REFORMING THE *NATIVE TITLE ACT*: BABY STEPS OR DANCING THE RUNNING MAN?

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I Introduction

In the mid-1980s, a new hip hop dance hit New York: the Running Man. The dancer vigorously moves their feet back and forth in a running motion, giving the impression of great activity while in fact going nowhere. After years of consultations, submissions, hearings and draft amendments to the *Native Title Act 1993* (Cth), many in the native title sector have been left wondering whether this might be an apt characterisation of the reform process under the last government.

It should be said that the previous Commonwealth Government made an effort not to raise hopes for wholesale reforms.[1] At the 2012 National Native Title Conference in Townsville, then Attorney-General Nicola Roxon stated her preference for 'incremental' rather than 'radical' change, calling it a 'strong but sensible' approach that would produce lasting benefits.[2] The implication was that modest piecemeal improvements would be more likely to gain the political support necessary to become law. More sweeping changes would be too contentious; better to take the achievable over the ideal. However, up until now the concrete achievements promised by the 'baby steps' approach have not materialised. On one view this demonstrates the wisdom of incrementalism: if relatively minor amendments failed, then surely more substantive reforms would have been doomed? But from another perspective, the inability to garner support for even minimalist changes may be a signal that avenues for further progress might lie elsewhere.

This article provides a guide to the various reform processes over the last six years and offers some thoughts about the prospects and potential direction of reforms under the newly elected Coalition Government. It is intended firstly as a reference tool for navigating what has been a complex and drawn-out series of Bills and inquiries, though it does not attempt to discern the political reasons for the failure of the most recent round of amendments. Secondly the article is intended to be a catalyst for a broader discussion about future strategies for reform, but without speculating on exactly what the new government (not to mention the myriad of new minor parties) may have in store.

This article argues that the various law reform processes in recent years have failed to produce even the modest changes sought. Whether by aiming too high or too low, the 'baby steps' approach was unable to succeed in its strategy of building up small changes over time. Looking to the future, the article argues that advocates for reform will be more likely to succeed in the new political environment if they can draw clear links to the Coalition's stated policy priorities. Chief among these are the efficiency of the claims process and the potential for native title to contribute to the improvement of traditional owners' economic circumstances. Big-picture thinking and ground-up reforms are more likely to capture Canberra's attention than the incremental changes that have been proposed in the past. But this bolder approach carries the risk that native title holders may end up in a weaker position than before.

II A Long and Winding Road: The Reform Process under Labor

In recent years there have been a number of inquiries, Bills and Acts relating to native title. This procession can be difficult to follow and after having made numerous submissions many stakeholders in the sector may understandably have lost track of it all. The next section sets out the successive developments with this in mind. While the subject matter of

the various proposed reforms will be described generally, this paper will not go too far into the arguments in favour or against. Rather than making a case for reform the paper instead describes some of the more important dynamics of the reform process.

A Previous Developments

Since 2007 the *Native Title Act 1993* (Cth) has been amended three times.[3] The first was the *Native Title Amendment Act 2007* (Cth) and *Native Title Amendment (Technical Amendments) Act 2007* (Cth): a pair of amending Acts passed toward the end of the Howard Government. The former altered the administrative and funding arrangements for native title representative bodies and service providers;[4] specified that consent determinations may be made over a part of the total claim area;[5] refined the way in which the Tribunal's mediation processes fit within the Court's own case management processes;[6] gave the Tribunal greater oversight functions within mediation;[7] and introduced a new 'inquiry' function for the Tribunal.[8] It gave the Court the power to dismiss applications that have failed the registration test and are unlikely to be registered in future.[9] Other technical amendments were also made.[10] The *Native Title Amendment (Technical Amendments) Act 2007* (Cth), as its name suggests, contains a myriad of technical changes relating to the native title process.[11] One substantive change was the amendment of section 66B to include consent, death or incapacity as grounds for replacing the applicant. Another, also relating to authorisation, was the insertion of section 84D which empowers the Court to require an applicant to demonstrate their continuing authorisation and also allows the Court to hear and determine an application notwithstanding a defect in authorisation.

