Committee Secretary
Senate Legal & Constitutional Committees
PO Box 6100
Parliament House
Canberra
ACT 2600
Australia

22 July 2011

Dear Madam/Sir

Native Title Amendment (Reform) Bill 2011

Please receive my Submission regarding proposed amendments to the Native Title Act.
Thank-you for the opportunity of contributing a comment to your deliberations.

Yours faithfully,

(...)

Rosemary O'Grady.
Lawyer.

(...)

I propose to speak in general terms about the Bill, from a position of a background in common law 'native title' litigation. I do not practise in the field of statutory 'native title law' for reasons which shall emerge in the course of my submission.

Draft Clause 4 – Objects
Schedule 1 Paragraph 3A (1) (a)...(g) incl., (2) & (3).

Before making some general remarks about the legislation and proposed reforms, I turn briefly, specifically, to the identified paragraphs stating Objects of the Bill, and Schedule 1 amendments to paragraph 3 of the schedule to the Act, proposing the introduction, by way of reform to the Native Title Act ('The Act'), of a 'statement' that it is a further 'Object' of the Bill/proposed Act – 'that governments in Australia take all necessary steps to implement the following principles set out in the United Nations Declaration on the Rights of Indigenous Peoples...' - which 'principles' are then enumerated – apparently with a view to their being so enumerated in the proposed Act.

I shall hereafter refer to the UN Declaration on the Rights of Indigenous Peoples by the acronym, albeit awkward, 'DRIP'.

It occurs to me that you appear not to have been flooded with submissions on these proposals because the very inanity and incompetence of this proposal renders comment null. Not only is a proposed Act of Parliament made the means of introducing mere 'motherhood' sentiments into draft legislation – but the proposal demonstrates no understanding of the method for introducing International Law into Municipal Law, and no understanding of the nature of the federal relationship (one forebears to invoke the loaded term 'contract' in this context) which pertains as between governments in Australia. Were any proposal of this type to pass an Australian Parliament , an unlikely event, the High Court would be unable to uphold it, in the event of challenge.

When one considers that, in 1994, the High Court, determining the constitutionality of legislation introduced (by the Commonwealth, and by states) in the wake of the *Mabo* decision, severed, from the Commonwealth Act, the clause stating, meretriciously (and sanctimoniously) that the common law was/is the law of Australia (as being a redundancy) – the objection to this proposed statement of Objects, and legislative intent (to incorporate DRIP into Australian law) is evident.

Some decades ago, in South Australia, the learned Supreme Court Justice Howard Zelling (since deceased), wrote with some asperity of the emerging legislative practice of burying amendments to legislation, piecemeal, inside the body of other legislation. It is misleading, he said, to do so.I do not have the citation to hand as I write, but his analogy was of the order that one ought not have to research, say, customs and excise legislation to discover amendments to, say, trade and commerce law. By analogy – an amendment to the currently impenetrable (the term is owed to Hon Michael Kirby J.) terms of the Native Title Act ought not to ground an excuse for a nod in the direction of the intended humanitarianism of International Law as it relates to rights of indigenous persons.

In other words: the proposed insertion of section 3A to the Schedule is an irrelevance to the subject-matter of this legislation and should be severed. It is not too great a stretch of the imagination to see this as an attempt to direct the judiciary in the performance of their duties – for which they are, to date, uniformly-qualified in the arts and disciplines of statutory interpretation - having, also, a proper understanding of the applicable constitutional doctrine of the separation of powers. The contents of this Bill raise concerns in the mind of the ordinary reader whether the proposer/legislator is fully-apprised of the meaning of that doctrine, and its applicability.

Preparing to write this submission I read the Bill and made notes – particularly with respect to inconsistency of language (eg the language of DRIP cf the language of the Act), and to the use of language itself, whether it is clear, comprehensible, accessibile of meaning to all but in particular to those most likely to be affected by operation of its terms. In my humble (but qualified- I have studied languages and linguistics at degree level) opinion, the Bill fails these tests. It adopts, perhaps inevitably one may say of an Amendment Act, the language already making impenetrable any comprehensive grasp of the Native Title Act – legislation which soon came to rival the Tax scheme and the Family Law scheme for byzantine elaboration and Dickensian obfuscation – with corresponding volumes of incomprehension and misery visited upon the subject-populace as a result. Notwithstanding the marshmallow - textured intentions evident in the proposed legislation – the Bill merely adds to current confusion, and should be rejected.

Additionally, a proposal to legislate for a duty to 'negotiate in good faith' (s. 31 (1) (a) also demonstrates redundancy. As a matter of law any agreement/contract impaired by demonstrated *mala fides* is void. Not merely voidable – but void, failing in the seminal pre-requisite of mutual intention. There is no need to restate the law in this form.Every attempt to improve or re-state the law adds to cost and confusion.viz – tax laws. Further to this point: the term 'reasonably believe' in proposed S. 61AA – 'Presumptions' is an invitation to conflict within claimant groups. I say no more on that point at this stage.

Summary

I have chosen not to dwell upon the shortcomings of the Bill in detail because whatever may be said of each proposal on grounds of imprecision or redundancy could, I feel, apply to most of the body of the entire misconceived adventure we call the Native Title Act.
The best thing to do with this legislative scheme would be to acknowledge that that is what it is, and repeal it, and begin again. The best way to rectify error is to acknowledge mistake, and, in the words of the late Professor Julius Stone, 'find a better rule/law'.

The so-called Native Title Act is at least as much an act for the use by others of lands identified by traditional owners (so-called) as their own inheritance in customary law and in equity and the common law of possession and occupation. The utter conceptual and linguistic muddle of, for example, the term : 'at sovereignty', adopted in the pleadings of NT Tribunal applications, is a small but foreboding indication of the ambiguity and inoperability of what the Native Title Act would become – has become!

The evils of the Native Title Act, and they are many – not least in the creation, by Schedule, of 'representative bodies' - were inherent from its conception with the creation of 'negotiators' appointed by government without consultation with those who carry authority in customary law. Indeed, appointed by exclusion of the most relevant indigenous authorities, some of whom were already in the courts progressing a more relevant (than *Mabo)* common law claim to territory. Amendment such as that here proposed cannot rectify this fundamental, and fatal, flaw in the scheme. And incorporation of DRIP-type clauses by amendment to a title law can not make amends for the 1993 violations by legislators of the fundamental human rights of those common law litigants – a violation of the rule of law deleterious to all citizens in our commonwealth because of abuse of process, use of sponsored violence, destruction of property, home-invasion, mal-administration (acknowledged by the Commonwealth Ombudsman), conspiracy to pervert the course of justice, contempt of court (non-compliance with court orders, eg for discovery)- these and

more violations to our rule of law accompanied the 1993 introduction and imposition of the Native Title Act. These allegations are all proved and documented in court records.

The Act is ripe for repeal and re- design. This type of Bill is not the remedy required.
I am willing to make myself available to assist the Committee with respect to questions it might have arising out of what I say in this submission.
Thank you for you attention.

(...)

Rosemary O'Grady.
22 July 2011.