CHANGES TO COME? PROPOSED AMENDMENTS TO THE NATIVE TITLE ACT

By Nick Duff

Moves are underway to make some changes to the native title system. Just what those changes will be, and how much of a difference they will make, is yet to be seen.

In March 2011, Greens Senator Rachel Siewart introduced a private member's Bill into parliament. That Bill was intended to change the *Native Title Act* to take away some problems that had caused serious frustration and disappointment for many traditional owners and others. These problems had been raised by high profile figures including several successive Aboriginal and Torres Strait Islander Social Justice Commissioners and the Chief Justice of Australia. The most significant changes proposed in the Bill were:

- Requiring the *Native Title Act* to be interpreted consistently with the United Nations Declaration on the Rights of Indigenous Peoples, including principles of self-determination and free, prior and informed consent
- Improving the 'right to negotiate' provisions in the 'future acts' regime by:
  - Requiring parties to use all reasonable efforts to reach agreement about developments on native title land (so that the standard six month period is merely a minimum time for negotiation)
  - Setting specific minimum standards for negotiations in good faith
  - Requiring the party seeking arbitration (usually the development's proponent) to prove that they negotiated in good faith, instead of the other party having to prove that there were no good faith negotiations, and
  - Allowing the Tribunal to impose profit-sharing conditions when making determinations about whether developments can go ahead
- Allowing parties to disregard the extinguishing effect of historical tenures or legislation by mutual agreement, and
- Removing some of the difficulties in proving that law and custom is 'traditional' and that connection to the land has been 'continuous' since the pre-colonial period—the amendments would effectively reverse the onus of proof for those issues

The Greens Bill was referred to the Senate Committee for Legal and Constitutional Affairs in May 2011, and the committee delivered its report in September 2011. Senator Siewart introduced a substantially similar Bill into parliament in February 2012.

At the same time as the Greens Bill was progressing, the government had been working on a parallel process of developing reforms. In June 2012 at the National Native Title Conference in Townsville, the Attorney General announced that the government would be introducing its own amendments to the *Native Title Act*. An exposure draft of these amendments was released for public comment in October 2012, and the Bill was introduced into Parliament the following month. Much of the substance of the government's proposed changes is similar to the Greens Bill, but there are some significant differences. The main differences are:

- There is no reference to the Declaration on the Rights of Indigenous Peoples
- The 'good faith negotiation' standards are not set as minimum criteria but instead are just 'indicators' of good faith
- There is no proposal to allow the Tribunal to impose profit-sharing conditions
- The provisions allowing the historical extinguishment of native title to be disregarded are limited to national parks and conservation reserves, and exclude off-shore areas
- There is no proposal to change the processes for how traditional owners are required to prove their traditional connection to their lands and waters

In relation to the 'right to negotiate' process, the government's proposed reforms would increase the minimum period before the Tribunal can be asked to mediate, raising it from six months to eight months. Further, the government has proposed changes to the authorisation processes for Indigenous land use agreements (ILUAs), clarifying the requirements for situations where there are people who claim to have native title in an area but who are not included in a registered native title claim.

AIATSIS made submissions to the senate committee inquiry into the Greens Bill and to the Attorney General's Department's exposure draft legislation. In general, AIATSIS was supportive of the proposed changes but considered that they (particularly the government's reforms) should go much further. In response to the government's exposure draft, AIATSIS recommended:

- Additional strengthening of the 'right to negotiate' process to ensure a more equal playing field between native title parties and developers and to allow for better quality agreement-making
- Making the disregarding of historical extinguishment automatic for parks and reserves, removing the exclusion of offshore areas, and allowing parties to agree on disregarding extinguishment in other areas
- Leaving in place the current period of three months for objections to be lodged against the registration of ILUAs, rather than reducing the period to one month as proposed

AIATSIS' submission can be accessed at: http://www.aiatsis.gov.au/ntru/submissions.html