The *Native Title Amendment Act 2009* (Cth) further altered the Tribunal's role in mediating native title claims, allowing the Court to appoint non-Tribunal mediators including Federal Court Registrars.[12] The 2009 Act also amended the arrangements for providing assistance to native title respondents,[13] made the consent determination process more flexible,[14] and made other procedural changes.[15] And in 2010 the *Native Title Act (No 1) 2010* (Cth) introduced section 24JAA to cover future acts relating to public housing and certain other social infrastructure.

As can be seen from this brief description, the changes were mostly procedural, technical and administrative. That is not to say that the changes were not valuable, effective or worthwhile. Some may well have increased the efficiency of certain parts of the native title system. Yet calls for more substantive change persisted, mostly from those who believe native title should be simpler to prove and should provide a more meaningful cultural and economic asset once recognised. For example, in 2009 Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma rejected a minimalist approach to reform that 'simply tinker[s] at the edges of the native title system', calling instead for transformations that ensure native title 'truly delivers justice for Aboriginal and Torres Strait Islander peoples and facilitates [their] social and economic development'.[16] In addition, in 2007 Mr Calma expressed concern that the government's attention was focused narrowly on increasing efficiency rather than on improving the recognition and protection of native title.[17] Successive Native Title Reports by Mr Calma and his successor Mick Gooda have argued for robust changes in several specific areas, including:

- allowing the long-term adjournment of claims that are not ready for finalisation;
- making the extinguishment of native title non-permanent;[18]
- allowing for the recognition of traditional ownership even where enforceable rights and interests have been lost or extinguished;
- reversing the burden of proof for native title claims;
- making the proof of connection more flexible;[19]
- automatic disregarding of historical extinguishment in a wide range of circumstances; and
- strengthening the 'good faith' negotiation requirements in the future act regime.[20]

An important impetus for some elements of the most recent round of reforms was a 2008 speech by Justice Robert French (as he then was). His Honour offered three 'modest proposals for improvement':

(i) allowing the Court to rely on a statement of facts agreed by the parties when making consent determinations;
(ii) introducing a rebuttable presumption in favour of the existence of native title (provided certain conditions were satisfied); and
(iii) disregarding historical extinguishment by consent.[21]

The government quickly adopted the first of these, enacting it in the 2009 amendment mentioned earlier.[22] The third

was the subject of exposure draft legislation released by the Attorney-General's Department in 2010,[23] but has not been implemented through legislation (see below). The second proposal has not been adopted by the government, but was introduced unsuccessfully in a private member's Bill, as will be explained below.

B 2010: Testing the Waters

As just mentioned, the Attorney-General's Department released exposure draft legislation in 2010 dealing with historical extinguishment. The draft proposed the introduction of a new section 47C, which would prevent national parks or conservation reserves from extinguishing native title.[24] The proposed section 47C contained two significant limitations: it would apply only to onshore areas, and would not take effect without the agreement of the relevant government respondent. Seventeen written submissions were received in response to this proposal, the majority being from bodies representing the interests of native title holders and claimants.[25] Of those, most were broadly supportive. A number considered that the reforms should go further. Submissions from organisations representing respondent interests raised some issues for further clarification, but other than the State of Western Australia none opposed the proposal outright. Western Australia's objections related to increased cost and complexity in managing the conservation estate, raised expectations among native title claimants, and the Commonwealth's failure to assist the State in bearing its compensation burden.

Also released in 2010 was a joint discussion paper by then Attorney-General Robert McClelland and Jenny Macklin, Minister for Families, Housing Community Services and Indigenous Affairs. Called 'Leading Practice Agreements: Maximising Outcomes from Native Title Benefits', the paper dealt largely with executive policy matters but did raise three potential amendments for discussion:

- reducing the notification period for registering Indigenous Land Use Agreements ('ILUAs') and making it more difficult to object to registration;
- allowing minor amendments to be made to ILUAs without re-registering them; and
- strengthening the future acts right to negotiate by clarifying the definition of 'negotiation in good faith' and encouraging parties to 'engage in meaningful discussions about future acts'.[26]

Twenty-eight written submissions were received from a broad range of stakeholders in the system. It is beyond the scope of this paper to canvas those views in any detail, but it is enough to make some general observations. Native title organisations were generally supportive of the changes. The Minerals Council of Australia, in a joint submission with the National Native Title Council, expressed support for all three amendments, as did the Association of Mining and Exploration Companies.[27] The National Native Title Tribunal's submission did not support the amendments to the ILUA provisions and did not support the statutory codification of the current 'good faith' indicia, but did suggest an amendment requiring parties' negotiations to address substantive issues.[28] The New South Wales government considered that the ILUA provisions would need to be handled very carefully and supported some changes to the good faith negotiation provisions.[29] The strongest opposition to amending the good faith requirements came from the Western Australian government, who considered that the Court had already provided sufficient certainty and that any more stringent requirements would impose an unacceptable procedural constraint on mining activity.[30] (The Western Australian government expressed no significant objection to the ILUA changes but said that more information was required.)

