For the Attention of: Hon. Attorney-General Ms. Nicola Roxon

Submission in response to '*A Bill for an Act to amend the* Native Title Act 1993, *and for related purposes*.'

Context Anthropology
October 2012

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Introduction

Context Anthropology's primary aim is to provide a tailored and transparent approach to cultural heritage management. We are passionate about discovering and implementing creative solutions to the preservation of cultural heritage.

"Our vision is to promote a culturally rich future by preserving the past and documenting the present. Through meaningful involvement and strategic participation, we aspire to build positive relationships based on our deep understanding of our clients' needs."

Context Anthropology wishes to submit a formal response to, 'A Bill for an Act to amend the *Native Title Act 1993,* and for related purposes'.

Our primary aim is to ensure Aboriginal heritage and property rights are preserved, protected and maintained to the fullest extent. We believe that the purpose of the *Native Title Act 1993* should maintain these principles and act as a clear, strong legal reflection of Australia's need to protect its ancient and invaluable cultural and physical heritage.

Context Anthropology welcomes changes to the current scheme that will improve the recognition of native title as a property right throughout Australia. However we express concern over measures that indirectly threaten or diminish the value of native title rights as established in *Mabo*. We believe that the definition of rights identified in the *Mabo* case have not been fully realised in the *Native Title Act 1993 (Cth)*, and have been further eroded by the *1998 Amendments*. Therefore we encourage changes to the legislation that work towards strengthening native title by adopting international human rights standards established in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and International Covenant on Economic Social and Cultural Rights (ICESCR). These principles should extend to agreements made between Traditional Owners, governments and other non-Indigenous parties. Additionally, any reform to the Act must not be implemented without the full consultation of Aboriginal and Torres Strait people.

The following is our response to the outlined proposals by the Attorney-General's office.

Response to Proposals

Proposal 1: 'Good faith' and associated amendments under the 'right to negotiate' provisions

The criteria

Context Anthropology (CA) strongly believes in the need for 'good faith' criteria that parties must follow for the purposes of agreement-making or compulsory acquisitions. In a number of recent Federal Court cases[1] a lack of 'negotiation in good faith' has been difficult to prove due to its ambiguous definition. This was recognised in the 2010 Discussion Paper *Leading Practice Agreements: Maximising Outcomes From Native Title Benefits,* co-authored by Jenny Macklin (MP) and former Attorney-General Robert McClelland (MP). Under its current definition the good faith provision solely requires "providing what was discussed and proposed… with a view to obtaining agreement to the doing of the future act".[2] Consequently they advise, "Any new requirements must be clear to prevent legal uncertainty regarding their satisfaction". It is clear the Attorney-General has recognised this and attempts to clarify the meaning of good faith, however the proposed amendments to Section 31(A)(2) use terminology that remains unclear and legally uncertain. For example, how does a party adequately prove they have:

> *(a) attended, and participated, in meetings at reasonable times,*
>
> *(b) disclosed relevant information (other than confidential or commercially sensitive information) in a timely manner, or;*
>
> *(f) refrained from capricious or unfair conduct that undermined negotiation.*

There are many possible interpretations of the terms 'reasonable', 'relevant', 'timely', 'capricious' and 'unfair', leaving the process of good faith negotiations to rest upon individual understandings of these phrases. While we support the move to introduce good faith criteria, we are concerned that it still lacks definition and suggest integrating measurable and quantifiable terms to the criteria. This may include setting procedural minimums and standards for the frequency parties' meet and *how* information is disclosed and shared.

Due to the inherent imbalance of power in negotiations the onus should be on the more financially capable of the negotiating parties to build the capacity of Indigenous communities to effectively engage in negotiations. Being able to fully understand, and have the time and resources to participate in the decision-making process, is the cornerstone to Article 32(2) of the UNDRIP. It states that good faith cannot be divorced from obtaining the free, prior and informed consent of Indigenous people on any project affecting their lands. Thus, preliminary discussions should focus on how people will meet these equitable platforms. Strict guidelines need to be put in place, dictating the rules of engagement and behavioral standards that are legally binding *before* negotiations take place.

Of course, by defining the criteria in this way, it narrows the type of behaviour allowed in the bargaining process, limiting the tactics employed by those to leverage the best deal. Herein lies the problem: the negotiation process can be perceived incorrectly as a purely commercial transaction of property rights.

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[1] *Puutu Kunti Kurrama & Pinkikurra People v FMG Pilbara Pty Ltd & Ors and FMG Pilbara v Cox* (2009) 175 FCR 141

[2] Macklin and McClelland 2010: 14

Rather, Indigenous peoples' 'connection to country' should be central to this. Land does not simply represent a means of production or possession; it is a profound spiritual relationship that connects people, beliefs, customs, traditions and land. To ignore this contravenes Article 15 of the ICESCR, which recognises the right for everyone to take part in cultural life. This distinct difference means that negotiations with native title holders should not be restricted by the same principles as common business practice. We believe that in clarifying good faith criteria this point should be made explicit.

