the existing requirement that the parties “negotiate in good faith with a view to obtaining the agreement of each of the native title parties”.⁵ ANTaR supports moves to strengthen the right to negotiate such that the “doing of the act” cannot be assumed to be a foregone conclusion.

The Bill proposes, in schedule 1, item 6, to insert into the Act non-exhaustive criteria to clarify the requirement to “negotiate in good faith using all reasonable efforts”. In its *Discussion paper: Leading practice agreements: maximising outcomes from native title benefits*, the Australian Government indicated an intention to amend the Act to clarify “what negotiation in good faith entails and to encourage parties to engage in meaningful discussions about future acts under the right to negotiate provisions”.⁶ The Government has already undertaken consultations on this matter and we refer the Committee to

⁴ Native Title Amendment (Reform) Bill 2011, Sch 1, Item 3.

⁵ *Native Title Act 1993* (Cth), s 31(1)(b).

⁶ Australian Government, *Leading practice agreements: maximising outcomes from native title benefits* (July 2010), 14.

ANTaR's submission to that process.⁷ ANTaR encourages the Committee to take into account the views of Aboriginal and Torres Strait Islander peoples, and their representatives, as expressed during these consultations when considering this item of the Bill.

ANTaR encourages the Committee to support the recommendation of the Australian Human Rights Commission regarding the development of a formal code or framework to provide further guidance for negotiating parties.

Onus of proving good faith

Schedule 1, Item 7 of the Bill would insert a new s 31(2A) into the Act to provide that the party asserting good faith has the onus of proving that it negotiated in good faith. A negotiation party would not be able to apply to an arbitral body for a determination unless it had complied with the proposed good faith negotiation requirements (proposed s 35(1A)). These amendments would be consistent with recommendations contained in the former Aboriginal and Torres Strait Islander Social Justice Commissioner's *Native Title Report 2009*⁸ and are supported by ANTaR.

Profit-sharing conditions

The Bill would amend the Act to enable an arbitral body to determine profit-sharing conditions. Currently, s 38(2) of the Act provides that an arbitral body cannot determine such conditions. The *Native Title Report 2009* recommended that this provision "should be reconsidered"⁹ due to the concern that the inability of the National Native Title Tribunal to determine profit-sharing conditions strengthens the negotiating position of proponents.

ANTaR shares the concerns identified in the *Native Title Report 2009* and supports the amendment proposed in this item. However, we believe it is important to also ensure that the National Native Title Tribunal has the expertise and capacity to analyse profit projections and impose acceptable profit-sharing conditions.

Disregarding prior extinguishment

The Bill proposes to amend the Act to enable an applicant and a government party to agree to disregard the prior extinguishment of native title rights and interests. This

⁷ The ANTaR submission is available at:
<http://www.antar.org.au/sites/default/files/Final%20submission%20to%20native%20title%20discussion%20papers%20November%202010.pdf>

⁸ Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), 124 (recommendation 3.15).

⁹ Ibid 108.

proposal is based on French CJ's suggestion that parties be able to agree to disregard extinguishment.¹⁰

In January 2010, the Australian Government released draft legislation proposing an amendment to the Act to enable applicants (among others) and the relevant government parties to agree to disregard extinguishment over areas "set aside or vested by a Government law for the purpose of preserving the natural environment of the area, such as a State or Territory park or reserve".¹¹ The amendment proposed by this Bill is not limited to such areas, and should therefore be supported as a more wide-ranging, beneficial provision.

Like the Government's draft legislation, the amendment proposed in the Bill would require that there be an agreement before extinguishment is disregarded. As the current Aboriginal and Torres Strait Islander Social Justice Commissioner has stated in relation to the Government's draft, "[t]he proposed amendment would therefore have the most impact where government parties are truly prepared to be flexible".¹²

Whilst ANTaR supports this item, we believe the Committee should expressly acknowledge the importance of government parties engaging constructively in all negotiating processes.

Onus of proof and presumptions of continuity

The Bill proposes to reverse the onus of proof in native title claims and to introduce specific presumptions of continuity into the Act.

Calls to reverse the onus of proof have long been made by native title peak and representative bodies, service providers and other Aboriginal leaders and spokespersons. More recently, they have been supported by other prominent public figures, notably Chief Justice French, Justice North, the then Aboriginal and Torres Strait Islander Social Justice Commissioner and former Prime Minister Paul Keating and Aboriginal leader Noel Pearson.¹³

According to the Explanatory Memorandum, the Bill implements the amendments suggested by Chief Justice French.¹⁴ Under this model, the members of the claim group must "reasonably believe" their laws and customs to be traditional. It has been suggested that this bar is still too high, and that the presumptions should apply once the registration test is passed.¹⁵ ANTaR supports as low a bar as practicable, taking into

¹⁰ R S French, "Lifting the burden of native title: Some modest proposals for improvement" (2009) 93 *Reform* 10, 13. Available at <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/>.

