

# ANTaR

Justice, Rights and Respect for Australia's First Peoples



## Comment on *Native Title Amendment Bill 2012* Exposure Draft

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Thank you for the opportunity to comment on the Exposure Draft of the *Native Title Amendment Bill 2012* (the Bill).

## **About ANTaR**

ANTaR is a national advocacy organisation, dedicated to promoting the rights of Aboriginal and Torres Strait Islander peoples and working to eliminate inequality and disadvantage.

ANTaR was formed in 1997 to defend existing native title rights and promote the opportunities offered by native title for Aboriginal and Torres Strait Islander people to achieve some measure of justice, recognition, protection of culture and economic opportunity.

## **Introduction**

This bill seeks to implement reforms announced by the Attorney-General, Nicola Roxon, at the National Native Title Conference on 6 June 2012 related to good faith requirements, historical extinguishment and Indigenous Land Use Agreement (ILUA) processes. The Conference marked 20 years since the Mabo decision (3<sup>rd</sup> June 1992), an anniversary which sparked calls from many Aboriginal and Torres Strait Islander leaders, organisations and advocates for fundamental reform of the system to deliver the promise of the historic decision.

At the time of the announcement, ANTaR joined national Aboriginal and Torres Strait Islander peak bodies and native title organisations in welcoming the modest reforms proposed, but expressing profound disappointment at their limited scope. ANTaR believes that the reforms contained in the Bill represent an improvement on the current situation but fail to address the major underlying inequities in the native title system in particular, the onus of proof and requirement to prove continuity, lack of clarity around commercial rights and the restrictive definition of 'traditional laws and customs'.

In this submission we highlight the need for more far-reaching reforms as an urgent priority, informed by the inequities in the current system, the fact that time is running out for many Community Elders to see land justice in their life times and the obligations imposed on the Australian Government by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Due to capacity constraints and the tight timeframe for submission, we have made only brief comments in relation to the specific amendments contained in the Bill.

## **Background**

In February 2012, the Australian Greens introduced the *Native Title Amendment (Reform) Bill (No. 1) 2012* ('the Greens bill') into Federal Parliament. The reforms contained in the Greens Bill were intended to create a fairer native title system for recognising and adjudicating the rights of Aboriginal and Torres Strait Islander peoples.

In our submission to the parliamentary inquiry into the Greens Bill (see submission attached as Appendix 1), ANTaR welcomed the intention of the legislation and its key provisions, which we noted at the time were informed by recommendations of the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Native Title Report 2009*.

We argued strongly that the time had come for major reform of the Native Title Act:

“ANTaR strongly supports efforts to strengthen the existing *Native Title Act* so that it can more effectively deliver economic opportunity and greater legal, social and cultural recognition of the rights, identity and cultures of Aboriginal and Torres Strait Islander peoples.

A growing number of Aboriginal and Torres Strait Islander leaders, native title peak and representative bodies and service providers, legal experts and others have been calling for reform of the Act. Australia’s native title system has also attracted international criticism due to the high standard of proof required of Aboriginal and Torres Strait Islander applicants and the obstacles to securing recognition.

ANTaR believes that social and political changes since the initial passage of the *Native Title Act* make this an opportune climate in which to achieve these important and necessary reforms. Many of the initial fears about the impact of native title expressed by certain sectors have proved to be unfounded. At the same time, the promise of native title as a vehicle for economic opportunity has not been realised due to impediments in the Act (including the onus of proof) which should be addressed.

In recent years there has been a growing cross-party political consensus that we need to “close the gap” between Aboriginal and Torres Strait Islander Australians and the non- Indigenous community. Reforming our native title laws and adopting a more mature and informed understanding of the opportunities which native title can provide would be a valuable contribution to closing that gap.

We urge the Committee to adopt an in-principle position supporting the overarching aims of the Bill including:

- a) strengthening the right to negotiate;
- b) reversing the current onus of proof;
- c) adopting a presumption of continuity;
- d) adopting a more realistic definition of traditional laws; and
- e) clarifying that native title rights and interests may be of a commercial nature.”

While ANTaR’s submission noted that the Greens Bill could be improved to enable it to better achieve its objectives, it recommended that current Bill be used as a vehicle to make such improvements.

The Parliamentary Committee Report on the Greens Bill recommended against the passage of the bill, despite high levels of support for its objectives.

As noted above, in June 2012, to mark the 20<sup>th</sup> anniversary of the historic Mabo decision, the Federal Attorney-General announced the reforms that are contained in the current Bill. This announcement was met with disappointment by many Aboriginal and Torres Strait Islander leaders, who recognised the need for far-reaching changes to enable justice to be delivered to native title claimants.

In late June 2012, ANTaR launched a joint online petition with the National Native Title Council calling for major reform to create a fairer native title system to:

- lower the bar for the recognition of native title, including by introducing a rebuttable presumption of continuity;
- redefine 'traditional culture' to recognise the dynamic and living nature of Aboriginal and Torres Strait Islander cultures;

- raise the bar for proving extinguishment of native title rights;
- provide for recognition of commercial rights to land to support economic development; and
- ensure consistency with the UN Declaration on the Rights of Indigenous Peoples.

