Submission

Australian Human Rights Commission Native Title Report 2021

ANTAR

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; and
- Advocating for treaty and agreement-making processes across Australia.

We also engage in national advocacy across various policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including anti-racism campaigns, 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 comments to inform the Senate Select Committee’s consideration of the Native Title Report 2021. We commend Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr June Oscar AO for her leadership and we take this opportunity to congratulate Dr Oscar and the Social Justice team for the seminal Wiyi Yabni U Thangani (Women’ Voices) report, released in December 2020.

As you know, Native Title is one of the core priorities of ANTAR and the driving issue that led to the formation of our peoples’ movement, ‘Australians for Native Title and Reconciliation’, nearly 25 years ago. As former Prime Minister Paul Keating said at the Lowitja O’Donoghue Oration in 2011, nearly 20 after the

[1] Native Title and Treaty Dialogue

Mabo High Court decision that instigated the eventual passage of the Native Title Act: 'We know, sadly, that the history of Aboriginal and Torres Strait Islander land rights had been broadly a shameful one. Not only from earlier High Court decisions implying that all native title rights to land were extinguished at sovereignty, but by unfulfilled promises by a clutch of otherwise well-meaning governments. Save for Gough Whitlam's Northern Territory Land Rights Bill of 1975, passed into law by Malcolm Fraser in 1976, which was, of course, confined to Northern Territory lands, there had been no exercise of the power under the 1967 constitutional amendment in favour of comprehensive land rights.'[2]

After 200 years of European colonisation, proper recognition of Aboriginal ownership was a long time coming, and the framework of Native Title as established under the Native Title Act (1993)[3] is, 30 years later, a new and evolving law. As the Act's Preamble states:

'Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests.'[4]

And so, as the evolution of Native Title continues across Australia and as we use moments of reflection, such as the Social Justice Commissioner's Native Title reports, it is timely that any review of Native Title upholds the intent of the Act to pursue justice and the 'rights and interests' of the First Nations Peoples of Australia.

[2] The Lowitja O'Donoghue Oration
[3] National Native Title Act (1993)
[4] Ibid.

Our submission will focus on several areas that address the specific questions raised by the Social Justice Commissioner in calling for submissions to inform the upcoming Report, as well as some other points to consider in the Native Title space. In particular, our submission covers:

- Accountability measures and the Native Title Act;
- Heritage protection through the Native Title system; and
- The relationship to Treaty and Truth.

Our submission draws upon expertise within the ANTAR network and that of our partners and stakeholders like the National Native Title Council. We also draw on our most recent submissions to the Federal Government in their consideration of the Native Title Legislation Amendment Bill (2020)[5] passed earlier this month.

Our previous submissions can be found here[6]:

As stated in our previous submissions regarding Native Title reform, ANTAR has outlined guiding principles,[7] which shape and determine the content of our submission Furthermore, any future reforms to the Native Title Act (NTA), not recently addressed by the Amendments Bill, 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 UNDRIP 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'.[8]

Furthermore, 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

[5] Native Title Legislation Amendment Bill (2020)
[6] ANTAR Resources
[7] ANTAR Previous Submissions
[8] United Nations Declaration on the Rights of Indigenous Peoples

how this can come to fruition. For example, the Aboriginal and Torres Strait Islander peoples are not resourced adequately to support the meeting of requirements and fiduciary responsibilities in Native Title management.

A starting position for Native Title reform must be that a change 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 their equitable claims. Moreover, the National Native Title Tribunal, which rules on disputes between native title holders and companies, has sided with native title holders only three times, compared to an overwhelming 126 times with companies.[9] This demonstrates how the NTA overwhelmingly favours commercial proponents over Native Title holders, and why reform is imperative.

Accountability and the Legislation

We note the recent passing of the Native Title Legislation Amendment Bill 2020 on 3 February 2021 and the generally uncontroversial changes to the Act. ANTAR is of the view that the amendments that continue to evolve the Native Title Act must build positively on what has been delivered by Native Title legislative regime to date.

We share the National Native Title Council (NNTC) view, articulated in their submissions to the NTA amendment considerations, that the system must be 'fair to all parties', and its continual evolution focused on improving the equity of the system for First Nations peoples.