In practice, the differences are already evident, where tactics of delay or walking away from the table are unavailable, because under the Right to Negotiate (RTN) process, this can be interpreted as *not* acting in good faith. Thus, by tightening up the good faith criteria, there is a danger of further disempowering native title holders. If both parties do not have the right to veto, a power imbalance will always remain. This fundamental flaw in the legislation needs to be addressed before any change to the good faith provision has real effect. It is not until the protocols of negotiating with Indigenous people are clearly distinguished from commercial transactions, and these rules for negotiating are legally defined as such, that a more rigid set of criteria would improve the process.

So, while we support the Attorney-General's attempt to clarify the criteria, there needs to be a more comprehensive and detailed document that defines this behaviour, where native title rights are strongly codified as a special form of property right. Furthermore, if Australian legislation is to be consistent with international human rights it should incorporate the ideals of free, prior and informed consent into a legally binding definition that can be upheld in a court of law.

Reversing the responsibility to prove 'Good Faith'

The Federal Court's decision in *FMG Pilbara Pty Ltd v Cox (FMG Pilbara)* highlighted the difficulty in proving a party *has not* negotiated in good faith. Considering the problems with pinning down a legally binding definition, we encourage the move to reverse the responsibility to prove a party *has* acted in good faith. Under the amendments this responsibility will rest, in practice, with the proponents if they wish to seek a litigated outcome. This is a good move towards balancing the inequities between Traditional Owners and non-Indigenous parties. However, the criteria still remains unclear as to what *extent* parties will have to fulfill the requirements. This may result in the need to clarify definitions through precedents in a case-by-case basis, which would take a number of years. So, although reversing the responsibility is a positive move, we believe the criteria are too vague. To strive for legal clarity and encourage positive relationship building, stronger, measurable definitions are needed in the form of best-practice behavioral standards. There should be incentives to meet these good faith 'targets' with penalties written into the protocols for any infringement of good faith.

Extending the timeframe

The reform to extend the timeframe before a party can seek an arbitrated determination from the NNTT is a recognition that the current time of 6 months contributes to a significant inequality in the negotiating power of Indigenous groups. In this period, mining companies can drive a very hard bargain on compensation knowing very well that they can escape paying royalties once the time period lapses. Following the *1998 Amendments*, the No Royalty Provision of the NTA means that:

> While the parties may include in their negotiations the possibility of conditions worked out by reference to profits, income or production of minerals (subsection 33(1)), the arbitrator must not include a condition in relation to such matters (subsection 38(2)).[3]

A situation has arisen where resource companies are welcoming an arbitrated outcome and "letting the clock tick down" as the Attorney-General declared in her 2012 press release. Not only is this a breach of good faith negotiation, but also a significant discrimination in the relative bargaining power, where one party risk losing all financial gains, while the other benefits from the situation. This is exacerbated by the current 6-month RTN timeframe. This uniformity of time limits needs to be reviewed and Section 31 should be amended so that parties are required to have reached a certain stage before they apply for arbitral determination.

In 2008 the Victorian Government suggested that the arbitral body should 'make determinations about the amount of profits, income and productions that were the subject of negotiations',[4] but these have been ignored. So too are the proposals put forward by Senator Siewert's (Reform) Bill (2011) that call for the removal of the No Royalty Provision. We strongly recommend the government adopt this as well as extending the timeframe to 8 months. It is a positive move, but other changes are more urgently needed to correct this key failing of the Act to 'provide for rights to be enjoyed on a non-discriminatory basis' (Article 2.2 ICESCR).

[3] Tehan and Godden 2012: 121

[4] Victorian Government, *Comments on the Australian Government's Discussion Paper Proposed minor native title amendments* (2008: 7)

Proposal 2: Historical Extinguishment

The High Court found in *Ward*[5], that the creation of parks or reserves completely extinguishes native title, even if Indigenous groups can still show unbroken connection to lands and traditions. As the Australian Human Rights Commission pointed out in their native title report in 2002, the breadth and permanency of the extinguishment of native title is contrary to Australia's international human rights conditions. Chief Justice French suggested in 2009 that native title should exist in parks and reserves and extinguishment to be disregarded where an agreement is entered into between the state and applicant.[6] Section 47C of the proposed amendments honours this idea and we support it, encouraging further moves to disregard extinguishment in specific circumstances.

However, it is important to recognise that such 'consent' to disregard extinguishment will be based on political will. Hence we ask the following questions:

- What are the incentives to facilitate such a process?
- What safeguards are in place to ensure that these parks and reserves aren't subject to rogue development?