C 2011: The Greens' Bill

In March 2011, Greens Senator Rachel Siewart introduced a private member's Bill into parliament. The Native Title Amendment (Reform) Bill 2011(Cth) included the following reforms:

- requiring the *Native Title Act* (Cth) 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;
- introducing a new requirement into section 24MB(1)(c) so that a future act can only pass the 'freehold test' if it is covered by heritage legislation that provides 'effective protection' for significant sites and areas;
- strengthening the 'right to negotiate' provisions in the 'future acts' regime by:
  - extending the 'right to negotiate' procedure to areas beyond the high water mark;
  - requiring parties to use all reasonable efforts to reach agreement about developments on native title land before any party can approach the Tribunal for a determination;

  - setting specific minimum standards for negotiations in good faith (not merely codifying the existing law and not merely listing non-definitive indicia);
  - requiring whichever party is seeking arbitration 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 applicants and government respondents to agree to disregard the extinguishing effect of any prior act affecting native title;
- 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, including by shifting the onus of proof onto respondent parties to *disprove* the existence of native title rights and interests; and
- specifying that native title rights and interests can include commercial rights including the right to trade.

The Greens' Bill was referred to the Senate Committee for Legal and Constitutional Affairs in May 2011. The Committee received 38 written submissions. Some, such as the Western Australian government and the Minerals Council of Australia, opposed virtually all aspects of the Bill.[31] Others, including a number of native title representative bodies and the National Congress of Australia's First Peoples,[32] endorsed every proposed amendment and further to this recommended additional changes. A number of submissions expressed general support for the aims of the Bill while raising matters of practical implementation that may require further consideration.[33] Interestingly, the Commonwealth Attorney-General Department's own submission stated that the government would carefully consider and consult on any proposed changes to 'ensure that amendments do not unduly or substantially affect the balance of rights under the Act'.[34] Taken literally, this implies the Department's starting assumption was that there should be no substantial shift in the balance of rights under the Act.[35] This was not a conclusion reached *after* careful consideration and consultation, but was instead the fundamental *premise* that would underlie any such consideration and consultation. That is a surprising approach, given that a range of stakeholders and observers have argued for years that the balance of rights is unfairly skewed against the interests of native title holders.[36]

The Committee gave its report in September 2011, recommending that the Senate should not pass the Bill.[37] It said there had been insufficient consultation and also there was a need to consider the practical implications in greater depth.[38] In an additional criticism the Committee expressed particular reservations about the 'piecemeal' nature of the proposed amendments.[39] That criticism seems at odds with the government's declared support of an 'incremental' approach to reform. Further, the government's own Bill (described below) dealt with an even narrower range of issues than the Greens' Bill and so could be said to be *further* from the Committee's stated ideal of a 'thorough' and 'holistic' approach to reform.[40]

Senator Siewart introduced a substantially similar Bill into parliament in February 2012.[41] It has not progressed beyond the Senate since then.

D 2012: The Government's Bill

At the same time as the Greens' Bill was being considered by the Senate Committee, the government was developing its own Bill. In June 2012 at the National Native Title Conference in Townsville four reforms were announced by Nicola Roxon who had recently replaced Robert McClelland as Attorney-General:

- Legislating 'criteria to outline the requirements for a good faith negotiation';
- Making ILUA procedures more flexible;
- Allowing parties to agree to disregard extinguishment in national parks; and
- Exempting native title payments from income tax and capital gains tax.[42]

An exposure draft giving effect to the first three of these amendments was released for public comment in October 2012 (the fourth was legislated separately, see below). Twenty-five written submissions were made to the Attorney-General's Department in response. The Bill was introduced into Parliament the following month, reflecting only very minor changes from the exposure draft. The Bill was also similar in many respects to the Greens' Bill, the main differences being that the government's Bill:

- made no reference to the *United Nations' Declaration on the Rights of Indigenous Peoples*;
- did not propose minimum criteria for 'good faith'

negotiation but instead introduced mere indicia of good faith, meaning a party could be 'negotiating in good faith' even if they did not meet all of the 'requirements';[43]
- did not propose to allow the Tribunal to impose profit-sharing conditions;
- would only allow historical extinguishment of native title to be disregarded over (onshore) national parks and conservation reserves;
- did not propose any changes to the process of proving traditional connection; and
- did not mention commercial native title rights.

