National Native Title Council

spirit of Change

ABN 32 122 833 158

27 November 2019

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Via Email: legcon.sen@aph.gov.au

Dear Committee

Re: Submission of the National Native Title Council to the Senate Legal and Constitutional Affairs Committee Inquire into the Native Title Legislation Amendment Bill 2019

Introduction

The National Native Title Council (NNTC), Australia's peak body for Native Title Organisations, both Native Title Representative Bodies, Service Providers and Registered Native Title Bodies Corporate (PBCs) welcomes the Australian Government's commitment to pursuing long overdue reforms to improve the effectiveness and workability of the native title system as proposed in the Bill.

The NNTC also commends the Government on the co-operative and inclusive approach it has adopted in the development of the Exposure Draft of the proposed Bill. In particular, the NNTC appreciates the model of engagement adopted through the establishment of the Expert Technical Advisory Group (ETAG) and would recommend a similar approach be adopted for other legislative reform or policy development initiatives.

This process has been undertaken in a context when the last substantive legislative amendments to the native title regime occurred over 10 years ago[1], and a major review of the *Native Title Act 1993* (NTA) was undertaken by the Australian Law Reform Commission 'Connection to Country: Review of the Native Title Act 1993 (Cth)' (June 2015). It is noted that a number of beneficial recommendations in that report have not been included in this process.

[1] Native Title Amendment Act 2007, Native Title (Technical Amendments) Act 2007. The most recent amendment was the Native Title Amendments (Indigenous Land Use Agreements) Act 2017.

The development and increasing maturity of the native title sector in the intervening years has the consequence that there is a pressing need for many, seemingly minor, amendments to the native title regime. Despite this appearance, many of these amendments are vital to ensure the ongoing effectiveness of the overall native title system. Many of the amendments address these needs and, as is discussed in greater detail below, are supported.

This noted, the NNTC is unable to support all the proposals. In addition, the NNTC believes that there are further amendments necessary to ensure the ongoing effectiveness and fairness of the native title system. These additional matters are discussed in the conclusion section to this submission.

Background

The NTA is intended to be legislation that is beneficial to the Aboriginal and Torres Strait Islander peoples of Australia. This status is recognised in the Preamble to the legislation and was confirmed by the High Court of Australia in the NTA case in 1995. To quote:

> … the *Native Title Act* is "special" in that it confers uniquely on the Aboriginal and Torres Strait Islander holders of native title ... a benefit protective of their native title.[2]

The *Native Title Amendment Act 1998* brought this characterisation in to doubt as native title holders' rights were seriously diminished in a range of provisions without the consent of Aboriginal and Torres Strait Islander peoples. As the Aboriginal and Torres Strait Islander Social Justice Commissioner reported in 1999:

> The recent amendments to the NTA represent a legislative 'resolution' to the meaning of native title in which non-Indigenous interests largely prevail over Indigenous ones. Gains made from the *Mabo (No.2)* decision, the original NTA and the *Wik* decision have been significantly eroded as a result of the amendments.[3]

The NNTC has been calling for a range of amendments to the NTA over a number of years to provide for comprehensive and substantive change. Its most recent proposals are detailed in the Position Paper "*Realising the Promise of Native Title – A National Native Title Council Position Paper*" released in February 2019.

From a native title holder's perspective, the Native Title Legislation Amendment Bill 2019 is examined through this lens.

Does it improve the recognition and rights of native title holders?

The current Bill provides for some modest improvements in answer to this question. The Bill has both substantive and procedural benefits. Although it is clear that some of the amendments are not beneficial and require change to the current drafting and effect.

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[2] *Western Australia v The Commonwealth* 183 CLR 373, 462.

[3] Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC. Report No. 1/2000 Native Title Report 1999 Human Rights and Equal Opportunity Commission, 1999, 3.

