Australian National University

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

RE: Native Title Legislation Amendment Bill 2019

1. I provide brief submission to this Senate Inquiry following on from earlier submissions made to the Attorney-General's Department on 'Options Paper—Reforms to the *Native Title Act 1993 (Cth)*' (dated 28 February 2018) and then on 'Exposure draft native title reforms' (dated 10 December 2018).
2. I have appended both these earlier commentaries to this submission to alert the current Senate Committee to their content.
3. In his second reading speech the Attorney-General refers to the content of this Bill being informed by feedback from stakeholders, but as one of those stakeholders it is far from clear to me how the issues that I have raised have been addressed. The departmental process for decision-making in this important area of national policy has received considerable input from submissions and stakeholder consultations, but there is no indication provided on how this input from a diversity of stakeholders has been assessed, nor how stakeholder trade-offs have been negotiated.
4. Under such circumstances I feel compelled to briefly highlight several issues of ongoing concern that have not been either discussed or addressed in the development of this Bill in its transformation from an options paper to an exposure draft to the current bill. If issues that I have raised have been overlooked, what evidence is there that issues raised by other stakeholders have not been treated similarly? In addition, I would like to add some additional brief comments on issues that that have arisen in the 12 months since the exposure draft was released some evident in recent Australian government policy proposals.
5. To begin, let me continue to highlight two social justice principles that underpin my perspective as emphasised in my earlier submissions.
6. First, in my view native title law should not be treated as a tradeable commodity, it is a special sui generis form of property that needs to be treated in a special way.
7. I realise, of course, that in some situations when native title rights and interests are extinguished or reduced they need to be commodified and translated into market valuations so that negotiated or just terms compensation can be paid. But that is different from interest group trading around native title law reform that usually favours the powerful in Australian society over native title interests.
8. In my view a 'native title interest test' should always be applied: any reform that has the potential to weaken native title rights and interests, that are already severely limited in Australian law, should not be countenanced.

9. Second, these reforms, like earlier amendments of the NTA, fail to address the first order issue of free prior and informed consent (FPIC) that would empower native title groups to determine what happens on lands and seas where native title rights and interests are legally recognised.
10. In the current absence of de jure recognition of native title rights in sub-surface minerals, the de facto mineral right that FPIC would represent would greatly strengthen the negotiating power that native title holders and claimants might exercise in negotiations over development on their ancestral lands.
11. Such FPIC rights have been incorporated in part as elements of the Aboriginal Land Rights (NT) Act in 1976 and this, alongside the resourcing of Aboriginal representative land councils has given a degree of power to traditional landowners in that jurisdiction.
12. Equity considerations alone suggest that similar provision should be incorporated in the NTA.
13. Free prior and informed consent also accords with the Indigenous peoples right, asserted in the UN Declaration on the Rights of Indigenous Peoples, to freely pursue their economic, social and cultural development.
14. In this context I want to further highlight that much of the rationale for amending the NTA has been couched in terms of reducing what are represented by developmental state and corporate perspectives as excessively high 'transactions costs'.
15. But in the absence of any FPIC rights were such purportedly high transactions costs to be reduced the already limited bargaining power available to native title parties in negotiations would simultaneously be further reduced.
16. Indeed, the main leverage that native title holders have in negotiations over future acts is the threat of delay, be it from on the ground activism opposing development or recourse to delaying arbitration and litigation.
17. Reducing 'transactions costs' will tilt the playing field away from those native title holders and claimants who can currently exercise a right to negotiate even further towards state and corporate developmental interests.
18. Law reform to reduce transactions costs in favour of developers would fail the 'native title interest test' that I propose. Conversely, FPIC rights would obviate the need for such detrimental reform from a native title standpoint.
19. Federal government policy more broadly is increasingly conflicted as it at once looks to reduce empirically and statistically evident Indigenous disadvantage under the broad rubric of Closing the Gap Refresh, while simultaneously looking to weaken the already limited property rights of native title holders and claimants.
20. This conflicting reform process is occurring at the same time as the terrestrial coverage of native title continues to expand: according to the National Native Title Tribunal as at 1 October 2019, 13 per cent of Australia (999,331 sq kms) was held under exclusive native title determination (with 94% of this territory in Western Australia) with non-exclusive native title determination extending over another 25 per cent (1,934,009 sq kms) of Australia. Along with land rights, Indigenous titled lands currently cover about 50 per cent of terrestrial Australia mostly in remote parts of the continent.
21. While we have no quantification (or even an estimate) to date of the number of Indigenous people who are land titled, statistical information from the 2016 census indicates that those living on these lands are among the most socioeconomically disadvantaged Australians.