The Bill was referred to the Standing Committee on Aboriginal and Torres Strait Islander Affairs ('SCATSIA') and the Senate Standing Committee on Legal and Constitutional Affairs. The former dealt more with the technical and legal aspects, while the latter considered the Bill from a social and economic policy perspective. Twenty-seven and 25 written submissions were received by the Committees respectively. A public hearing was held by the Senate Committee in Canberra in March 2013.

Both Committees delivered their reports in March 2013. The SCATSIA's Report gave full support to the Bill and went further to recommend a comprehensive review of the native title system during the next Parliament.[44] The Senate Committee's Report recommended that the Bill be passed, subject to two amendments. The first of these was that the Bill should simply codify the so-called 'Njamal indicia' for negotiation in good faith rather than adapting slightly different criteria from the *Fair Work Act 2009* (Cth).[45] The second recommendation was that the period during which a person may object to the registration of an ILUA should be three months rather than the one month specified in the Bill.[46]

Each of the Committee Reports appended a minority report by Coalition Members or Senators. The SCATSIA minority report stated that the 'Committee as a whole recognised the need for a significant reform of Native Title', but that the Bill had procedural and substantive problems. Procedurally, they said there had been inadequate consultation on the changes,[47] that the proposed changes were 'disjointed and ad hoc' and that there should have been a 'comprehensive review or analysis of the performance of the 1993 Act'.[48] Substantively, the Coalition members warned that the changes would 'not lead to greater transparency, certainty or reduction in any current asymmetry perceived in the power relations between parties', but would have unintended consequences including increasing delays and litigation.[49] On the historical extinguishment issue, the minority report said that insufficient attention had been given to the interests of non-government respondents. On negotiation in good faith, they said that the changes were unnecessary since the current law is working well: negotiated agreements are common and native title parties only very rarely mount challenges to the proponents' good faith in negotiations.[50] By contrast, a requirement to demonstrate 'all reasonable efforts' would produce unacceptable uncertainty and shifting the onus of proof onto proponents would be tantamount to a veto for native title holders.[51]

The Senate minority report repeated the SCATSIA Coalition committee members' concerns about the Bill's failure to demonstrate a 'thorough or holistic approach to enhancing or improving the operation of the Act'.[52] Again, there were calls for an 'over-arching review or analysis of the Act in its totality'.[53] The consultation process was also said to be flawed, paying insufficient attention to practical considerations - particularly the concerns of the mining industry.[54] And the same arguments were offered supporting the adequacy of the current law on good faith negotiations.[55]

By the time the Committee reports were published, Mark Dreyfus had been appointed as Attorney-General following Nicola Roxon's resignation the previous month. Mr Dreyfus retained his position following Kevin Rudd's return to the Prime Ministership in June 2013. When Parliament was dissolved in August 2013 the Bill had still not been passed by the House of Representatives. At that point the Bill lapsed. It would seem that despite (or, more likely, *because of*) the Attorney-General's baton changing hands for a third time, the reform process was still more 'Running Man' than relay race.

E 2013: Taxation and Charity Status

In contrast to the more contentious reform processes described above, two Treasury-led reforms were seen through to completion in 2013.

The first, which was flagged in Minister Roxon's speech to the 2012 National Native Title Conference, was to exempt native title benefits from income tax or capital gains tax. The *Tax Laws Amendment (2012 Measures No. 6) Act 2013* (Cth)

was introduced into Parliament in November 2012 after consultations on an exposure draft (and in the wake of a more general consultation process in 2010). It was passed in the Senate in June 2013.