The Native Title Legislation Amendment Bill 2019 has its origins in the Native Title Amendment Bill 2012. The 2012 Bill included new provisions that would improve the Right to Negotiate sections of the NTA (Subdivision P, Division 3 of Part 2) which are not included within this Bill.[4]

The Bill amends both the NTA and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

Executive Summary

The NNTC welcomes most of the proposed amendments in this Bill, in particular those that:

- allow historical extinguishment to be disregarded by agreement over national parks (Schedule 3 Part 1);
- ensure that Aboriginal corporations that have members can benefit from section 47 to disregard extinguishment in relation to Aboriginal owned pastoral leases (held by companies limited by guarantee under the *Corporations Act 2001* or by corporations under the CATSI Act (Schedule 3 Part 1);
- provide for conditional authority to be given to the applicant in relation to claims (including compensation) and Indigenous Land Use Agreements (ILUAs) and provide for a default decision making of a majority of those constituting the applicant group unless otherwise specified by the claimant group; and replacement of members of the applicant (Schedule 1);
- confirm the validity of section 31 agreements that may have issues similar to that arising from the decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10 (Schedule 9);
- allow body corporate ILUAs to include areas where native title has been extinguished (Schedule 2 Part 1); and
- provide a new function for PBCs to bring compensation claims (Schedule 4).

In relation to the Federal Court of Australia and the National Native Title Tribunal (NNTT) the NNTC supports the proposed amendments that:

- grants exclusive jurisdiction to the Federal Court in respect of civil matters arising under the CATSI Act in relation to PBCs (Schedule 8 Part 4); and
- provide the NNTT with enhanced dispute resolution functions in relation to PBCs and common law holders of native title (Schedule 7).

[4] For a more detailed description of the Native Title Amendment Bill 2012 and background see Bill Digest No.135,2012-13 13 June 2013. https://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/2517615/upload_binary/2517615.pdf;fileType=application/pdf

The NNTC ***does not support*** the following amendments as currently drafted:

- **De-registration of an Indigenous Land Use Agreement (ILUA) (Schedule 2 Part 2) –** this proposed amendment provides that any future act approved by an ILUA that is later de-registered or expires is not affected. This means that any future act authorised by the ILUA that has been done through ***fraud, undue influence or duress remains valid and will still affect native title.*** As with the recognised exceptions to indefeasibility of registered title under the Torrens system in Australia there should be similar exceptions in relation to future acts authorised pursuant to a de-registered ILUA. *The amendment is only supported if this exception is included.*
- **Commonwealth Intervention in native title proceedings (Schedule 5).** The explanatory memorandum describes this amendment as 'technical' to clarify the role of the Commonwealth Minister in native title proceedings (Item 14). The amendment requires the Commonwealth to be a party to any agreement if it has intervened. This would theoretically allow the Commonwealth to oppose an agreement even where all the other parties are in agreement. This is not supported. It does not affect the existing right of the Commonwealth to intervene in proceedings generally (s 84A) or if its interests are affected.
- **Amendments affecting RNTBCs and the CATSI Act – the power of the ORIC Registrar (Schedule 8 Part 3) –** The NNTC does not support increased powers of the ORIC registrar to intervene and place a RNTBC into administration. Any increase in powers for the Registrar that may intervene in the rights of self-determination of native title holders and their corporation is of concern. As the proposed amendments seek to increase the powers of the ORIC Registrar in relation to RNTBCs, in the NNTC's opinion any new powers should be considered in the light of a more holistic review of the Act and the provisions affecting RNTBCs and the NTA.
- **Membership of PBCs and common law holders (Schedule 8 Part 1, Item 19) –** Whilst this amendment is supported in principle, the NNTC strongly recommends a 5-year transition period rather than 2 years. This takes into account the resource constraints on the native title sector to achieve these changes.

It is noted that a range of proposed amendments by the NNTC to Government were not consulted upon nor further discussed by Government. The proposals are detailed at the end of this submission for the attention of the Committee.

Improvements to the position of Native Title holders

The substantive improvements are in relation to amendments that provide for the extinguishment of native title to effectively be overturned by new amendments to the NTA

and therefore provide for the recognition of native title. The extinguishment of native title is an ongoing concern. These amendments:

- allow **historical extinguishment to be disregarded** by agreement over national parks (Park Areas - Schedule 3); and
- ensure that Aboriginal corporations that have members can benefit from **section 47 to disregard extinguishment in relation to Aboriginal owned pastoral leases** (held by companies limited by guarantee under the *Corporations Act* or by corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act*.