We are still assessing the details of the recent Amendments Bill, but reiterate for the purposes of the Social Justice Native Title Report 2021 process, better accountability and due process following the Social Justice Native Title Report would be achieved by:

- Section 35(1)(a) of the NTA be amended such that the minimum negotiation period before a proponent can seek a future act

[9] Why most Aboriginal people have little say over clean energy projects planned for their land.

determination by the NNTT (National Native Title Tribunal) 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.
- 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.
- 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.'

Beyond reviewing how well Government has addressed the recommendations and issues raised by stakeholders in the NTA Amendment process, ANTAR suggests that the Social Justice Commissioner consider the recommendations outlined in the recent NNTC, AIATSIS and CSIRO Report on the 2019 Survey of Prescribed Bodies Corporate (PBCs).[10] This report surveyed the recognised First Nations corporate entities managing their Native Title in various jurisdictions across Australia. The report made 12 recommendations that covered:

- Board composition and sustainability;
- PBC growth and development; and
- Working with PBC to provide resourcing and support.

Heritage and Environment Protection

The High Court recognition of Native Title in 1992 was a momentous development, a legal structure for protecting Indigenous culture.[11] As the Australian Human Rights Commission has stated in previous Native Title Reports (see 2000 Native Title Report), under this concept, sacred and significant sites and objects have the potential to be protected, not within the

[10] Burbidge, B., Barber, M., Kong, T M, & Donovan, T. 2021. Report on the 2019 Survey of Prescribed Bodies Corporate

[11] Native Title Report 2000: Chapter 4: Indigenous heritage

historical category of Aboriginal Heritage, but rather as matters valued in present day Indigenous culture that have ongoing significance.[12]

The growing global conservation movement, distinguishes nature and culture as contrasts.[13] This distinction remains grounded within laws, policies and institutions that centre on environmentalism, removing agency from the environment itself and from First Nations Peoples who historically have inhabited and managed country well before colonisation.[14]

It is well established that Aboriginal and Torres Strait Islander peoples have an inextricable connection with the lands and environments in which they reside, with a distinct system of knowledge, innovation and practices relating to the use and management of biological diversity on these lands and environments.[15] This knowledge and understanding should not only be the foundation for heritage and environmental protection systems, but additionally a necessary contribution to mitigate climate change, a national interest.[16]

While Native Title, cultural heritage and environmental laws provide some recognition and protection, current legal provisions are insufficient and need adjustment.[17] Despite variations between jurisdictions, we see Native Title as the lead legal-policy space for cultural heritage protection.

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) produced a publication by Pamela Faye McGrath in 2016, which highlights several recommendations regarding the protection of heritage in the era of Native Title.[18]According to the AIATSIS publication, heritage and environmental protection within the context of Native Title would benefit from:

- Aboriginal ownership of Aboriginal culture and heritage being recognised, and Aboriginal peoples should make decisions about the significance of cultural heritage;

[12] Ibid.
[13] Native Title and Ecology: Agreement-making in an Era of Market Environmentalism
[14] Ibid.
[15] Native Title Report 2008: Chapter 7: The Protection of Indigenous knowledge's
[16] Ibid.
[17] Ibid.
[18] The right to protect sites: Indigenous heritage management in the era of native title

- Where Native Title has been determined, holders being the primary contact for Indigenous heritage matters through recognised representation, to ensure input and control of management under state and territory heritage laws; and
- Improved access for developers on information regarding Aboriginal and Torres Strait Islander places held on state and territory heritage registers and accrediting state and territory government processes

Additionally, ANTAR supports the AHRC (2000) critique of the NTA's capacity to protect Aboriginal Heritage and its limitations in three key areas, these being:

- The extinguishment of Native Title through the confirmation provisions of Division 2B of Part 2 of the amended NTA;
- The denial and erosion of procedural rights by the (2000) amendments to the NTA. These amendments to the NTA continue to substantially reduce the procedural rights available to Native Title holders in relation to a broad range of future acts now covered by Division 3 of Part 2;
- The reliance in the NTA upon inadequate protection provided in Commonwealth, State and Territory heritage legislation. Where the protection of Indigenous heritage and native title coincide under the NTA, the protection of Indigenous heritage is diverted to inadequate Commonwealth, State and Territory Indigenous heritage legislation.[19]

With the recent NTA amendments, it is timely to review the more recent amendment to the NTA to see how these areas have evolved and if further reform is needed in the legislation to afford better Heritage Protection.