ANTaR maintains its position that these substantive reforms are necessary to deliver some measure of justice for Aboriginal and Torres Strait Islander peoples. Additional reforms may be required to achieve full compliance with the UNDRIP. ANTaR suggests that a comprehensive review of the native title system should be undertaken to ensure full compliance with UNDRIP, as per Recommendation 19 in ANTaR's 2012-13 Pre-Budget Submission which called for funding for \$1.5 million in 2012-13 for:

*“Funding for an independent inquiry into the reform of the native title system*

Commission and provide sufficient resources and funding for an independent inquiry, led by an appropriately qualified panel of experts, to consider reforms to the *Native Title Act 1993 (Cth)*, related legislation, regulations and procedures, to remove barriers to the fair and equitable recognition of native title claims, and to reflect the principles of the UN Declaration on the Rights of Indigenous Peoples.

### **Discussion of proposed amendments to the *Native Title Act 1993***

In this section, we make brief comments in relation to key reform proposals contained in the Exposure Draft.

#### ***Schedule 1: Historical Extinguishment***

1. The changes in this Schedule are, according to the Departmental explanatory statement, intended to provide greater flexibility in agreements about extinguishment and create increased consistency across the states and territories.
2. ANTaR welcomes these amendments, which represent an improvement on the current law, which does not allow parties to disregard extinguishment in these circumstances. However, we are concerned that the reforms do not go far enough.
3. ANTaR believes that, given the structure of the *Native Title Act 1993* ('NTA') and judicial decisions in relation to that Act, all native title determinations should aim to recognise native title to the greatest extent possible, i.e., for native title to fill the tenure gap. That is, native title rights and interests should be recognised over all land and waters not currently subject to other interests in land and to the extent that the land and waters are not subject to such other interests.
4. In our view, the *NTA* should be structured to allow native title applicants to achieve this aim to the greatest extent possible.
5. This aim is currently achieved through mechanisms such as the non-extinguishment principle (s 238) and sections 47, 47A & 47B, which allow prior extinguishment to be disregarded in some circumstances. Proposed s 47C should be seen in this context as a further attempt to enable native title applicants to fill the tenure gap.
6. The explanatory statement indicates that the proposed s 47C is in part designed to address the specific wrong created by the High Court's decision in *Ward v State of Western Australia* that the vesting of reserves under the *Land Act 1933* (WA) extinguished all native title rights and interests because the vesting amounted to the conferral of a freehold title in the vestee. ANTaR submits that, rather than addressing this problem specifically through the proposed provision, it would be preferable to amend the *NTA* to reduce 'the tenure gap'.
7. Further, ANTaR submits that the section should have broader application and not be subject to agreement with State Governments and other relevant parties.

### *Limited scope of operation*

8. Proposed s 47C is limited in its operation to 'park areas', which are areas set aside for the use of the public in general. There are relatively few other interests of a private nature that would have to co-exist with native title rights and interests if native title was recognised through the operation of s 47C.
9. However, there is no reason why the interests of private individuals in respect of public land that would otherwise be subject to native title should not co-exist with native title rights and interests. For example, there is no apparent reason why such private interests holders should be treated any differently from pastoral lease holders, whose pastoral interests must co-exist with native title (see *Wik, Ward*).
10. The scope of the current tenures that give rise to the operation of s 47C should be broadened to include:
  - a. Any tenure that does not fully extinguish native title; and
  - b. Any otherwise fully extinguishing tenure, under which the land is to be used for a public purpose (such as freehold grants under which the land is to be used for a public purpose, e.g. freehold granted to a State or Territory conservation authority).

### *Need for agreement with the Commonwealth, State or Territory*

11. ANTaR submits that agreement should not be a pre-requisite for the operation of the provision. This is likely to create uncertainty and inconsistency between jurisdictions and governments. Rather, such agreement should instead be required as part of the operation of the provision, and be directed to finding means by which the various private, public and native title rights can co-exist. Therefore, s 47C should be drawn in similar terms to ss 47, 47A and 47B so that prior agreement is not required. In this respect, ANTaR notes that the Greens Bill provides that extinguishment must be disregarded when the section is engaged. ANTaR believes this is a more equitable approach.

### *Other comments*

12. The provision allowing the extinguishing effect of the construction or establishment of public works should be extended to ss 47, 47A & 47B.
13. It should also be extended to public works constructed or established by or on behalf of statutory authorities and local government bodies, not just those constructed or established by or on behalf of the Crown (see s 47C(10)).

## **Schedule 2 Negotiations**

### *Consideration of the effect of the act on native title rights and interests*

14. The inclusion of proposed s 31(1)(c) is useful. However, ANTaR submits that there should be a direct link between the requirement that the negotiations include consideration of the effect of the act on native title rights and interests and the ability for the proponent to seek a determination from the arbitral body.
15. Proposed s 36(2) should be amended by adding 'and that s 31(1)(c) has been complied with' at the end.