Furthermore, we believe it is important to perceive this amendment not from a potential development perspective, but with the standpoint of native title rights being associated with joint management schemes and environmental sustainability projects. The integration of Indigenous knowledge-systems into environmental management is increasingly practiced on a global scale and we believe it is important that Australia adopts a similar focus. Thus, we applaud this amendment and propose that it is worded in a way that asserts the value of native title in this circumstance.

Proposal 3: Simplifying process for amendments to Indigenous Land Use Agreements (ILUAs)

In our experience, the inability to amend minor details in ILUAs has been cumbersome, especially when both parties want to update an ILUA to reflect their current situation. The fixed nature of an ILUA also impacts on intergenerational equity and long-term sustainability of agreements. Therefore we approve of the proposed reforms that establish a threshold to determine whether or not a new registration process is required for amendments to an ILUA. This is a good reflection of the government's intention to speed up the potential of ILUAs to unlock the economic benefits for Indigenous people.

Proposal 4: Minor technical amendment to section 47

The move to change the terminology surrounding who is able to access the royalties from development on a pastoral lease is a positive one. Indigenous corporations often have members rather than shareholders; benefits are currently held by the few shareholders, restricted to the names on the Registered Claim. Amending the category to include 'members' will therefore benefit a wider range of native title holders. However, we stress that because the meaning of 'member' is different in each corporation this must be further defined. For instance, will the benefits differ for those members who are not yet aged 18? Will there be any restrictions? Overall this is a good move by the Attorney-General and indicates her willingness to unlock the economic benefits for all Indigenous Australians.

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[5] *Western Austrlia v Ward (2002) 191 ALR 1*

[6] Chief Justice RS French, 'Lifting the burden of native title: Some modest proposals for improvement' (2009) 93 *Reform* 10, 13.

Additional Recommendations

Removing the No Royalty Provision

Green's Senator Rachel Siewert proposed this move in her Native Title (Reform) Bill (2011). She states that, "Parties reaching agreements during good faith negotiations can include provisions for royalty payments or profit sharing. This amendment provides that similar conditions can be applied when a matter goes to arbitration". We fully support this proposal and believe that there can be no equality in bargaining power between parties when there is a threat of arbitration, which, in practice, means that Traditional Owners stand to gain no financial benefits from a company. If the true aim of the proposed reforms is improving "agreement-making and promoting sustainable outcomes" with a focus on equaling the relative bargaining power of the two parties, then this reform is crucial. Why has it been overlooked?

Reversing the onus of proof for Native Title determinations

Senator Siewert has also campaigned for this fundamental change to the system. It is widely recognised that the cumbersome process of proving connection to country undermines the initial intent of 'native title' as celebrated in the *Mabo* decision. At the very least the Act should provide for a presumption of continuity. As Justice North and Tim Goodwin have indicated:

> *Those who have been most dispossessed by white settlement have the least chance of establishing native title. They find it hardest, and usually impossible, to establish that they belong to a society which has led a continuous vital existence since white settlement because the policy of the settlers had the effect of destroying or dissipating members of the society.*[7]

By introducing a provision for presumptive continuity it would place the onus on the government to prove substantial interruption, rather than force native title claimants into an arduous and expensive battle that often lasts decades. If the Attorney-General is committed to speeding up the process for people to access economic benefits then this is absolutely vital.

Just Terms Compensation

Section 51 (1) of the NTA states that Traditional Owners are entitled to "compensation on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests". However we strongly believe that the legal meaning of 'just terms', like 'good faith' is too ambiguous and open to interpretation. The understanding of such phrases has resulted in conflict and disagreement, which have been adversarial to the process of building relationships, as outlined by the Attorney-General. We recommend that a stronger definition of 'just terms' is also included in the Act, incorporated into the good faith criteria. Thus 'negotiating in good faith' would involve, among other things, proving just terms compensation as outlined in Article 32(3) of the UNDRIP:

> *States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*

[7] Justice A M North & T Goodwin, *Disconnection - the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 2.

Furthermore, it is our belief that just terms compensation for the impediment of native title rights over an area should begin at the freehold value for 'developed' land. Developed land in a European sense constitutes houses, shops or other constructs that enrich the value of the land. We argue that land over which there is native title is equally developed from an Indigenous perspective as it holds richness and significance in its potential for accommodation, schooling, sourcing food and leisure activities, as well as maintaining a physical connection with ancestral spirits and creation beings. In other words, the land sustains Aboriginal societies, as would the idea of 'developed land'. We recommend that a clause be integrated into Section 51 to specify that 'just terms' compensation constitutes, at a minimum, the developed freehold value of the land.

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