Treaty and Truth

Since the Mabo High Court decision (1992) and the subsequent Native Title Act (1993), many Australians, both First Nations and non-Indigenous peoples, have

[19] Native Title Report 2000: Chapter 4: Indigenous heritage

had growing expectations that a negotiated settlement in the form of Treaty would be the culmination of Reconciliation in Australia. As stated in our submission to the Federal Parliament's 2019 '*Nationhood, national identity and democracy*' inquiry:

> 'The Mabo High Court decision in 1992 showed the fallacy of the basis of Australia's claim of sovereignty, however, the High Court could not go further and directly recognise the sovereignty of the First Nations as it cannot recognise any sovereignty other than that which has given it authority. The question of sovereignty and ownership has remained in a state of limbo ever since. Despite the subsequent Native Title Act 1993 which set out the framework for the recognition of Native Title, the original question of what is the legal basis for British and now Australian sovereignty has not been addressed.
>
> The solution? Australia must finally enter into a negotiated settlement or treaty with the First Nations peoples to truly reconcile the last 230 years of shared history. A number of States and Territories (Victoria, Queensland and the Northern Territory) have already begun treaty processes in their jurisdictions and we expect other states and territories to follow soon.'[20]

After two decades of consecutive Federal Parliaments beginning (but not following through) processes via formal inquiries, Joint Select Committees, Referendum Councils and other consultations – First Nations Peoples made an emphatic statement of how they want Australia to proceed towards Constitutional reconciliation in the 2017 *Uluru Statement from the Heart*.[21]

The Statement called for a constitutionally enshrined 'Voice' to Parliament for First Nations Peoples and a Makarrata Commission that would pursue Agreement Making (Treaty) and Truth telling. The Federal Government must show leadership by backing the formation of a Makarrata Commission that will facilitate and support agreement-making across Australia. We are already

[20] ANTAR Previous Submissions.
[21] The Uluru Statement from the Heart

centuries behind those colonising nations we most closely associate with. Canada, the USA and New Zealand all have treaties with their First Nations peoples and, while not perfect, the Treaties frameworks in place have been the mechanism for ongoing dialogue and agreement.

Native Title has already been the instigator of much of the progress made in negotiating settlements between the First Nations communities and the State. From the processes underway in the jurisdictions listed above, Native Title considerations have led to agreements such as:

- the South West Native Title Settlement between the Noongar nation and the WA Government;[22]
- the Yamatji Southern Regional Agreement between the Yamatji people and the WA Government;[23] and
- The agreements around fishing and land use flowing from the Buthera Agreement in South Australia between the Narungga people and the SA Government.[24]

The Federal government and the other State and Territory governments should follow the lead of Victoria, Queensland and the Northern Territory and begin Treaty processes that will reinforce and strengthen Native Title.

Furthermore, Native Title has played a crucial role in bringing the Truth of dispossession, displacement and the cruelties of colonisation to light. The very process of exploring cultural connection and investigating the claims of First Nations Peoples – while historically painful, costly and extremely lengthy– has done much to force direct recognition of Truth over the last three decades.

In honouring the call in the Uluru Statement for a Commission of Truth-telling, the Native Title space should be recognised as a national project of Truth-telling and be a formal element of any future Truth process. At present much of the NTA process is seldom revealed so it is not contributing to truth-telling in the wider community. We must consider how to use the evidence

[22] Department of the Premier and Cabinet Western Australia: South West Native Title Settlement
[23] Yamatji Marlpa Aboriginal Corporation: For Yamatji people
[24] 'Historic' fishing deal signed with SA Native Title group.

in a respectful way that complements the process of Truth-telling across Australia.

Conclusion

Thank you again for the opportunity to provide a submission to inform the drafting of this important 2021 Native Title Report.

ANTAR offers our ongoing support to a process that meets the expectations of Aboriginal and Torres Strait Islander peoples and we would also welcome the opportunity to meet with the Social Justice Commissioner Oscar and the Australian Human Rights Commission, to discuss any of the points raised in this submission.

Sincerely

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With thanks:

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ANTAR is proud to acknowledge and pay our respects to First Nations Peoples as the traditional owners of the lands on which we work across the continent.