### *The good faith negotiation requirements*

16. ANTaR welcomes reforms to clarify the content of the requirement to negotiate in good faith. The proposed reform is intended to address the current difficulty in proving an absence of good faith (due to lack of clarity) and the inequities in the

current system. The Exposure Draft departmental explanatory statement states that “the amendments are intended to encourage parties to focus on negotiated, rather than arbitrated, outcomes; improve the balance of power between negotiating parties; and promote positive relationship-building through agreement-making.”

17. While welcoming these objectives, ANTaR is concerned about the possibility that listing the content of the good faith negotiation requirements in s 31A(2) will direct the NNTT and Courts’ attention to those requirements to the exclusion of other evidence of negotiating in good faith, even though they are expressed not to limit the more general requirements in s 31A(1). We suggest that some additional form of words might need to be added to avoid this possibility.
18. In addition, we believe that the list of negotiation requirements in s 31A(2) should be expanded by reference to the content of the Greens Bill, which required a broader range of activities and would go further towards levelling the playing field. Additions should include:
  - a. That participation should be ‘active’ (s 31A(2)(a));
  - b. ‘Where reasonably practicable, participated in meetings at a location where most of the members of the native title parties reside, if requested by them’; and
  - c. ‘Given responses to proposals in a detailed manner, including providing reasons’.
19. ANTaR submits that the change to the negotiation period in s 35(1)(a) is likely to make little difference, given that negotiation in accordance with the good faith negotiation requirements is likely to take more than 8 months.
20. We welcome the changes proposed in the new s 36(2) and 36(2)(a) which would place the onus of proof on the negotiation party making the application for a determination by arbitration, which is a substantial change from the current provision which places the onus on the party asserting lack of good faith.
21. However, ANTaR suggests that the applicant for a determination should be required to negotiate in accordance with the good faith negotiation requirements ‘until the determination is made’, not just ‘until the application was made’ (see s 36(2)).
22. Finally, ANTaR suggests that the Government’s stated objective of levelling the playing field between native title negotiating parties will not be achieved without adequate resourcing for native title representative bodies (‘NTRBs’). We refer the Government to Recommendation 19 in our 2012-13 Pre-Budget Submission to this effect:

*“Additional funding for Native Title Representative Bodies (NTRBs)*

Provide additional resources to Native Title Representative Bodies to ensure they are adequately resourced to represent Aboriginal and Torres Strait Islander peoples in native title negotiations.

**\$26 million in 2012-13/ (\$53 million over 2 years)”**

### **Schedule 3 ILUAs**

#### *ILUAs dealing with the operation of s 211*

23. Items 1, 4 & 13 propose the addition of ‘the operation of s 211 in relation to the area’ to the list of topics that can be the subject of ILUAs. Section 211 basically provides that where the exercise or enjoyment of native title rights and interests that consists of carrying on hunting, fishing, gathering, and cultural or spiritual activities, and a law requires people to obtain a licence or permit in order to be able to carry on such an activity, the native title holders do not need such a licence or permit. Section 211 is a provision intended to benefit native title holders.
24. Accordingly, ANTaR is concerned that any provision in an ILUA that deals with the operation of s 211 is likely to be to the detriment of native title holders and questions the rationale for such a provision.

#### *Limiting the ability of NTRBs to enter ILUAs*

25. Proposed s 24CD(4A) limits the capacity of a NTRB to enter ILUAs, by requiring that it first be of the opinion that all those who have authorised the making of the agreement have also authorised it to do so.
26. NTRBs have a general role in the protection of native title, even where there are no registered claimants and no determination of native title (see, for instance, s 203BJ). Their capacity to exercise this supervisory and protective role may be limited by the requirement to have the authorisation of the group making the ILUA before they can become a party to it. There may be occasions where the NTRB should become a party to an ILUA to protect native title rights and interests that are not expressed by the registered claimants or PBC that are parties to the ILUA. This provision would prevent them doing so without the authorisation of those parties.

#### *One month notice period*

27. The reduction of the period within which objections may be made to the registration of area ILUAs from three months to one month may have the effect of unreasonably limiting the ability of potential native title holders to object to its registration.

#### *Prima facie case that people may hold native title*

28. The proposed changes to s 251A mean that:
  - a. The only native title parties who can make an ILUA are registered claimants, PBCs, and people who can establish a *prima facie* case that they may hold native title; and
  - b. Effectively, these are the only people or entities that can reasonably object to the registration of an ILUA, as one of the ways of resolving an objection is by ensuring that the objector is a party to the ILUA. If they cannot become a party, effectively, they cannot sustain an objection.
29. This change is problematic because:
  - a. People who may hold native title must provide evidence before they can gain the capacity to make a contract (the ILUA);
  - b. The need to provide evidence will add to the cost, time and complexity of the ILUA process;
  - c. It is not certain who will assess the evidence provided (though presumably it is the NNTT); and
  - d. It potentially reduces the capacity for matters to be resolved by ILUA rather than litigation, since ILUAs will become less flexible.