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Re: Exposure draft native title reforms

1 Thank you for your invitation dated 30 October 2018 to provide submission on the exposure drafts for reform of the *Native Title Act 1993* (henceforth NTA) that has been under way for some years now.

2 In making some brief comments on the exposure drafts I have mainly focused on the two Fact Sheets provided rather than seeking to navigate the legally complex Native Title Legislation Amendment Bill 2018.

3 It is clear from the Fact Sheets that the amendments are looking to make aspects of the NTA including the Role of the Applicant, Section 31 Agreements, Claims Resolution and Agreement Making, Post-Determination Dispute Resolution and Accountability and Improved Prescribed Bodies Corporate Governance more streamlined, especially in relation to reducing transactions costs and complying with the dominant Australian legal system that forms the carapace under which the NTA is framed.

4 Some of these changes appear sensible, some favour native title interests and some favour development interests. For example, allowing a 'reserve' applicant to automatically replace a deceased applicant seems sensible; allowing extinguished native title to be revived clearly is of potential benefit to native title claimants; and confirming the validity of existing section 31 agreements where at least one member of the applicant has signed the agreement so as to address uncertainty is clearly in developmental interest and potentially dilutes native title interests.

5 Such an approach to legal reform that is based on trade-offs between statutory wins and losses to different stakeholders is not unusual in law making in Australia. It does raise the important question if native title

interests are just another stakeholder in the reform process or a special stakeholder whose interests, given past injustice and contemporary socioeconomic and political marginalisation, should be given priority. In my view any reform to the NTA should be required to pass a native title interest test. In other words, if a reform has the potential to leave native title interests weaker, then they should not be considered. This is especially the case as legal amendment can be difficult to correct and so proposed reform should be risk averse to Indigenous interests in such circumstances.

6 In my view the overall tenor of the proposed reforms looks to foster a form of mainstream (market capitalist) development that suits corporate, political and bureaucratic elites, including some Indigenous advocates who speak on behalf of native title holders with no legitimate representational or land-title authority. In earlier submission to this reform process (see attachment) I questioned whether such a notion of development accorded with the aspirations of all native title holders recognising that some native title interests may be pro-development. Such likely diversity of views can be best resolved if in accord with articles in the UN Declaration on the Rights of Indigenous Peoples native title holders are granted free prior and informed consent rights and rights of self-determination including consensus decision-making.

7 In this submission I want to make brief comment on three inter-related issues: the reform process, policy effectiveness, and the politics of implementation.

8 On **the process**, the exposure draft has been made public on 30 October 2018 nine months after closure of a call for submissions (28 February 2018) on an earlier options paper. As someone who provided a submission (attached) to the earlier process it is entirely unclear how input from 46 diverse submissions (at https://www.ag.gov.au/Consultations/Pages/Reforms-to-the-Native-Title-Act-1993.aspx) have been translated into the proposals in the exposure draft? The process is quite opaque, and no methodology whatsoever is provided: Were all submissions given equal weight? Were some privileged over others? How are the interests of say the Minerals Council of Australia or Rio Tinto or the developmental Western Australian government weighed against the views of say the National Congress of Australia's First Peoples or the representative Northern or Central Land Councils or the regional Yamatji Marlpa Aboriginal Corporation? What is the value of such apparently transparent consultation if the links between inputs and outputs are not clarified? There is a danger in such processes that they will be perceived to serve particular vested and powerful interests, including the government of the day, rather than the native title interests or even the public interest. This is evident when statements such

as ‘ stakeholders have raised concerns …’ are articulated: which stakeholders, where and when?

9 On **policy effectiveness**, as already noted it strikes me that the approach is piecemeal and proposes trade-offs. As with submission assessment it is quite unclear who benefits the most from such trade-offs and whether the overall policy outcome will be beneficial. Arguably, in terms of tilting the playing field in favour of development the reforms will be effective. Hence there is recourse, for example, to decision-making options based on majority rather than consensus (that accords more with Indigenous tradition) that are explicitly aimed at reducing transactions costs, although whose transactions costs is not clearly specified. Similarly, the emphasis on the professionalisation of prescribed bodies corporate focuses on governance and accountability (including to members) but not on empowerment, so that instead of being provided with any independent needs-based or revenue-contingent financial support, PBCs can now garner ‘assistance’ from the National Native Title Tribunal that has also seen its capacity reduced by funding cuts in recent years. At the same time there are proposals to reduce the accountability of PBCs to regional Native Title Representative Bodies who represent wider Indigenous jural publics and groups who according to Aboriginal custom and tradition might be impacted by a major resource extraction project. There are examples provided in Fact Sheet #2 of potential for potential benefit for members of PBCs from streamlining consent requirements (using standing instructions) but arguably this is a form of facilitating what Yellowknives Dene political scientist and activist Glen Coulthard refers to as ‘accumulation by self-dispossession’. As broad government policy goals have focused on Closing the Gap, it is unclear if narrower policy goals to facilitate development (with mineral exploration and extraction being the main form of development referred to in the Fact Sheets) will support these broader goals sustainably and inter-generationally.

10 On the **politics** of the proposed NTA reform I want to make two comments. First, the spatial coverage of native title determination now covers about 35 per cent of the Australian continent. Historical conservative governments’ promise to deliver ‘bucketloads of extinguishment’ have clearly not materialised. To deal with this political problem there is an emerging emphasis on diluting procedural native title rights and interests (property rights) on a still-expanding Indigenous estate. Given the failure of the current government to close socio-economic disparities especially in remote and very remote Australia where most native title (especially exclusive possession) has been determined, in my view property rights need to be strengthened so that the negotiation leverage of native title interests are improved. The proposed amendments do not do this. Second, in its two terms in office to date the

Abbott/Turnbull/Morrison governments have failed to reform the NTA. With a federal election looming in May 2019 the prospects of this reform package being implemented in a well-considered manner appears increasingly limited.

11 Indeed, one suspects given past parliamentary practice that the current native title reform exposure draft will be referred for further scrutiny and assessment to the Australian Senate's Constitutional and Legal Affairs Committee in 2019. Such referral to multi-party assessment will ensure more transparent processes for assessing the relative merits of submissions and expert evidence. Such Senate inquiry should also see more holistic assessment of the likely policy outcomes from proposed reforms of the NTA; and a broader political engagement with the reform process than is possible when the process is institutionally constrained by a bureaucracy accountable principally to the government of the day. Given the importance of the native title system it is imperative that the approach to reform is both precautionary and supported by the native title constituency.

12 While my submission focuses primarily on process issues this is intentional because navigating productive Indigenous policy reform, especially on constitutional, Indigenous Advancement Strategy and 'Closing the Gap Refresh' matters, has become highly politicised. Indeed, despite all the recent government rhetoric of doing things 'with' rather than 'to' Indigenous Australians there is little evidence that such an approach has been implemented in the last five years. Unfortunately this also seems to be the case in relation to native title.

Yours sincerely

Jon Altman
Research Professor
10 December 2018

Attachment: Submission by Jon Altman on the Native Title Reform Options Paper available at: https://www.ag.gov.au/Consultations/Documents/Reformstothenativetitleact1993/Jon-altman-submission.pdf (accessed 10 December 2018).