ANTaR
Justice, Rights and Respect for Australia's First Peoples

Sea of hands

Submission on Native Title Legislation Amendment Bill 2019

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With thanks:

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About ANTaR

ANTaR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Peoples. We do this primarily through campaigns, advocacy and lobbying.

Our current national campaigns include:

- Constitutional Recognition and Equality – for Constitutional change to recognise Australia's First Peoples and remove discriminatory elements from our founding document;
- Justice - for action to reduce imprisonment rates and end deaths in custody; and
- Treaty and agreement making to address the unfinished business of colonisation.

We also engage in national advocacy across a range of policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including native title, languages and cultures, economic and community development, remote communities' services and infrastructure, health and human rights.

ANTaR is a foundational member of the Close the Gap Campaign Steering Committee, the Change the Record Campaign Steering Committee and the Redfern Statement Alliance.

ANTaR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTaR is a non-government, not-for-profit, community-based organisation.

'The recognition of native title came from an acknowledgement of important truths about our past and the need to reconcile these truths with contemporary notions of justice. But it also brought to the fore a fundamental conflict arising at the time of the establishment of Australia as a colony; that is the conflict between the assertion on one hand that the settlement of Australia gave rise to exclusive territorial jurisdiction by the colonial power and, on the other hand, the illegality and immorality of asserting this right without an agreement from those who previously occupied that land and who continue to maintain their deep spiritual, economic and social connection to the land...'

Dr William Jonas AM, 2002[1]

Introduction

Thank you for the opportunity to provide some comments to inform the consideration of *Native Title Legislation Amendment Bill 2019*. As you know, ANTaR has a long interest in the progress of native title in Australia and we provided a submission on the Exposure Draft legislation in late 2018.

This submission draws heavily from the submission that is to be provided to the Committee from the National Native Title Council (NNTC) which is Australia's peak body for Native Title Organisations, both Native Title Representative Bodies, Service Providers and Registered Native Title Bodies Corporate (PBCs). It is essential that the NNTC and the organisations and bodies they represent are heard and understood on these matters and we commend their submission and recommendations to you.

As the NNTC have noted, the *Native Title Act* 1993 (Cth) (NTA) 'is intended to be legislation that is beneficial to the Aboriginal and Torres Strait Islander peoples of Australia. This status

[1] William Jonas (2002) 'Native Title and Treaty Dialogue', [online] available at: https://www.humanrights.gov.au/news/speeches/native-title-and-treaty-dialogue

is recognised in the Preamble to the legislation and was confirmed by the High Court of Australia in the NTA case in 1995.'[2]

Background

In our previous submissions regarding native title reform, ANTaR has outlined its guiding principles[3], which shape and determine our responses to these proposals. Furthermore, any reforms to the NTA should be consistent with the intentions and principles set forth in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Australia as a signatory to the UNDRIP, has committed to maintaining the standards it sets out. Specifically, the NTA must comply with the principle of self-determination. This is set out in Articles 3 and 4 of the UNDRIP, whereby 'By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.[4]

Additionally, and as said in previous submissions, ANTaR welcomes the aim of native title reform to enhance transparency and good governance, as well as the legislation of a statutory fiduciary duty. However, ANTaR believes that without proper resourcing and support for First Peoples, it remains to be seen how this can come to fruition.

We state again, that any reforms to the NTA must fundamentally be favourable to Aboriginal and Torres Strait Islander peoples, recognising the historical trauma of colonisation and the impact of successive State and Federal government policies that have disadvantaged or ignored the First Peoples of this continent.

Comments

Joining with the NNTC, ANTaR *does not support* the following amendments as currently drafted:

[2] NNTC submission (2019) to the Native Title Legislation Amendment Bill 2019

[3] ANTaR, 2011. *Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Inquiry into the Native Title Amendment (Reform) Bill 2011*, Sydney: ANTaR; [online]: https://antar.org.au/sites/default/files/final_submission_to_senate_inquiry_into_native_title_reforms_july_2011.pdf; ANTaR, 2012. *Comment on Native Title Amendment Bill 2012 Exposure Draft*, Sydney: ANTaR; [online]: https://antar.org.au/sites/default/files/draft_native_title_amendment_bill_submission_-_final_22.10.12.pdf.