The amendments that go to the authority of the applicant, decision making and replacement of the applicant are a substantive improvement as they empower native title holders in terms of their authorisation of the applicant. As the amendments:

- provide for conditional authority to be given to the applicant in relation to claims (including compensation) and ILUAs and provide for a default decision making of a majority of those constituting the applicant group unless otherwise specified by the claimant group; and replacement of members of the applicant in the instance of death or incapacity without the need for further authorisation in certain circumstances.

In relation to **Park Areas (National Parks)** (Schedule 3 Part 1) of the Bill the main purpose of this part is to insert a new s 47C. The new s 47C would enable prior extinguishment to be disregarded in Parks where this is agreed to by the Commonwealth, State or Territory. The extinguishing effect of public works in a Park may also be disregarded where the agreement with the Commonwealth, State or Territory includes a statement to this effect or there is a separate agreement to this effect.

The definition of “park area” … is sufficiently broad so as to encompass the diversity of contemporary land tenure structures utilised for conservation purposes and is appropriate.

The proposed amendments apply to any claimant application made after the commencement of the legislation, or to an application made before commencement that has not yet been determined (so as to permit these applications to be amended where agreement about s 47C has been reached with the Commonwealth, State or Territory).

The proposed s 47C in a similar form was included in the Native Title Amendment Bill 2012. It was considered extensively and supported by the report of the Senate Constitutional and Legal Affairs Committee that considered that Bill. The NNTC considers that the proposed s 47C facilitates the making of comprehensive settlement agreements with regards to parks and that such agreements can ensure effective uniform land management within these parks. The proposed amendments are supported.

It should be noted that the proposed s 47C is an enabling provision that merely allows a State or Territory (or where relevant, the Commonwealth) to reach an agreement with native title holders that will facilitate rational, uniform, land management planning and operations within a (defined) park area. The interests of other parties who may be affected by such an agreement are addressed in the public notification provisions of (proposed) s 47C (5) and primarily by the obligations the State (etc) which created such interests. It is reasonable to assume the State (etc) would have regard to such interests in making a decision as to the terms of the agreement reached with native title holders.

It is noted that this proposal, whilst welcome is modest in that its application requires the agreement of the relevant Government unlike the other section 47 provisions which apply on their own terms without the need for consent of another party. In addition, the NNTC has previously advocated that such a provision should apply to all Crown land where there is no other interest.

Aboriginal Corporations and section 47 NTA – Schedule 3 Part 2

Pastoral leases held by native title claimants
Section 47 allows for previous extinguishment to be disregarded in the event a determination application is made over a pastoral lease that is held by the native title group. The proposed amendment would extend the application of the section to pastoral leases held by body corporates comprised of "members" and not just "shareholders". This amendment would extend the application of s 47 to pastoral leases held by companies limited by guarantee under the *Corporations Act 2001* or by corporations under the CATSI Act.

These are sensible amendments that remedy a significant omission in the original drafting of the section.

Role of the Applicant – Schedule 1

Part 1 – Authorisation
The first purpose of Part 1 of this schedule is to insert a new s 251BA. The proposed s 251BA clarifies that a native title group may impose conditions on the authorisation of an ILUA and on an applicant making a native title determination or compensation application

These provisions clarify the legitimacy of what is often current practice by native title groups and empower those groups to have greater control of applications and ILUAs concluded in their name. They are supported.

Duties of Applicant
The second purpose of the schedule is to insert a new s 62B. The proposed new section clarifies the application of existing common law and equitable duties of named applicants to

a native title group. The proposed new section is in conformity with current case law (Gebadi v Woosup (No 2) [2017] FCA 1467) and ensures accountability of named applicants to the native title group. The proposal is supported.

Part 2 – Applicant Decision Making
The purpose of Part 2 is to insert provisions into the NTA that establish a default position that in authorising an ILUA or prosecuting an application a majority of the named applicants have authority to act. The default position may be altered by decision of the native title group requiring a particular authorisation process (for example particular persons to be parties to an ILUA).

The provisions ensure the new arrangements are prospective only. The proposals are supported.

Part 3 – Replacement of the Applicant
The main purpose of Part 3 is to insert a new subsection 66B (2A). In summary the new subsection provides that where a member of the applicant dies or is unable to act because of physical or mental incapacity, members of the native title claim group may apply to the Federal Court for an order to replace the current applicant and that the authority of the continuing members endures despite the death or incapacity.