22. Possibly in recognition of this situation, in revisiting the Closing the Gap framework that failed to meet its targets for the period 2008–2018, in 2019 for the first time there is reference to Land and Water as a priority area in the draft set of targets issued by COAG in December 2018.[1]
23. This priority area seeks an outcome whereby 'Aboriginal and Torres Strait Islander peoples' land, water and cultural rights are realised'. It is proposed in the draft that 'A Land and Waters target will be developed by mid-2019 by all jurisdictions to support Aboriginal and Torres Strait Islander peoples' access, management and ownership of land of which they have a traditional association, or which can assist with their social, cultural and economic development' (my highlighting).
24. While for some unstated reason this target has not, as yet, been defined, the policy sentiment expressed is consistent with my emphasis on the need to strengthen the rights and interests of native title holders and claimants.
25. In my view the Senate Legal and Constitutional Affairs Committee should thoroughly explore if the proposals in the Native Title Legislation Amendment Bill 2019 are consistent with this new Closing the Gap Refresh policy direction.
26. I want to make just two additional observations for the Committee's consideration.
27. The first is around the decision-making practices of native title groups and the proposal that that Native Title Act is amended to 'allow the applicant to act by majority as the default position'. (The applicant being the group of people who represent native title groups in relation to future acts.)
28. As already noted, in my view granting native title interests FPIC rights with consent being determined by land interest group consensus in accord with their own internal decision-making processes (as occurs in the NT under land rights law) is a preferable option that should be pursued.
29. But if such an approach is not countenanced, it strikes me that the requirement to act by majority as the default position is fraught with potential dangers particularly when a larger regional group might be negotiating over a proposed development, like a mine, in a distinct locality.
30. At once it strikes me that the Australian government and corporate interests seek to valorise private property rights except when they might hamper developmental (usually mineral extraction) access.
31. Majority decision making is a very western liberal democratic institution that might not sit comfortably with Indigenous decision-making processes, bearing in mind that continuity of customs and traditions need to be demonstrated in legal native title claim processes.
32. In other words, the rights and interests of those who matter in accord with tradition might be usurped by the wishes of a wider polity. This in turn could generate political conflict in the native title domain that should be avoided.
33. I say this cognisant of an emerging literature that is analysing with the recent history of the conflict over development at James Price Point in the Kimberley.[2]
34. At once this case is instructive because irrespective of the final outcome (that was negative from a developmental perspective, positive from a conservation perspective), the negotiations

[1] At https://closingthegap.niaa.gov.au/ accessed 28 November 2019.
[2] See for example Mills, LN (2019) The conflict over the proposed LNG hub in Western Australia's Kimberley region and the politics of time, *The Extractive Industries and Society* 6 (2019): 67–79 and O'Neill L (2019) The *Bindunburr* 'Bombshell': The true traditional owners of James Price Point and the politics of the anti-gas protest, *UNSW Law Journal* 42 (2): 597–618.

appear to have been progressing more effectively when registered claimants were guaranteed de facto FPIC rights (the development would only proceed with their consent) by then Premier Carpenter. After a change of government, that guarantee was withdrawn; and the threat of compulsory acquisition was articulated by the incoming then Premier Barnett; and negotiations became increasingly divisive and acrimonious.

35. The issue of FPIC is obviously just one element in this very complex and massive natural resource processing setting and I understand that correlation must not to be confused with causation. But it is nonetheless worthy of consideration.
36. I am also aware that a Senate Select Committee is currently looking at the effectiveness of the Australian Government's Northern Australia agenda and I have co-authored a submission (no.13) (with my colleague Dr Francis Markham) to this Inquiry.
37. It strikes me that the government might be revisiting its *Our North, Our Future: White Paper on Developing Northern Australia* just four years after its completion in a rapidly changing climatic and commercial global environment.
38. This transformational environment that some interpret as Australia's low-carbon opportunity[3] might fundamentally alter the prospectivity of remote native title lands and the relative importance of restricted common property forms of land titling.
39. There are already two proposals for massive solar and solar wind projects on Indigenous titled lands one reputed to be based on an agreement over 6,000 sq kms of native title lands in the north Pilbara.
40. Similarly, an already well-established carbon reduction enterprise Arnhem Land Fire Abatement (NT) Limited is operating on 80,000 sq kms of Aboriginal-owned land held under inalienable freehold title.
41. This project is part-funded from payments for Australian Carbon Credit Units made by the Emissions Reduction Fund (curiously renamed the Climate Solutions Fund by the current government).
42. Future clean energy production and decarbonisation projects might be best served by consensual decision-making processes between myriad landowning groups as is currently occurring under land use agreements in Arnhem Land.
43. Proper resourcing of Prescribed Bodies Corporate would go some way toward levelling the playing field and reducing transactions costs for all parties in native title future act negotiations.
44. The second is the issue of redress.
45. The proposal in the Native Title Legislation Amendment Bill 2019 to allow historical extinguishment over areas of national and state park to be disregarded where the parties agree to allow native title claim is a welcome way to deliver more land justice and help reduce massive inequalities in the national distribution of native titled lands.
46. But if at some future date native title holders and claimants are to sole or joint manage national and state parks it is imperative that they are adequately resourced for such purposes.
47. This is especially the case where lands are returned to Indigenous landowners in either degraded condition or facing significant environmental threat.
48. In my earlier submissions (attached) I have highlighted the possibility of attenuating redress to determinations as currently occurs in New Zealand with treaty settlements.

[3] Garnaut, R (2019) *Superpower: Australia's low carbon opportunity,* La Trobe University Press, Melbourne.

49. All too often in Australia, Indigenous titled lands that are relatively environmentally intact are declared as Indigenous Protected Areas and included in the National Reserve System.
50. Subsequently, Indigenous landowners and ranger groups need to petition the Australian government for resources to manage these lands with resources allocated bearing little or no relation to environmental need.
51. My point here is to merely caution that while quite understandably Indigenous Australians will always seek to claim native title over their ancestral lands, it is important that adequate resources are made available to meet the biodiversity conservation entailments that accompany repossession.
52. I end by noting that native title is in my view a legal framework that looks to deliver a form of land justice (that holistically also includes social, environmental and economic justice) to Indigenous Australians.
53. There are systemic and structural shortcomings in the NTA legal framework that are not addressed by the Native Title Legislation Amendment Bill 2019. I highlight the need for free prior and informed consent rights to ensure that native title property rights are strengthened.
54. While some structural and systemic shortcomings might be ameliorated by this Bill, others might be exacerbated. This is not a very productive way to ensure that native title assists holders and claimants deploy their rights and interests to improve their circumstances in contemporary Australia.

Yours sincerely