

**Submission to Legal and Constitutional Affairs Committee:
Inquiry into the *Native Title Amendment Bill 2012***

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Thank you for the opportunity to comment on the *Native Title Amendment Bill 2012* (‘the Bill’). The Bill was referred to this Committee on 29 November 2012 for inquiry and report by 13 March 2013.

ANTaR notes that an inquiry is presently also being conducted by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs into the Bill and future reforms of the native title system. We refer this Committee to our submission to the House of Representatives Inquiry for consideration and information. In doing so, we note that there is some overlap between the contents of the two submissions.

About ANTaR

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, protection of culture and economic opportunity.

Introduction

This bill seeks to implement reforms announced by the Attorney-General, Nicola Roxon, at the National Native Title Conference on 6 June 2012 related to good faith requirements, historical extinguishment and Indigenous Land Use Agreement (ILUA) processes. The Conference marked 20 years since the Mabo decision (3rd June 1992), an anniversary which sparked calls from many Aboriginal and Torres Strait Islander leaders, organisations and advocates for fundamental reform of the system to deliver the promise of the historic decision.

At the time of the announcement, ANTaR joined national Aboriginal and Torres Strait Islander peak bodies and native title organisations in welcoming the modest reforms proposed, but expressing profound disappointment at their limited scope. ANTaR believes that the reforms contained in the Bill represent an improvement on the current situation but fail to address the major underlying inequities in the native title system - in particular, the onus of proof and requirement to prove continuity, lack of clarity around commercial rights and the restrictive definition of ‘traditional laws and customs’. These issues are the subject of further analysis in our Submission to the House of Representatives Inquiry referred to above and we urge the Committee to consider the current bill in the broader reform context.

In this submission, we focus on the procedural and technical amendments contained in the Bill. In our separate submission to the House of Representatives Standing Committee inquiry into the Bill and future reform of the native title system, we highlight the need for more far-reaching reforms as an urgent priority.

Human Rights Compatibility Statement

ANTaR commends the Federal Government on the detailed nature of the Compatibility Statement, and in particular, on its consideration of human rights issues related to the United Nations Declaration on the Rights of Indigenous Peoples.

Discussion of proposed amendments to the *Native Title Act 1993*

In this section, we make brief comments in relation to key provisions of the Bill. According to the Explanatory Memorandum, the amendments contained in the Bill are designed to “improve the operation of the native title system, with a particular focus on agreement-making, encouraging flexibility in claim resolution and promoting sustainable outcomes.”

Schedule 1: Historical Extinguishment

1. The changes in this Schedule, according to the Explanatory Memorandum, “will ensure that native title can be recognised over parks and reserves where there is agreement between the parties, even where the creation or vesting of the national, State or Territory park or reserve may otherwise extinguish native title.”¹
2. These amendments represent an improvement on the current law, which does not allow parties to disregard extinguishment in these circumstances. For this reason, ANTaR welcomes these reforms, though we are concerned that the reforms do not go far enough.
3. ANTaR believes that, given the structure of the *Native Title Act 1993* (*NTA*) and judicial decisions in relation to that Act, all native title determinations should aim to recognise native title to the greatest extent possible, i.e., for native title to fill the tenure gap. That is, native title rights and interests should be recognised over all land and waters not currently subject to other interests in land and to the extent that the land and waters are not subject to such other interests.
4. In our view, the *NTA* should be structured to allow native title applicants to achieve this aim to the greatest extent possible.
5. This aim is currently achieved through mechanisms such as the non-extinguishment principle (s 238) and sections 47, 47A and 47B, which allow prior extinguishment to be disregarded in some circumstances. Proposed s 47C should be seen in this context as a further attempt to enable native title applicants to fill the tenure gap.
6. The Explanatory Memorandum indicates that the proposed s 47C is in part designed to ameliorate the effects of the High Court’s decision in *Western Australia v Ward* (2002) 213 CLR1, which found that the vesting of reserves under the *Land Act 1933* (WA) extinguished all native title rights and interests because the vesting amounted to the conferral of a freehold title in the vestee. ANTaR submits that, rather than addressing this problem specifically through the proposed provision, it would be preferable to amend the *NTA* to reduce ‘the tenure gap’.
7. Further, ANTaR submits that the section should have broader application and not be subject to agreement with State Governments and other relevant parties.

Limited scope of operation

8. Proposed s 47C is limited in its operation to ‘park areas’, which are areas set aside for the use of the public in general. There are relatively few other interests of a private nature that would have to co-exist with native title rights and interests if native title was recognised through the operation of s 47C.
9. However, there is no reason why the interests of private individuals in respect of public land that would otherwise be subject to native title should not co-exist with native title rights and interests. For example, there is no apparent reason why such private interests holders should be treated any differently from pastoral lease holders, whose pastoral interests must co-exist with native title (see *Wik, Ward*).

¹ Explanatory Memorandum at page 8.

10. The scope of the current tenures that give rise to the operation of s 47C should be broadened to include:
 - a. Any tenure that does not fully extinguish native title; and
 - b. Any otherwise fully extinguishing tenure, under which the land is to be used for a public purpose (such as freehold grants under which the land is to be used for a public purpose, e.g. freehold granted to a State or Territory conservation authority). In effect, this would cover all Crown land, including unallocated Crown or State land and land reserved for a public purpose.