The amendment specifies that 'native title benefits' (either compensation payments or benefits provided under ILUAs, section 31 agreements, or other agreements dealing with acts affecting native title) are not part of the assessable income of an Indigenous individual or 'Indigenous holding entity'.[56] The exception to that is if the payment is for the purpose of meeting administrative costs or is paid in exchange for goods or services.[57] For capital gains tax purposes, certain dealings with either native title or the right to be provided with a native title benefit do not contribute to the capital gains or losses of an Indigenous individual or holding entity.[58]

The second reform was part of Treasury's broader project of developing a single definition of 'charities' for the purpose of all Commonwealth legislation. A discussion paper was released in 2011 and over 200 submissions were received. Exposure draft legislation was released for further comment between April and May 2013, a Bill was introduced into Parliament soon after and passed by the Senate in June 2013. The *Charities Act 2013* (Cth) makes a modest but important qualification to the definition of 'public benefit': if an entity's purpose would otherwise fail to constitute a 'public benefit' solely because of the family relationships between the potential beneficiaries, then the entity is treated as having a public benefit purpose so long as the purpose is directed to the benefit of Indigenous persons only and the entity receives benefits relating to native title or other traditional ownership rights.[59] This will not guarantee that registered native title bodies corporate or their affiliated corporations will qualify as charities, but it does remove a potentially significant hurdle – namely that the law might otherwise regard the pool of beneficiaries as too narrow for a charitable purpose.

In August 2013, Ministers Macklin and Dreyfus and Assistant Treasurer David Bradbury announced the government's support for further reforms. The proposed reforms were based on recommendations of the Working Group on Taxation of Native Title and Traditional Owner Benefits and Governance, which had been set up in March 2013 and included representatives of native title holders and the mining industry among others.[60] Specifically mentioned were the following reforms:

- providing for a new kind of tax-exempt status entity called a Indigenous Community Development Corporation;
- regulating private agents involved in negotiating native title agreements;
- creating a statutory trust that would hold native title benefits where there was no other appropriate entity to hold them;
- introducing a process for registering native title agreements (presumably in addition to the current process for registering ILUAs); and
- clarifying that the native title holding community is the beneficial holder of native title benefits.

No legislation relating to these proposals had been introduced by the time Parliament dissolved later in August 2013.

F 2013: Australian Law Reform Commission Inquiry

In June 2013 the Attorney-General's Department released draft Terms of Reference for a review by the Australian Law Reform Commission of the *Native Title Act 1993* (Cth).

An independent review of the Act had been recommended by the Aboriginal and Torres Strait Islander Social Justice Commissioner in the 2010 and 2011 Native Title Reports.[61] Those reports called for an inquiry into the operation of the doctrine of extinguishment, the process of proving traditional connection, the future act regime, and options for advancing negotiated settlements.

The draft Terms of Reference were somewhat more constrained than this. They directed the Australian Law Reform Commission to report on the native title system in relation to just two areas:

- 'connection requirements relating to the recognition and scope of native title rights and interests'; and
- the 'identification of barriers, if any, imposed by the Act's authorisation and joinder provisions' to 'access to justice' and 'access to and protection of native title rights and benefits'.[62]

The 'Scope of Review' document accompanying the draft Terms of Reference made it clear that the first item was intended to capture (among other things) the reversal of the onus of proof originally suggested by Justice French in 2008.[63]

Twenty-two submissions were received in response to the draft Terms of Reference. Many commended the proposed review but recommended that the Terms of Reference be broadened.

When the final Terms of Reference were announced in August 2013, they were unchanged from the draft version except that the first item was expanded to specify that the Commission should (among other things) consider whether there should be:

- a presumption of continuity of acknowledgement and observance of traditional laws and customs and connection;
- clarification of the meaning of 'traditional' to allow for the evolution and adaptation of culture and recognition of 'native title rights and interests';
- clarification that 'native title rights and interests' can include rights and interests of a commercial nature;
- confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use; and
- empowerment of courts to disregard substantial interruption or change in continuity of acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.[64]

That means that the review will not be directed towards broader questions of extinguishment, the future acts system, the role of prescribed bodies corporate, nor native title's potential contribution to Indigenous economic development. Those issues may be raised tangentially but only within the context of discussions of connection, authorisation or joinder. The Commission's report is due in March 2015.

G Summary of the Labor Period

Since 2010 there have been two discussion papers, three exposure drafts, two Bills, three parliamentary committee inquiries, four Attorneys-General and a newly announced Law Reform Commission inquiry, and yet the resulting changes to the native title system (other than the Treasury-led changes to charities and taxation) have not materialised.

