

Introduction

- 1.1 On 28 November 2012 the Hon. Nicola Roxon MP, Attorney General, introduced the Native Title Amendment Bill 2012 (hereafter referred to as the Bill). The Bill proposes amendments to the *Native Title Act 1993* (Cth).
- 1.2 On 29 November 2012 the Selection Committee asked the Committee to inquire into and report on the Bill.

Scope of the Bill

- 1.3 In June 2012 the Attorney General announced a number of proposed changes to the native title system on the twentieth anniversary of the High Court's Mabo decision. In the second reading speech, the Attorney-General advised that the Bill was introduced to make 'the native title system fairer and more flexible'. The Attorney-General stated that the proposed amendments 'will create a native title system that achieves faster and better outcomes, with a focus on unlocking the economic potential of native title and promoting sustainable agreement making'.¹
- 1.4 The Bill proposes to amend the *Native Title Act 1993* (Cth) to:
 - enable certain parties to agree to disregard historical extinguishment of native title in certain areas set aside and public works in areas set aside
 - clarify the conduct expected of parties in future act negotiations
 - extend to eight months the time before a party may seek a determination from an arbitral body
 - streamline processes and broaden the scope for voluntary Indigenous Land Use Agreements (ILUAs), and
 - make a technical amendment.

¹ *House of Representatives Hansard*, Wednesday, 28 November 2012, p.13649.

- 1.5 Legislation aimed at improving opportunities for Indigenous communities to access the economic potential of native title is proposed in the Tax Laws Amendment (2012 Measures No. 6) Bill 2012.
- 1.6 Measures proposed in that bill clarify that a payment or non-cash benefit provided under the *Native Title Act 1993 (Cth)*, or under an agreement made under an Australian law to the extent that that payment or benefit relates to native title, will not be subject to income tax. These amendments remove the longstanding uncertainty about the income tax treatment of these payments and benefits by confirming they are not subject to income tax.

Specific amendments

- 1.7 The Bill contains a number of amendments to the Act which aim to improve agreement-making, encourage flexibility in claim resolution and promote sustainable outcomes.

Schedule 1

- 1.8 Schedule 1 will create a new section 47C of the Act to allow historical extinguishment of native title to be disregarded over areas set aside for the preservation of the natural environment where the native title party and the relevant government party agree.
- 1.9 These areas include national, state and territory parks and reserves.
- 1.10 The schedule will allow parties to agree to disregard the historical extinguishment over public works within areas set aside for the preservation of the natural environment.

Schedule 2

- 1.11 Schedule 2 will clarify the meaning of good faith in the Act, and the conduct and effort expected of parties in seeking to reach agreement.
- 1.12 This schedule will create a new section 31A which will clarify the conduct expected of parties in future act negotiations. In addition it extends the time before a party may seek a determination from the arbitral body from six to eight months.
- 1.13 This schedule will amend subsection 36(2) of the Act so that where a negotiation party asserts that another negotiation party (the second negotiation party) has not satisfied the good faith negotiation requirements, it is this second party that must then establish that it has met the good faith negotiation requirements, before being able to seek a future act determination from the arbitral body (in effect reversing the onus of proving good faith).

Schedule 3

- 1.14 Schedule 3 will make amendments to streamline processes in relation to ILUAs.
- 1.15 This schedule will make amendments to section 24BC of the Act to broaden the scope of body corporate agreements (Subdivision B ILUAs). Amendments are proposed to streamline registration and authorisation processes for ILUAs. The schedule will create a new section 24ED to allow parties to agree to certain amendments to registered ILUAs while still preserving the binding nature of the ILUA against all native title holders.
- 1.16 A new subsection 251A(2) will be created to clarify the identity of who must authorise an ILUA by clarifying that for the purposes of authorisation, a person or persons who may hold native title means a person or persons who can establish a prima facie case to hold native title.

Schedule 4

- 1.17 Schedule 4 will amend section 47 of the Act to ensure that where a body corporate holds a pastoral lease on behalf of, or for the benefit of, a native title group, the fact that the body corporate has members (rather than shareholders) does not prevent historical extinguishment of native title over the area from being disregarded.

