Wangan & Jagalingou Family Council

NATIVE TITLE AMENDMENT BILL 2017:

THE NEED FOR CONSULTATION WITH ABORIGINAL TRADITIONAL OWNERS

8 MAY 2017

We urge Senators not to pass the *Native Title (Indigenous Land Use Agreements) Amendment Bill* this week

Attached is a statement of reasons which we believe go to the heart of the concerns regarding Aboriginal Traditional Owners in Australia about this bill, and the process surrounding it. We concentrate on the importance of native title and the Act first created by the Keating Government honouring the Mabo decision, and forming a compact between Indigenous and non-Indigenous Australians.

The points raised also encompass our present position and we outline briefly here how the development of this bill works against Wangan and Jagalingou Traditional Owners (W&J), and is inconsistent with our rights.

We have previously detailed our concerns and issues, and included a statement of rights under International law, in our submission and presentation to the Senate Inquiry – and to the UN Rapporteur on Indigenous Peoples' Rights.

We note the following –

1. The bill should not be about Adani's requirements – yet the haste with which it is being enacted, and the public statements by the Government at the most senior levels, indicate that it is a key driver for the apparent urgency and purpose of the bill. To ensure that native title reform is not confused with these matters, the bill should be deferred for proper consideration and consultation
2. In any event, it is essential that a proper period of consultation is now held in which we and other Traditional Owners can respond to the proposed amendments. The consultations by the Government with NTRB / NTSP staff has cut corners. These bodies do not enjoy a general mandate to speak on behalf of Aboriginal Traditional Owners and their imprimatur is not sufficient to convey the support or otherwise of Traditional Owners to the bill
3. Our own NTRB, whose CEO is deputy chairperson of the National Native Title Council, is conflicted regarding our group and the Traditional Owners we represent. We do not and cannot accept that they speak on our behalf. No effort at all has been made by Queensland South Native Title Services to inform us about, or seek our views on, the bill. As the intended beneficiaries of native title law, and as people who will be directly and adversely impacted by any changes the Government makes, we have a right to consultation and consent

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4. Given the Coalition's general antipathy towards native title and the Coalition's ongoing willingness to change the rules to facilitate development when it suits them, it is essential that a national precedent is not set that enables Governments to consult only with a compliant and financially interested set of NTRBs/NTSPs when it sets out to amend the NTA. This alone is a significant reason why the Opposition and Senate Crossbench should require prior direct Traditional Owner consultations, as a precondition for support for any proposal to amend the NTA
5. The Government defends its NTRB-only consultation approach by invoking unspecified urgency. It said nearly three months ago that "urgent amendments are imperative to preserve the operation of currently registered ILUAs and provide the sector with a prospective process for registering ILUAs which minimises the risks presented by the *McGlade* decision". The Government has so far not backed up its claim, nor made a convincing argument against *McGlade*. We ask that you demand proper process so it can be established publicly and transparently what actual impact *McGlade* has had on ILUAs and agreement making. The Aboriginal right to free prior informed consent rests on it
6. We strongly urge you to demand that the NTRBs/NTSPs involved in consultations with the Government to date, and who are reported to have reached agreement, undertake a transparent process of consultation with the Traditional Owners of their area in relation to the Bill. This is a necessary pre-condition to have, and be seen to have, any support for the Bill. Such consultations should occur over the space of at least 2 to 3 months, and the NTRBs/NTSPs should be required to report back to all Senate parties the extent of their consultations with traditional owners, as well as the outcomes of those consultations

We hope in this 25th anniversary year of the Mabo decision that you will give native title reform a more thorough, genuine and worthy hearing than this cursory and limited process currently being run by the Government to secure the interest of a handful of lobbyists clamouring for 'certainty'.

As Traditional Owners, we are entitled to know that our rights and interests in land, and our laws and customs that underpin them, are respected and protected by Australian law. We need the certainty that we can determine our own future, make our own decisions, and will be asked for our free prior and informed consent before Governments and other interests can impact upon our rights. This is especially so with legislation which is national in scope and far reaching in its effects such as the Native Title Act.

We ask that you do all within your power to ensure the bill is not passed this week and that proper consultations on proposed amendments begin immediately. We encourage you to further use that opportunity, and the 25th anniversary of the Mabo decision, to begin a national dialogue on substantial Native Title Act reform.

Yours faithfully,

Adrian Burragubba Murrawah Johnson

For the Wangan and Jagalingou Traditional Owners Family Council

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1. The *Native Title Act 1993* (NTA).

   1.1 The NTA of 1993 was a remarkable achievement.

   1.2 The Keating Government used the High Court's *Mabo [No 2]* decision as an opportunity to right an historic wrong to the extent possible.

   1.3 The Keating Government's approach was to negotiate the terms of the NTA directly with a broad group of Aboriginal leaders.

   1.4 Consequently, the NTA is regarded as a form of "compact" between Indigenous and non-Indigenous Australians.

   1.5 In the face of a vicious and misleading industry campaign against the High Court's *Wik* decision in 1997, the ALP Opposition and others stood firm in support for and defence of the principles enshrined in the NTA against the Howard Government's "10-Point Plan".

