INDIGENOUS PEOPLES' ORGANIZATION (IPO) AUSTRALIA

Attention: Chair, Legal and Constitutional Committee, Senate Legal and Constitutional Affairs Legislation Committee

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

Responses to the inquiry into Native Title Legislation Amendment Bill (2019):

1. Your submission suggests that the proposed amendments to the *Native Title Act 1993* (Cth) are in breach of Article 1 of the *International Covenant on Civil and Political Rights* and Article 1 of *International Covenant on Economic, Social and Cultural Rights*. Would you please outline your concerns in more detail?

   The submission by IPO was in relation to *McGlade v Native Title Registrar [2017]* FCAFC 10 "which raised issues on the validity of Indigenous land use agreements that were not signed by all of the registered claimants".[1] Further the IPO stated it "does not regard the *McGlade* decision as a flaw" as the "amendments (to *McGlade*) contemplated by the (Australian) Government to the *Native Title Act 1993* (Cth) are inconsistent with international law … [2] Namely, "Indigenous traditional decision-making and any form of revitalised decision-making which Indigenous groups consider appropriate".[3]

   The Australian Law Reform Commission (ALRC) undertook a review of Commonwealth native title laws and legal frameworks and completed the Final Report ALRC 126, *Connection to Country: Review of the Native Title Act 1993* (Cth). The Terms of Reference for the Inquiry confirmed "Australia's statement of support for the *United Nations Declaration on the Rights of Indigenous Peoples"*[4] (UNDRIP)

[1] Submission 20 Indigenous Peoples' Organisation (IPO) Australia to the Legal and Constitutional Affairs Inquiry into the Native Title Legislation Amendment Bill 2019.
[2] Ibid.
[3] Ibid.
[4] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth), Final Report No 126 (2015) 79 [2.95]. Note, Australia

– thus a "contextual factor for consideration".[5] The Law Council of Australia explained that UNDRIP "embodies many human rights principles already protected under international customary and treaty law and sets the minimum standards for the States Parties' interactions with the world's indigenous peoples".[6] The Australian Government 'formally supported UNDRIP on 3 April 2009'.[7]

The ICCPR in "Art 1. 1 states that, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Where any registered native title claimants, individuals, do not seek to sign an ILUA 'it is neither registrable nor enforceable'.[8] The rights of Indigenous individuals were disregarded and amendments to the NTA to favour a majority was passed by the Federal Government and Opposition,[9] contra to Indigenous peoples rights to self-determine, as individuals, in rights to pursue their "economic, social and cultural development".

We note, in British Columbia Canada (BC) Bill 41, 'the Declaration on the Rights of Indigenous Peoples Act', which was passed at the end of 2019. Although this 'does not bring UNDRIP into effect' it allows the UNDRIP Act 'to act as a guide'[10] - as 'enabling legislation'.[11]

2. (a)What impact might the shift towards allowing applicants to act by majority as the default position have on your members?

   The IPO makes no further comment, at this time.

   (b)Will this affect smaller subgroups within a claim group? How might other amendments in the bill, including the ability of claim groups to impose conditions on the applicant interact with this shift in practice?

   The IPO makes no further comment, at this time.

3. Have your members provided any feedback or raised any concerns about the proposed amendments, which would extend the circumstances in which historical

[5] Ibid.
[6] Ibid 82 [2.110].
[7] Ibid 84 [2.113].
[8] Richard Bartlett, *Native Title in Australia* (Lexis Nexis, 4th ed, 2020) 122 [10.21].
[9] Ibid 123 [10.13].
[10] Canada (BC) Hansard, Committee of the Whole House, Tuesday 19 November 2019 (Hon. S Fraser).
[11] Ibid.

extinguishment can be disregarded to areas of national, state or territory parks where native title has been extinguished, with the agreement of the parties; and pastoral leases controlled or owned by native title corporations?

4. (a)The National Native Title Tribunal has argued that it be given a new arbitral power in addition to the mediation function proposed in the bill.

   (b)Do you have a view on that suggestion?

   The IPO makes no comment, at this time.

   (c)Have your members provided any feedback on that proposal?

   The IPO makes no comment, at this time.

5. The Law Council of Australia submits that the dichotomy between 'traditional' processes of decision-making and 'agreed to and adopted' in proposed section 251BA results in a 'narrowing' of the use of traditional laws and customs for practical reasons. They argue that rather than having a mandated decision-making process, native title claim groups should be enabled to pursue a decision-making process of its choice. Does your organisation have any particular comments on this position?

   The IPO makes no comment, at this time.