¹¹ The Hon R McClelland MP, Attorney-General, "Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances" (undated), 1.

¹² Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011) 40-41.

¹³ See French, above note 10; Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009); Calma, above note 8, 123 (recommendation 3.2); Paul Keating, 'Time to revisit native title laws to redress the past', *The Australian* (1 June 2011) 16; Elks, above note 1.

¹⁴ Explanatory Memorandum, Native Title Amendment (Reform) Bill 2011, 7. See R S French, "Lifting the burden of native title – some modest proposals for improvement" (Speech delivered to the Native Title User Group, Adelaide, 9 July 2008). Available at: http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj35.html.

¹⁵ North Queensland Land Council, *Submission: Inquiry into the Native Title (Reform) Bill 2011* (27 May 2011).

account the stated intent of the Act and the clear public benefit which can derive from any formal acknowledgement or recognition of native title.

This amendment would also enable the courts to take into consideration whether a disruption in continuity was caused by a State, a Territory or non-Indigenous person. This would improve the fairness of the current system. ANTaR welcomes this proposal and suggests the Committee consider whether the Commonwealth could also be named in this provision.

Definition of traditional laws and customs

The Bill would amend the Act to clarify that the expressions “traditional laws acknowledged” and “traditional customs observed” in s 223 of the Act include such laws and customs as remain identifiable through time, regardless of whether there is a change in those laws and customs or in the manner in which they are acknowledged or observed. This would be an improvement on the current situation which requires that laws and customs remain ‘largely unchanged’.

The Bill would also amend the Act to clarify that it is not necessary for a “connection with the land or waters” referred to in s 223(1)(c) to be a physical connection, thereby clarifying that a spiritual connection is adequate to attract legal recognition and bringing the Act into line with existing case law on this issue.¹⁶

ANTaR supports these proposals as setting a more realistic threshold for claimants to meet which recognises cultural adaptation.

Commercial rights and interests

In Schedule 1, Item 14, the Bill would amend the Act clarify that native title rights and interests may be of a commercial nature. This amendment was also explored in the *Native Title Report 2009*.¹⁷ ANTaR believes it is very important that Aboriginal and Torres Strait Islander people have the ability to derive maximum benefit and opportunity from native title rights and interests. The barriers to deriving direct commercial or other economic benefits from these rights have been a source of ongoing frustration for many Aboriginal and Torres Strait Islander people and communities.

The right to have maximum control over how to use rights and interests in land and waters is a pivotal one which lies at the heart of the Act’s stated intent to rectify the consequences of past injustices. It can also provide an important mechanism to achieve a more fully reconciled Australia into the future and contribute to closing the economic and social gap.

¹⁶ See *De Rose v South Australia No 2* (2005) 145 FCR 290, 319.

¹⁷ Calma, above note 8, 108-110

Summary and Recommendations

ANTaR believes this Bill provides an important opportunity to increase economic opportunity for many Aboriginal and Torres Strait Islander people and communities, to reduce delay, unfairness and expense in native title determination processes and to advance reconciliation.

The inability of past Australian Parliaments to ensure maximum economic, cultural and social opportunities for today's descendants of the First Peoples was a source of serious disillusionment amongst many Aboriginal and Torres Strait Islander people who derived great hope from the High Court's *Mabo* and *Wik* decisions. It was also a missed opportunity for our nation.

ANTaR encourages this Committee to make the most of the opportunity presented by consideration of this legislation and the issues it seeks to address. We urge the Committee to send a message of broad political support for strengthening the native title system to increase the ability of Aboriginal and Torres Strait Islander people to use native title for economic and social empowerment.

This Bill is to be commended as an important first step towards identifying solutions to the difficulties faced by Aboriginal and Torres Strait Islander peoples in seeking justice through the native title system. ANTaR urges the Committee to ensure that the views of Aboriginal and Torres Strait Islander peoples are seriously considered in developing its recommendations. We urge the committee to ensure that any uncertainty about the legal effects of the Bill not undermine the important opportunity to make significant advances in this important area but instead signal the need for a broader review of the native title system to ensure it delivers justice and maximum social and economic benefit to Aboriginal and Torres Strait Islander peoples.

Recommendation 1

That the Committee clearly express its support for the stated object of the Bill, that is, to reform the *Native Title Act 1993* to improve the effectiveness of the native title system for Aboriginal and Torres Strait Islander people, and express support for the passage of legislation that would achieve this reform.

Recommendation 2

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