Need for agreement with the Commonwealth, State or Territory

11. ANTaR submits that agreement should not be a pre-requisite for the operation of the provision. This is likely to create uncertainty and inconsistency between jurisdictions and governments. Rather, such agreement should instead be required as part of the operation of the provision, and be directed to finding means by which the various private, public and native title rights can co-exist. Therefore, s 47C should be drawn in similar terms to ss 47, 47A and 47B so that prior agreement is not required. In this respect, ANTaR notes that *Native Title Amendment (Reform) Bill (No 1) 2012*, introduced by Senator Siewert ('the Greens Bill') provides that extinguishment must be disregarded when the section is engaged. ANTaR believes this is a more equitable approach.

Other comments

12. The provision allowing the extinguishing effect of the construction or establishment of public works to be disregarded should be extended to ss 47, 47A and 47B.
13. It should also be extended to public works constructed or established by or on behalf of statutory authorities and local government bodies, not just those constructed or established by or on behalf of the Crown (see s 47C(10)).
14. The provision should also be extended to provide for the disregarding of historic extinguishment by grants that would be caught by ss 47 and 47A if they were current when the native title application is made. These include grants of freehold or the vesting of reserves for the use and benefit of Aboriginal or Torres Strait Islander peoples. At present, such grants or vestings, which are not current, totally extinguish native title.

Schedule 2 Negotiations

Schedule 2 contains amendments to clarify good faith negotiation requirements, extends the timeframe before a party may seek a future act determination and shifts the onus of proof where one party alleges that another party has not negotiated in good faith. The Explanatory Memorandum explains the Government's objectives in the following terms:

"These amendments will encourage parties across the whole sector to focus on negotiated, rather than arbitrated, outcomes and will promote positive relationship-building through agreement-making."²

Consideration of the effect of the act on native title rights and interests

15. The inclusion of proposed s 31(1)(c) is useful. However, ANTaR submits that there should be a direct link between the requirement that the negotiations include consideration of the effect of the act on native title rights and interests and the ability for the proponent to seek a determination from the arbitral body.

² Explanatory Memorandum at 16.

16. Proposed s 36(2) should be amended by adding 'and that s 31(1)(c) has been complied with' at the end.

The good faith negotiation requirements

17. ANTaR welcomes reforms to clarify the content of the requirement to negotiate in good faith. The proposed reform is intended to address the current difficulty in proving an absence of good faith (due to lack of clarity) and the inequities in the current system.
18. We believe that the list of negotiation requirements in s 31A(2) should be expanded by reference to the content of the Greens Bill, which required a broader range of activities and would go further towards levelling the playing field. Additions should include:
 - a. That participation should be 'active';
 - b. 'Where reasonably practicable, participated in meetings at a location where most of the members of the native title parties reside, if requested by them'; and
 - c. 'Given responses to proposals in a detailed manner, including providing reasons'.
19. ANTaR supports the extension of the negotiation period in s 35(1)(a), but submits that it is likely to make little difference, given that negotiation in accordance with the good faith negotiation requirements is likely to take more than 8 months.
20. We welcome the changes proposed in the new s 36(2) and 36(2A) which would place the onus of proof on the second negotiating party to establish it has met the good faith requirements, where the first party alleges a failure to do so. This is a substantial change from the current provision, which places the onus on the party asserting lack of good faith.
21. Finally, ANTaR suggests that the Government's stated objective of levelling the playing field between native title negotiating parties will not be achieved without adequate resourcing for native title representative bodies ('NTRBs'). We refer the Government to the relevant recommendation in our 2013-14 Pre-Budget Submission to this effect (see ANTaR's Submission to House of Representatives Standing Committee for further detail).

Schedule 3 ILUAs

The Bill contains amendments to the Indigenous Land Use Agreement (ILUA) process to broaden the scope of body corporate agreements, reform authorisation and registration processes and simplify the process for amendments to ILUAs.

One month notice period

22. The reduction of the period within which objections may be made to the registration of area ILUAs from three months to one month may have the effect of unreasonably limiting the ability of potential native title holders to object to its registration.

Prima facie case that people may hold native title

23. The proposed changes to s 251A mean that:
 - a. The only native title parties who can make an ILUA are registered claimants, PBCs, and people who can establish a *prima facie* case that they may hold native title; and
 - b. Effectively, these are the only people or entities that can reasonably object to the registration of an ILUA, as one of the ways of resolving an objection is by ensuring that the objector is a party to the ILUA. If they cannot become a party, effectively, they cannot sustain an objection.
24. This change is problematic because:
 - a. People who may hold native title must provide evidence before they can gain the capacity to make a contract (the ILUA);
 - b. The need to provide evidence will add to the cost, time and complexity of the ILUA process;
 - c. It is not certain who will assess the evidence provided (though presumably it is the NNTT); and
 - d. It potentially reduces the capacity for matters to be resolved by ILUA rather than litigation, since ILUAs will become less flexible.