Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Title: Submission on the *Exposure draft - Native Title Legislation Amendment Bill 2018*
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Seed Indigenous Youth Climate Network
Seed is Australia's first Indigenous Youth Climate Network. We are building a movement led by and for Aboriginal and Torres Strait Islander young people to protect our country, culture and communities from the causes & impacts of climate change. Seed is a branch of the Australian Youth Climate Coalition(AYCC).

Executive summary
The Native Title Legislation Amendment Bill 2018 (2018 Bill) proposes a range of disparate amendments to the *Native Title Act 1993* (Cth) (NTA).

Some of the proposed amendments seem to be beneficial to native title holders; some of the amendments involve legislative "housekeeping" to address new circumstances; and some of the amendments appear to be in the interests of mining companies and other developers, and not in the interests of native title holders.

The 2018 Bill is a continuation of a trend that began in 2017, when the Commonwealth Government began a program of amendment to the NTA without proper consultation with native title holders through their authorised representatives.

By choosing to consult with representatives of Government-funded and –controlled Native Title Representative Bodies (NTRBs) and Service Providers (NTSPs) about proposed changes to native title law, the Government is avoiding proper consultation with native title holders, and is failing to meet the standard of consultation required by UNDRIP. NTRBs and NTSPs have separate interests and agendas to many native title claim groups, and indeed do not represent many native title claim groups around the country.

Parliamentary consideration of the 2018 Bill should be postponed until:
a) the Government has met its commitment under Art. 19 UNDRIP by consulting in good faith with affected Indigenous people through their own representative organisations, not just through Government-funded and -controlled NTRBs and NTSPs; and
b) the Bill has been considered and reviewed by a parliamentary committee.

Background

In 1998 the Coalition Government led by John Howard enacted wide-ranging amendments to the NTA. The Coalition Government's amendments were strongly resisted by Aboriginal and Torres Strait Islander Australians. The Labor Opposition also opposed many of the amendments, which ultimately were enacted only with the support of independent Tasmanian Senator Brian Harradine. Apart from anything else, the technical complexity of the 1998 amendments had the effect of taking away understanding and control of native title from many Aboriginal and Torres Strait Islander people, and putting control into the hands of lawyers and other technocrats.

After the 1998 amendments to the NTA Coalition Governments steered away from further proposals to amend the NTA for almost two decades. This was in part because of the perceived strength of the likely collective reaction and response from Aboriginal and Torres Strait Islander peoples and their supporters.

In 2009 Australia signed on to the United Nations Declaration of the Right of Indigenous People (UNDRIP).

Under Article 19 of UNDRIP, signatory states commit to consult and cooperate in good faith with the Aboriginal and Torres Strait Islander peoples through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

In 2017 the Coalition Government proposed amendments the NTA, among other things aimed towards diluting native title holders' consent requirements for major mining and other uses of country. The amendments were intended to overcome the effect of the Federal Court's *McGlade*[1] decision and to "lower the consent bar" to enable the appearance of native title holders' consent to Adani's proposed Carmichael coal mine in Central Queensland even where there is significant opposition to the project within the native title group concerned.

Claiming urgency, the Government did not consult widely with native title holders in relation to the 2017 amendments. It consulted primarily with (the often non-Indigenous) representatives of NTRBs and NTSPs established under the NTA rather than with native title holders' authorised representatives. Many native title groups have rejected their regional NTRB/NTSP and are not represented by an NTRB/NTSP. The Government was successful in passing amendments to the NTA in 2017 because among other things:

- NTRBs and NTSPs supported the amendments;
- The amendments were highly technical and their effect was difficult for ordinary people to understand;
- The views of Aboriginal and Torres Strait Islander people were not sought or heard; and
- In these circumstances the Labor Opposition voted with the Government in favour of the amendments.

Inadequate Consultation

Now in 2018 the Government proposes a new round of amendments to the NTA. Pleased with the outcome of its narrow NTA amendment consultation process in 2017, the Government has again apparently chosen to consult with select representatives of the NTRBs and NTSPs (through the "National Native Title

Council") rather than with the authorised representatives of native title holders, even though there is no apparent urgency involved in the amendments. The Government claims to have held over 40 consultation meetings about the 2018 Bill, but does not say who it has consulted apart from an *Expert Technical Advisory Group comprised of nominees from the National Native Title Council, National Native Title Tribunal, government and industry****[2]****.*

The Government again seems to be relying on compliant NTRB and NTSP representatives to avoid proper, good faith consultation consistent with UNDRIP standards and to provide the appearance of Indigenous support for its proposed amendments.

Recommendation 1: Parliamentary consideration of the 2018 Bill should be postponed until:
a) the Government has met its commitment under Art. 19 UNDRIP by consulting in good faith with affected Indigenous people through their own representative organisations, not just through Government-funded and -controlled NTRBs and NTSPs; and
b) the Bill has been considered and reviewed by a parliamentary committee.