[4] General Assembly resolution 61/295, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (2 October 2007), available from https://www.undocs.org/A/RES/61/295.

- **De-registration of an Indigenous Land Use Agreement (ILUA)** (Schedule 2 Part 2) – this proposed amendment provides that any future act approved by an ILUA that is later de-registered or expires is not affected. This means that any future act authorised by the ILUA that has been done through *fraud, undue influence or duress remains valid and will still affect native title.* As with the recognised exceptions to indefeasibility of registered title under the Torrens system in Australia there should be similar exceptions in relation to future acts authorised pursuant to a de-registered ILUA. *The amendment is only supported if this exception is included.*
- **Commonwealth Intervention in native title proceedings (Schedule 5).** The explanatory memorandum describes this amendment as 'technical' to clarify the role of the Commonwealth Minister in native title proceedings (Item 14). The amendment requires the Commonwealth to be a party to any agreement if it has intervened. This would theoretically allow the Commonwealth to oppose an agreement even where all the other parties are in agreement. *This is not supported. It does not affect the existing right of the Commonwealth to intervene in proceedings generally (s 84A) or if its interests are affected.*
- **Amendments affecting RNTBCs and the CATSI Act – the power of the ORIC Registrar (Schedule 8 Part 3)** – _The NNTC does not support increased powers of the ORIC registrar to intervene and place a RNTBC into administration. Any increase in powers for the Registrar that may intervene in the rights of self-determination of native title holders and their corporation is of concern. As the proposed amendments seek to increase the powers of the ORIC Registrar in relation to RNTBCs, we share NNTC's view that any new powers should be considered in the light of a more holistic review of the Act and the provisions affecting RNTBCs and the NTA.
- **Membership of PBCs and common law holders (Schedule 8 Part 1, Item 19)** – ANTaR supports views that a longer transition period than that currently proposed is necessary as the PBCs are often working with limited existing resources to manage any changes and amend processes.

Beyond the issues of these specific amendments, we generally support the amendments proposed for the NTA via this new legislation.

Additional reforms that should be considered to improve the *Native Title Act*

As the NNTC have stated in their draft submission, the native title system must be designed to be 'fair to all parties' and the evolution of the system must be about improving the equity of the system for First Nations peoples. The NNTC and others have noted that 'the existing future act determination process and other future act processes are demonstrably not fair to native title holders' and this must be addressed. We support the NNTC's additional recommendations that:

- 'Section 35(1)(a) of the NTA be amended such that the minimum negotiation period before a proponent can seek a future act determination by the NNTT be extended from six months to nine months.
- Section 38(2) of the NTA be amended to allow conditions relating to the payment of royalty (or equivalent) to be included in NNTT determinations.
- That the criteria for NNTT arbitral determinations contained in s 30 of the NTA be amended to give greater weight to the views of native title holders.
- That Part 2, Division 3, Subdivision G of the NTA be amended such that the diversification of activities allowed on non-exclusive agricultural and pastoral leases described in that subdivision enliven the Right to Negotiate (RTN) procedure.'[5]

In closing, and as stated in our 2018 submission on the Exposure Draft - ANTaR supports amendments to the *Native Title Act 1993* that will improve the accountability and transparency of RNTBCs, if the amendments support the primary obligation of RNTBCs to protect and manage the rights and interests of native title holders. ANTaR also supports amendments that support the efficiency of the native title system.

It is important that reforms do not act to disempower or undermine RNTBCs and that any reforms are made to benefit the native title system, in favour of native title holders. It is also important that amendments are made in consultation with RNTBCs and native title holders where possible. RNTBCs should be provided adequate resourcing and funding by the government to support their capacity to undertake this critical work.[6]

[5] NNTC Submission (2019)

[6] ANTaR Submission (2018) *on Exposure Draft Native Title Reform*

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