Between 2007 and 2013, there was certainly a lot of law reform *activity* in the native title system. To those tasked with drafting submissions and appearing at enquiries, it would have felt more like an energetic dance than careful 'baby steps'. Even just getting through the summary above may have brought some sweat to the reader's brow. Notwithstanding the Coalition committee members' complaints about insufficient consultation, many stakeholders have taken full advantage of the numerous opportunities to discuss the small number of relatively modest changes that have been on the agenda over the last six years. Some even reported feelings of being 'consulted to death'. Yet when all of this activity is measured against the meagre results, the Running Man characterisation seems quite appropriate.

III A New Government

The Liberal-National Coalition won government at the Federal election in September 2013. Prospects for amendments to the *Native Title Act 1993*(Cth) are likely to be very different under the new government. This section will set out some aspects of the new environment, without trying to speculate on the details of what the government is likely to do in this area. Because of both the prospective nature of this exercise, and the new government's stated commitment to large-scale reform over piecemeal changes (explained below), the following discussion will necessarily be more generalised than the previous sections.

A A New Environment

The Parliamentary landscape has changed dramatically. This will have clear implications for the kinds of reform that are likely to succeed in future and so it is worthwhile taking a moment to consider the makeup of the new Parliament. The Coalition took government with 90 out of 150 seats in the lower house, in contrast to the delicately balanced position of the previous government. The Upper House has seen a large change also: 17 Coalition Senators were elected at the September election and when their terms begin in July 2014 the Coalition will have a total of 33 Senators in a 76-member chamber. The election produced a large cross-bench of 17 Senators, of which nine are from the Australian Greens, and the remainder are independent or represent small parties including the Palmer United Party, Australian Motoring Enthusiast Party and Family First Party.[65] The government will require the support of at least six of these in order to pass legislation that is opposed by the full contingent of Labor. Of course, if the government proposes laws that Labor supports, the views of the minor parties would be less relevant.

In addition, administrative arrangements have changed. The new government has shifted departmental responsibility for the native title system, although the precise arrangements are not known at the time of writing.[66] Responsibility for the *Native Title Act 1993*(Cth) was originally moved from the Attorney-General's Department to the Department of Prime Minister and Cabinet, but it has since shifted back.[67] The role previously played by the Department of Families, Housing, Community Services and Indigenous Affairs will be transferred to the Department of Prime Minister and Cabinet under the portfolio of the new Minister for Indigenous Affairs. Nationals Senator Nigel Scullion has been appointed as Minister for that portfolio, while Senator George Brandis is the new Attorney-General.

B New priorities?

When Senator Scullion spoke to the National Native Title Conference in June 2013, he set out a number of his policy concerns.[68] He saw his (future) role in the portfolio as giving him responsibility for 'making sure that native title holders and claimants and Indigenous people generally, get the best possible service and a fair result'. He considered the key challenges for native title holders to be how to convert formal recognition into 'meaningful practical benefits for traditional owners' and how to integrate native title into governance structures. More specifically, he referred to the following focal points of a Coalition approach to native title:

- doing whatever can be done to speed up the claims process;
- ensuring that Indigenous people get the 'best possible economic return and economic opportunities from their Native Title rights and from the land that they own';
- removing barriers to Indigenous people's ability to develop their own land, without 'foisting' development on them;
- a 'major overhaul' of the Indigenous Land Corporation and Indigenous Business Australia, while maintaining the value and integrity of the Indigenous Land Fund;
- more progress on home ownership and tenure reform, facilitating the investment of private capital in order to 'foster the emergence of something that might begin to look like a normal housing market'.[69]

Senator Scullion considered that despite some 'ups and downs', native title representative bodies have generally performed well and had improved their capacities in recent years. He mentioned the FaHCSIA review of native title organisations and said that the Coalition would consider its report 'very carefully'. [70]

Overall, there was little in the speech to indicate any clear proposals for amending the legislation. Two important objectives can nevertheless be discerned: efficiency in the claims process and maximum possible economic opportunities from native title. True enough, this seems fairly similar to the previous government's statement of priorities: for example, former Attorney-General Robert McClelland spoke of the Rudd government's commitment to a 'native title system which delivers real outcomes in a timely and efficient way [and] provide[s] Indigenous people with an important avenue of economic development'.[71] Nevertheless, there are good reasons to suspect that the Coalition's approach to reform will be substantially different.

