House of Representatives Coalition Minority Report

Summary

1.1 We cannot support the recommendations of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs that this Bill be passed.

Introduction

1.2 This Bill proposes what would be in effect substantive changes to the *Native Title Act* 1993.

1.3 **Schedule 1** creates a new section of the Act (47C) which would allow native title to be revived, by agreement between two parties namely the native title party and the relevant government party. Such an agreement would set aside the historical extinguishment of native title in areas that had been set aside or where an interest had been granted or vested for the purpose of preserving the natural environment, for example in National Parks or reserves.

1.4 **Schedule 2** amendments propose changing and codifying the obligation to negotiate in good faith in relation to grants of mining interests and acquisitions of native title.

1.5 **Schedule 3** proposes some technical amendment to the Act in relation to Indigenous Land Use Agreements (ILUAs). These amendments would broaden the scope of the body corporate, amend ILUA authorisation and

registration requirements including amendments, objection and certification processes.

1.6 The Committee as a whole recognised the need for a significant reform of Native Title and discussions at the round table were in accord with the views expressed and reflected in Chapter 3.

The Context

1.7 The government of the day made it clear that its original *Native Title Act* 1993 was aiming to do justice to the Mabo decision in protecting native title where it was found to exist, and to ensure sustainable and certain land management.

1.8 The Act was therefore expected to deliver justice and certainty for Indigenous Australians, industry and the whole community.

1.9 The stated intention of the amendments in this Bill (2012) is to improve agreement making, to encourage flexibility in claim resolution and to promote sustainable incomes.

Discussion

1.10 Unfortunately, contrary to the stated intention of this Bill, it is our conclusion that its enactment would not lead to greater transparency, certainty or reduction in any current asymmetry perceived in the power relations between parties. Longer times would be required for resolution and in particular there would be more litigation without commensurate benefits for any party.

1.11 Sufficient time and resources were not made available for adequate consultation in relation to any changes of the original Act. The changes brought forward were therefore disjointed and ad hoc. Other serious concerns about the current functioning of the *Native Title Act* raised in evidence to ours and the parallel Senate committee were not addressed, for example the lack of guidance in identifying an appropriate level of compensation.

1.12 The geneses of the major changes proposed in this Bill were flagged in the Native Title Amendment (Reform) Bill 2011 proposed by Senator Rachel Siewert of the Australian Greens Party.

1.13 In the Senate Committee Majority report on this Greens Bill, Government and Coalition senators comment that there was: "Numerous comments (from witnesses) were also directed toward the lack of attention to

practical considerations which could result in unintended consequences as well as a dearth of comprehensive consultation and consideration." (3.84)

1.14 The proposed amendments in this Native Title Amendment Bill 2012 do not move beyond the narrow agenda first identified in the Greens Bill. There has not been any comprehensive review or analysis of the performance of the 1993 Act, nor has there been consultation or contribution to the discussion about the Act or these proposed amendments beyond the narrow list of those agencies which have the significant resources to act as national advocates on behalf of their stakeholders.

Revival of extinguished Native Title Section 47C

1.15 The proposed new Section 47C allows for native title to be revived over areas otherwise set aside or dedicated to the preservation of the environment.

1.16 However in these amendments, third party rights which can exist in these areas are largely ignored. There is no obligation on either the relevant government or the native title party to respond to or take into account any such interest. The simple requirement to notify them is in our view inadequate. Given there is likely to be real social and economic impacts as a consequence of this amendment, it is particularly concerning that consultation has been minimal. Given the poor drafting with inadequate focus on all of the practical implications it is our view this new section of the Bill will actually lead to less certainty and more protracted disputes and litigation.

Negotiations in Good Faith Section 31

1.17 The former Attorney General explained in her second reading speech on the Bill that currently parties are required to negotiate in good faith under the *Native Title Act* but that "good faith" is not defined. In the Explanatory Memorandum to the Bill it is stated that the amendment to this section 31 will overcome the problem of what they see as the "consequences" of the *FMG v Cox* decision, inferring it could lead to greater capricious or unfair conduct.

1.18 In fact in the 7,140 mining tenements and acquisitions notified since 1 January 2000, good faith has only been challenged on 31 occasions. Agreements are by far the most common means of resolving issues under the NTA.

1.19 The Bill does not give any guidance as to the meaning of "all reasonable efforts" in the proposed section 31A (1). The reversal of the onus of proof in relation to good faith matters may in effect confer a veto on the native

title party, and so far from creating greater certainty these amendments may make the provisions more likely to be litigated.

1.20 As well, the proposed amendments reflect the indicia found in the *Fair Work Act*, whereas the more useful and relevant are the Njamal indicia which have been utilised and developed over the years of case law.

Conclusion

1.21 The passing of the Native Title Amendment Bill 2012 is not supported by the Coalition membership of this committee. Contrary to the stated intentions of the Bill, if enacted, there would be greater uncertainty, potentially more litigation in particular in the context of the "future act" regime, with few identifiable additional benefits for Indigenous Australians or the wider society.

1.22 Given the national significance of these issues, genuine consultation in relation to identifying any current problems and real improvements to the current Act should be adequately resourced and continue.

1.23 Many parties concerned with the outcomes relating to Native Title often lack a true understanding of the intent of the legislation. Much evidence was heard of the disappointments endured as a result of disparity between expectations of claimant groups and practical outcomes both financial and territorial. To legislate changes of an unresolved nature without conclusive consultation would we believe increase confusion and reduce benefits to all parties.

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