Previous inquiries and consultation

Exposure draft consultations

- 1.18 Since 2010, the Government has undertaken extensive consultations with key stakeholders including Indigenous groups, state and territory governments, farmers, miners, local council associations and other peak bodies and organisations. The exposure draft legislation was released for four weeks and consultations were undertaken.
- 1.19 The Attorney General's Department received 25 submissions from a range of organisations.
- 1.20 Following consultation on the exposure draft, the Attorney General asserted that 'all views have been carefully considered. The government believes a sensible balance has now been struck'.²

² House of Representatives Hansard, Wednesday, 28 November 2012, p.13649.

Concurrent Senate inquiry

- 1.21 On 29 November 2012, the Bill was referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report. The Senate Committee received 25 submissions from a range of organisations across Australia.
- 1.22 Many of these Senate submissions duplicate submissions received to this inquiry.
- 1.23 The Senate Committee conducted a public hearing on 6 March 2013. The Senate Committee reported on the Bill on 18 March 2013. Relevant documents and additional information can be accessed on the Senate Committee's website.³
- 1.24 On several occasions, Senate and House committees have been referred concurrent inquiries. As far as possible, this Committee has endeavoured not to duplicate those areas it anticipates the Senate Committee will consider in detail, and not to burden stakeholders with multiple requests for submissions. Therefore, in some instances the Committee may refer to the submissions received by the Senate Committee.
- 1.25 The mandate of the Senate Legal and Constitutional Affairs Committee is to inquire into legal and constitutional matters, and the Senate Committee has conducted a more legal and technical inquiry into the drafting of the Bill.
- 1.26 The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' mandate is to consider and provide an oversight function for the rights, protections, wellbeing and sustainable economic outcomes for Aboriginal and Torres Strait Islander people. Since the Selection Committee has determined to refer the Bill to the Committee, it is this mandate and perspective which the Committee brought to the inquiry into the Bill.

Conduct of the inquiry

- 1.27 On 17 December 2012, the Committee released a media alert about the inquiry and sent invitations to make submissions to a range of organisations and individuals.

³ Senate Legal and Constitutional Affairs Committee <www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/native_title_2012/index.htm>, accessed 28 February 2013.

- 1.28 The Committee received a total of 27 submissions and one supplementary submission. A list of submissions is at Appendix A.
- 1.29 The Committee held a roundtable public hearing on 8 February 2013 at the National Centre for Indigenous Excellence in Redfern, Sydney. A list of witnesses who gave evidence at the hearing is at Appendix B.

Scope of the report

- 1.30 In the referral of the Bill by the House of Representatives Selection Committee, the Committee was asked to examine the benefits of amending the Bill to reverse the onus of proof for claimants on on-going connection to land.
- 1.31 The purpose of an advisory report on a bill is to examine how effectively the bill meets its objectives, whether it achieves a fair and equitable balance for stakeholders, has appropriate safeguards in place, and does not have unintended consequences.
- 1.32 Consequently, the Committee has not inquired into options or areas beyond the measures proposed in the Bill under consideration. This is not the function of an advisory report on a bill, and timing and resources do not permit a more expansive inquiry to be adequately conducted at this time.
- 1.33 The Committee has consulted and inquired into the efficacy of the Bill as proposed in achieving its stated objectives. Chapter 2 of the report examines issues raised by stakeholders about the four schedules of the Bill.
- 1.34 However, the Committee is cognisant that there are calls for wider native title reform, and for greater consultation regarding future native title reform. To this end, as part of its public hearing roundtable, the Committee provided the opportunity for stakeholders to initiate a dialogue around longer-term reform of the native title process. Reversing the burden of proof in the *Native Title Act 1993* (Cth) was raised in this forum as one option of many in considering future reform.
- 1.35 Chapter 3 of the report provides a summary of the roundtable discussions regarding longer-term reform of the native title process. This summary is provided for the benefit of the House in considering an appropriate process and plan of action to develop future reforms.