For instance, the Nationals' policy platform document released shortly before the election supported calls 'by respected figures, such as Noel Pearson' for a 'closer examination' of naive title in order to reach a 'new understanding'.[72] The Nationals want to 'put in place a fairer system'.[73] This last reference to fairness is ambiguous, as it does not disclose whether the Nationals consider the current system to be unfair to native title holders or to respondents and proponents. What is clear, though, is that the Nationals see a need for fundamental change rather than small procedural alternations.[74] And this desire for a wholesale revisiting of the previous assumptions of native title was also reflected in the minority reports made by Coalition committee members in response to the Native Title Amendment Bill 2012 (Cth), outlined above.

The Nationals' platform also includes a focus on the governance of Indigenous organisations, both to prevent 'sharp practices' and to assist compliance;[75] and a somewhat ambiguous reference to the 'redirection of funds from the Land Councils and other Native Title bodies currently responsible for compiling and storing' information about Indigenous history and culture.[76] On this latter issue, the Nationals' goal is to centralise that compilation and storage, 'providing better coordination of records for academic and research purposes, while securing other secret and sensitive materials'.[77] The platform document does not elaborate on how this centralisation would cope with the fact that the 'compilation' of cultural information is currently done by

native title representative bodies in the context of native title litigation.

The Nationals' platform recognises that 'Indigenous Australians are entitled to self-determination and the right to pursue economic prosperity and social cohesion free of constraints and prejudice'.[78] However, that recognition was qualified by the words '[a]s all Australians', implying that the Nationals would not necessarily be supporting the incorporation of the *United Nations' Declaration on the Rights of Indigenous Peoples* into domestic law.[79] Continuing with the theme of economic prosperity, the Nationals propose a system of tax incentives for businesses (Indigenous or not) that might be able to provide employment in remote Indigenous communities.[80] In all, there is a suggestion of some broad objectives around using native title as a tool for Indigenous economic development, and perhaps a general openness to new or untested ideas.

The pre-election Liberal/Coalition policy on Indigenous affairs makes only one reference to land issues or native title. It asserts that housing problems for Indigenous people are caused not only by lack of finance but also by 'restrictive native title laws that don't allow for private home ownership'.[81] It is not clear whether this is a reference to the principal of inalienability in general, or whether it is limited to the inability of exclusive possession native title holders to use their assets as security for borrowing.

At the date of writing, the new government had not proposed any specific reforms to the native title system. Judging by the tone and content of the Coalition minority reports on the previous government's proposed amendments, it is unlikely that anything similar will be forthcoming. Those minority reports demonstrated a high sensitivity to the interests of the resources sector and the State governments, and a keen awareness of the transactional costs involved in any substantial change to the legislation. In February 2013, Senator Brandis (then the shadow Attorney-General) said that while the current system is not perfect, legislative change is unnecessary. He considered that the Native Title Amendment Bill 2012 (Cth) would 'remov[e] the obligation to negotiate in good faith' and thereby 'allow claimants to game the system',[82] (it is not clear which part of the Bill the Senator thought would have that effect).[83]

It is possible to draw a few tentative conclusions from all of the Coalition policy pronouncements just outlined:

(a) A Coalition Government is most likely to support proposals with the potential for significant and observable effects on Indigenous economic wellbeing or on the efficiency of the native title system - small-scale changes risk being dismissed as 'tinkering'.
(b) Arguments about improved economic wellbeing seem more likely to gain support than those based on rights.
(c) Any reform proposals will need to address the interests of the resources industry and (probably to a lesser extent) the States – this suggests a need to articulate 'win-win' scenarios rather than attempting to shift the balance in a notional zero-sum game.

Bringing these admittedly speculative propositions together, it seems that the most promising areas for reform are those in which 'both sides'[84] currently experience frustration and dissatisfaction with the status quo. Developing new and creative solutions for existing problems is more likely to produce results than continuing to push the same reforms as previously. In particular, improvements in efficiency are likely to be attractive to government and – all other things being equal – produce benefits for native title holders and claimants. However, throwing current arrangements up in the air for renegotiation is risky because when the different elements all fall back into place there is no guarantee that native title holders will not be in a worse position than before.