2018 Bill: Commentary

"Housekeeping"
Some of the amendments proposed in the 2018 Bill seem to be reasonable and useful improvements to the operation of the NTA. For example the amendments relating to the expanded assistance functions of the National Native Title Tribunal (Schedule 7) and the registered native title bodies corporate amendments (Schedule 8) seek to address a range of issues that have arisen since native title has been formally determined in many areas. The proposed amendments may improve fairness and transparency in the way that registered native title bodies corporate operate, for the benefit of all members of a native title group. The proposed amendments should also improve the ability of native title holders to seek assistance when necessary from the National Native Title Tribunal and the Registrar of Indigenous Corporations in areas where native title has already been formally recognised.

Beneficial amendment proposals
Some proposed amendments appear to be beneficial to some native title holders. Refer for example to the amendment proposals in Schedule 3 (Historical Extinguishment) that would enable prior extinguishment of native title in national park areas to be disregarded[3]; extend the ability to ignore prior extinguishment over pastoral leases that are held by registered native title bodies corporate[4]; and ensure that native title holders' procedural rights like the right to negotiate will apply over land and waters where the extinguishment of native title may be ignored[5].

Detrimental amendment proposals
However, sprinkled throughout the 2018 Bill are also proposed amendments that appear to be detrimental to native title holders; inconsistent with the principle of Free, Prior, Informed Consent contained in UNDRIP; and a continuation of the 2017 Bill's theme of diluting the minimum requirements for native title holders' consent to future acts like mining on native title land. Some examples follow.

1. Reducing the number Applicant Signatories

Among other things, the 2018 Bill proposes to create a new default rule that a *majority* of members of a native title group's Applicant (i.e. authorised representatives), rather than *all* of the members of the applicant, is sufficient to bind the group to a future act (e.g. mining) agreement: s.62C (Item 32, Part 2, Schedule 1).

Often in native title claims each member of the applicant represents a different family, clan or even tribe. Until recently the general rule has been that *all* members of the applicant must sign a future act agreement or ILUA in order for it to be valid. The rule that all members of the applicant must sign is an important safeguard against oppression of the minority, because once a future act agreement comes into force it binds all members of the native title group in contract.

There is a growing body of evidence that mining companies and others are prepared to interfere in the business of a native title claim group in order to secure the group's consent to new mining and development proposals. For example in *TJ (on behalf of the Yindjibarndi People) v State of Western Australia**[6]*** Justice Rares found that the mining company FMG had organised and paid for meetings of members of the native title claim group in a secretive way to manipulate the group's decisions about supporting FMG's mining proposals on their country.

By seeking to change the law to provide for *majority* rather than *unanimous* action by the native title applicant, the Government would facilitate the kinds of dirty, manipulative tactics that FMG and other mining companies are prepared to use to manipulate native title groups' consent to their mining proposals.

Recommendation 2: This amendment proposal should be rejected as inconsistent with UNDRIP principles, and because it will facilitate manipulative "divide and conquer" tactics against native title groups by mining companies, governments and others.

2. Changing the terms of ILUAs without a native title group's re-authorisation

One of the 2018 Bill's proposals is to allow the parties to an ILUA to make "minor amendments" the ILUA without the need to ask the wider native title group to hold a meeting to re-authorise the ILUA.
The kinds of ILUA amendments that could be made in this way will be set out in new subsection 24ED(2), and include updating the description of property and parties; and altering administrative processes under the ILUA.
However it is also proposed to give the Commonwealth Minister the power to specify by regulation other kinds of ILUA amendment that can be made the native title group's re-authorisation: subsection 24ED(1)(f).

It is important to bear in mind that an ILUA once registered binds all members of the native title group in contract as though each member had signed the ILUA. Therefore all members of the native title claim group should have a say in any changes that are proposed to be made to an ILUA. The native title group's authorisation is an important safeguard against the sort of corrupt and manipulative behaviour by mining companies and others that has already been exposed by the Federal Court.

Recommendation 2: The proposal to give the Commonwealth Minister power create new categories of amendments to ILUAs that don't require the native title group's prior consent and authorisation should be rejected.

3. Regulations: reducing the requirement for registered native title bodies to consult with their members

Before entering into agreements with miners, governments and others, a registered native title body corporate must identify and consult with sub-groups of native title holders who have different native title rights and interests across a native title determination area.

This is an important rule, as native title claims are often made by separate families, clans or even tribes with distinct interests in different areas.

The Government now proposes (Item 27, Schedule 1) to remove the requirement to identify and consult with each sub-group of native title holders. This proposal risks creating circumstances where a majority of native title holders may permanently oppress a minority group.

Recommendation 3: This proposal should be rejected.

Seed/AYCC is happy to consent to the publication of this submission.

We would be pleased to elaborate further upon request.

Amelia Telford
Seed National Director

E: amelia@aycc.org.au
www.seedmob.org.au

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[1] *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10
[2] Native Title Amendment Bill 2018 Exposure Draft Public Consultation Paper, Cth Attorney-General's Department, October 2018, p.1.
[3] Proposed s.47C, Item 2, Division 1, Part 1, Schedule 3 of the 2018 Bill.
[4] Proposed Subpar 47(1)(b)(iii), Item 17, Part 2, Schedule 3 of the 2018 Bill.
[5] Item 21, Part 3, Schedule 3).
[6] [2015] FCA 818 (21 July 2015)