The proposed amendment applies to applications to amend the applicant made after the commencement of the provisions – irrespective of when the death or incapacity occurred (clause 45).

The proposed amendment reduces some of the complexity arising from the 'named applicant' structure and is supported.

Procedural Improvements to the position of Native title holders
The following amendments are more of a procedural nature which should improve the effectiveness of the NTA and secure existing benefits to native title holders.

Indigenous Land Use Agreements – Schedule 2
There are four components to these amendments. The following are supported:

- providing that body corporate ILUAs can include areas where native title has been extinguished;
- the removal of the 'requirement for the Native Title Registrar to notify an area ILUA unless they are satisfied it meets the requirements to be an ILUA'; and
- to allow minor amendments to be made to an ILUA without requiring a new registration process.

The proposed amendment (Schedule 2 Part 2) is said to 'clarify' that the removal of an ILUA from the Register of ILUAs does not invalidate future acts approved pursuant to that ILUA. As mentioned, *this is not supported in its current form.* The Federal Court currently has the

power to 'de-register' an ILUA where it has been procured through fraud, undue influence or duress (s 199D (3)).

This means that any future act authorised by the ILUA that has been done though ***fraud, undue influence or duress remains valid and will still affect native title.*** As with the recognised exceptions to indefeasibility of registered title under the Torrens system in Australia there should be similar exceptions in relation to the de-registration of an ILUA. The amendment is only supported if this exception is included.

Allowing a RNTBC to bring a compensation application – Schedule 4

When a determination is made and a RNTBC (PBC) is established it may also occur that within the boundaries of the determination area it is found that native title does not exist because of previous extinguishment, at times this previous extinguishment may be potentially compensable. Under the current structure of the NTA the bringing of this compensation application must be by the usual method of the native title claim group nominating named applicants who lodge and prosecute the compensation application.

The proposed amendments to ss 58 and 61 provide for the RNTBC to lodge and prosecute such a compensation application if it is authorised by the common law holders to do so. These proposals simplify the administration of compensation applications and ensure that a RNTBC is best placed to manage the interests of its constituent common law holders. The provisions will apply to compensation applications made after the commencement of the amendments.

The proposed amendments are supported.

Section 31 agreements – Schedule 6 Part 2 and Schedule 9

Section 31 agreements concern mining and the compulsory acquisition of native title. The proposed amendments go to two substantive issues. First to advise the NNTT (the arbitral body in a right to negotiate a matter) of the existence of ancillary agreements to the section 31 agreement. Second to deal with any issues that may arise from the *McGlade* judgement of the Full Federal Court that were subsequently dealt with by the Parliament in the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* in relation to section 31 agreements.

The new subsection requires negotiation parties to advise the arbitral body (the NNTT) of the existence (but not the content) of an ancillary agreement to any s 31 agreement. This applies only prospectively.

The proposed amendment is seen as promoting transparency in relation to the conclusion of s 31 agreements while still protecting the essential commercial in confidence nature of many such agreements. As such the proposed amendment achieves a sound balance between these potentially competing priorities and is supported.

There are further amendments that deal with ancillary agreements and the role of the arbitral body and the Registrar which are supported. The remaining amendments in Schedule 6 'to ss 25(2), 31(1) and 36(2) clarify that a "Government Party" does not need to be an active party to any "Right to Negotiate" proceedings. A Government Party would however remain classified as a negotiation party for the purposes of executing any subsequent s 31 agreement. The proposed amendments reflect current practice and operate to simplify the Right to Negotiate procedure. They are supported.

National Native Title Tribunal – Schedule 7

This provides a new function to the NNTT to assist RNTBCs and native title holders by providing the Tribunal with a dispute resolution function. This is operative once native title has been determined (recognised) and is managed by a RNTBC as required by the NTA. It is supported.

Registered Native Title Bodies Corporate - Schedule 8

These amendments are generally supported as they improve the responsibility of Corporations to be inclusive of the common law holders of native title. RNTBCs are the legal entity responsible for the management of native title once determined to exist by a Court. The NNTC has consistently advocated for increased funding to RNTBCs and these new requirements are a further example of the need. The transition period for these amendments to take effect should be extended to 5 years as indicated earlier in this submission.