   1.6 The opposition to the "10-Point Plan" was informed and guided by close consultation with Indigenous people from around Australia. The 'Wik amendments' did not receive the endorsement of any Aboriginal groups in the country

   1.7 In summary, those who have upheld the Native Title Act have always insisted that changes to native title law and policy be subject to close consultation with the intended beneficiaries, Aboriginal Australians.

2. The Coalition has never embraced the core principles of the NTA.

   2.1 The Coalition has never supported native title.

   2.2 The Coalition voted against the NTA in 1993.

   2.3 The Coalition's 1998 amendments to the NTA were expressly designed to achieve "bucket loads of extinguishment" of native title, in the words of then-deputy PM Tim Fischer.

   2.4 The only potentially beneficial provisions of the "10-Point Plan" are the ILUA provisions, which were in fact proposed by Indigenous representatives in response to the mining industry's calls for certainty in agreement-making.

3. Consequently, the motives of the Coalition in dealing with native title should always be carefully scrutinised.

   3.1 The Coalition does not enjoy the "benefit of the doubt" when it comes to proposals to amend the NTA. The Coalition proudly represents the interests of industry and others, to the exclusion of native title holders.

4. The Coalition's 1998 amendments to the NTA had the effect of complicating the law of native title beyond the understanding and control of Aboriginal traditional owners.

4.1 The effect of the Howard Government's 1998 amendment to the NTA are to complicate it beyond the comprehension of everyone but technocrats.

4.2 In 1998 Gareth Evans QC MP described the Howard Government's amended NTA as the most complicated piece of legislation in Australia apart from the *Tax Act.*

4.3 In this way, the Coalition seized control of the meaning, understanding and management of native title from Aboriginal traditional owners.

5. <u>In the name of false urgency, the Government has chosen to consult with Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) rather than with Aboriginal traditional owners.</u>

5.1 Senator Brandis has claimed urgent amendments are required to address the effect of the Full Federal Court's *McGlade* decision. To date no basis for this urgency has been identified, apart from the proposed Adani Coal Mine.

5.2 Under cover of this false urgency, the Coalition has by its own admission failed to consult with Aboriginal traditional owners. Instead, it is consulting with NTRBs and NTSPs.

6. <u>What is wrong with just consulting the NTRBs and NTSPs?</u>

6.1 The Keating Government's NTA provided for the recognition of NTRBs.

6.2 The original concept was to create effective services of advice, support and representation for Aboriginal traditional owners seeking recognition and protection of their native title.

6.3 From about 1998 the Howard Government embarked on a project of "*De-Aboriginalising and Professionalising*" of NTRBs[1]. Together with increasingly strict funding conditions, the Howard Government effectively took control of NTRBs/NTSPs and turned the NTRBs and NTSP into servants of the Commonwealth as much as servants of Aboriginal traditional owners.

6.4 Whilst there are often well-intentioned young lawyers and anthropologists working in the NTRB/NTSP system, the management of the NTRBs and NTSPs understand perfectly that their tenure is at the pleasure of their Commonwealth masters.

6.5 Consequently, the Commonwealth can generally rely on NTRBs/NTSPs to behave in an obedient if not sycophantic fashion. Many Aboriginal traditional owner groups around the country do not trust the NTRBs/NTSPs and have "sacked" the NTRB/NTSP for their area. Even with limited resources available to them, many traditional owner groups prefer to take their chances on their own.

6.6 The inherent conflicts of interest within NTRBs, and the extent to which those organisations have become agents of the Commonwealth, is a matter for further investigation another day.

6.7 Even assuming the best of intentions by NTRB/NTSP staff, they do not enjoy a general mandate to speak on behalf of Aboriginal traditional owners.

6.8 For present purposes, it cannot and should not be assumed that in consulting with NTRBs/NTSPs, the Government is consulting with Aboriginal traditional owners.

[1] Brian Stacey, ATSIC Native Title Program Director, to Queensland Indigenous Working Group, 1998.

7. <u>The Opposition and Crossbench Senators should demand that consultation on the Native Title Amendment Bill 2017 be undertaken with traditional owners.</u>

   7.1 The hallmark of the ALP's approach to native title law and policy is ensuring close consultation with the intended beneficiaries of native title law, namely Aboriginal traditional owners.

   7.2 Neither Senator Brandis nor the Coalition has pointed to any real urgency in the Native Title Amendment Bill of 2017.

   7.3 Consequently, there is no excuse for the Coalition to "cut corners" in its consultations with Aboriginal traditional owners about the Bill.

   7.4 The Opposition and Crossbench Senators should demand that the NTRBs/NTSPs involved in consultations to date undertake a transparent process of consultation with the traditional owners of their area in relation to the Bill as a pre-condition of any support for the Bill. Such consultations should occur over the space of at least 2 to 3 months, and the NTRBs/NTSPs should be required to report back to all Senate parties the extent of their consultations with traditional owners, as well as the outcomes of those consultations.

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