The exception to this as outlined in the Executive Summary is the increase of powers of intervention though special administration by the ORIC Registrar (Part 3).

Validation s 31 Agreements – Schedule 9

These clauses operate 'to validate any existing s 31 agreements that may potentially be considered invalid because of the application of the "McGlade" principle to s 31 agreements.' It is likely that there are a significant number of s 31 agreements where not all members of the applicant have signed the agreement. It is a requirement of the amendment that at least one member of the native title party must have signed the agreement.

It is important that these agreements be secured as they provide significant benefits to native title holders.

McGlade went to the circumstances where some named native title applicants either refused or were unable to execute an ILUA. Following the McGlade decision the *Native Title Amendments (Indigenous Land Use Agreements) Act 2017* was enacted to clarify that it was not necessary to have all named applicants execute an ILUA provided that the ILUA was properly authorised by the native title group. These amendments effect equivalent changes with respect to s 31 agreements.

The proposed provision gives effect to agreements that have already been negotiated and agreed with native title holders and thereby provides certainty and stability in the native title sector. They are supported.

Just Terms Compensation – Schedule 9

This proposed amendment (an historic shipwrecks clause) ensures that in the unlikely event that the validation of section 31 agreements constitutes an acquisition of property then compensation must be paid on just terms. It is supported.

OTHER AMENDMENTS

Schedule 5 Part 2 Consent Determinations

This is an amendment to s 87A(1)(b) that clarifies that s 87A operates with respect to a consent determination with respect to part only of a determination application area and that agreements with respect to consent determinations covering the entirety of a determination application are dealt with under s 87.

The proposed provision appears to merely clarify the operation of s 87A and is supported.

Schedule 6 amendments go to the role of government parties in s 31 agreements and are supported.

In addition, Clause 1 proposes an amendment to s 24MD(6B). This subsection deals with the procedure for native title parties to object to a proposal for a compulsory acquisition of native title rights and interests for the benefit of a third party. The proposed amendment to 24MD(6B) (f) clarifies the mechanism for objection by specifying a time period (8 months) within which the objection must be heard by an independent person or body. The current 24MD(6B) (f) does not specify any time period.

The proposed amendment remedies a shortcoming in the existing objection procedure and is supported.

Schedule 8 Part 4 - Corporations (Aboriginal and Torres Strait Islander) Act 2006 and Federal Court

These proposed amendments are primarily to Division 586 of the CATSI Act that would have the effect of giving the Federal Court (and where appropriate the High Court) exclusive jurisdiction in all matters relating to RNTBCs. The proposed amendments would apply prospectively and not affect any matter currently on foot (or any consequent appeal).

The matters particular to RNTBCs are complex and commonly related to matters incidental to a determination of native title. The Federal Court as the Court with exclusive jurisdiction with respect to a determination of native title under the NTA and therefore the

appointment of a PBC (RNTBC) is the appropriate Court for dealing with matters arising from the operation of the RNTBC under the CATSI Act.

The proposed amendments are supported.

Other Amendments to Improve the *Native Title Act*

The NNTC is committed to ensuring the native title system, in particular the future act regime, is fair to all parties. The existing future act determination process and other future act processes are demonstrably not fair to native title holders. To remedy this the NNTC believes the following further amendments to the NTA should be considered:

- Section 35(1)(a) of the NTA be amended such that the minimum negotiation period before a proponent can seek a future act determination by the NNTT be extended from six months to nine months.
- Section 38(2) of the NTA be amended to allow conditions relating to the payment of royalty (or equivalent) to be included in NNTT determinations.
- That the criteria for NNTT arbitral determinations contained in s 30 of the NTA be amended to give greater weight to the views of native title holders.
- That Part 2, Division 3, Subdivision G of the NTA be amended such that the diversification of activities allowed on non-exclusive agricultural and pastoral leases described in that subdivision enliven the Right to Negotiate (RTN) procedure.

In addition, the NNTC believes there are a number of proposals contained in the Australian Law Reform Commission's Connection to Country report that can usefully be considered as part of any NTA legislative reform process.

I trust the above comments are suitable for your purposes, however if you have any queries or require any further information please do not hesitate to contact me on at your convenience.

Yours sincerely

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