In relation to the proof of native title connection: the Australian Law Reform Commission has been tasked with examining options for making the requirements more flexible, particularly around the issues of cultural continuity and change. Given the policy priorities discussed above, the arguments for reform most likely to gain support in Canberra are those that focus on the time and expense of proving (and arguing about) continuity of cultural practice. In particular, advocates may wish to emphasise the lack of any link between that investment and *any* discernible policy outcome (much less a policy outcome related to Indigenous peoples' economic development). That is, if the new government is looking to get the best 'bang for its buck' in Indigenous expenditure, it may be interested in finding out how the current process for establishing native title under section 223 *Native Title Act 1993* (Cth) benefits anyone except the lawyers and anthropologists working for either side. Cutting down the time and money spent on often obscure factual inquiries may be attractive to the new government. The risk for native title parties, however, is that some State governments and industry groups have indicated they would

expect some kind of 'trade-off' for any change. To the extent that they see native title as imposing additional costs through compensation liability, increasing the costs of investment or reducing the Crown estate, then the States may resist moves to make it easier to prove. The cost of gaining their support may be a dilution of the content of rights. That is, States and other respondents may seek legislative changes that would diminish the legal and economic significance of native title, perhaps by limiting the circumstances in which the right to negotiate applies or reducing the time limit for negotiation, or else placing some kind of quantum limit on compensation liability.

Similar logic applies to questions of extinguishment. Any moves to expand the circumstances in which extinguishment can or must be disregarded will raise concerns among governments and industry about the increased cost of doing business. If there was less extinguishment, the future acts regime would apply in more places than it does currently. To native title holders that no doubt seems entirely fair and they may even take comfort in Senator Scullion's recent observation that 'despite the large number of claims being settled, the sky has not fallen in. Native Title is now an accepted part of how we do business in Australia'.[85] And yet in political terms the States' and proponents' concerns are likely to hold substantial sway in Canberra. In light of that, advocates for reform may find it useful to highlight the potential for governments to *avoid* compensation liability through provisions that disregard extinguishment. That is, where historical extinguishment is denied any ongoing effect, the compensation liability is likely to be lower. Again, this kind of trade-off carries risks for native title holders: changes in cultural practices, ecology or economic realities may mean that compensation could in some cases (though certainly not all) be more valuable to native title holders than the continued recognition of native title rights.

Finally the future acts regime may offer the strongest prospects of reform, but also the greatest potential for risks to native title holders' interests. Resource companies and native title bodies alike have long expressed dissatisfaction with the 'right to negotiate' process - the obscurity and complexity of its rules, the protracted and sometimes directionless nature of negotiations, the lack of any firm positions from which bargaining can occur. Uncertainty, cost and long time-lines for negotiation are likely to be particularly concerning to industry. Native title parties may be concerned about their lack of control over the outcome or the process, their inadequate negotiation capacity, the fairness of the deals struck, the degree to which they are accorded respect and recognition and the capacity for benefits to improve their social and economic circumstances. If new models for the negotiation regime can be developed to meet some of these concerns for both sides, there may be better prospects for reform than previously. The new government's view of this issue is difficult to gauge. On the one hand the Coalition's emphasis on native title's potential contribution to Indigenous economic development indicates they may be willing to back reforms in this direction. Mining may be seen as a source of private funding for 'closing the gap'. On the other hand, there may be some in the new government who agree with Andrew Forrest's characterisation of royalty payments as 'mining welfare', doing little to contribute to social and economic improvement.[86] On this logic, the contribution of mining to Indigenous employment may be seen as more important than any cash payments. Assuming provisionally that the Coalition would be willing to consider changes to the future acts regime, there is no guarantee that such changes would be unambiguously good for native title holders. For example, a shorter, simpler negotiation process would be attractive to many in the mining industry, but may weaken native title holders' bargaining position. Similarly, the uncertainty of which mining companies often complain may be one of the sole sources of leverage available to native title holders under the current system. Any reduction in that uncertainty would be damaging to native title holders' interests unless accompanied by greater certainty around environmental and heritage protection conditions and profit-sharing or royalty arrangements. All of this means that advocates for native title holders may have a better opportunity than previously to engage with government on substantial change to the future acts regime, but that opportunity carries the risk of losing hard-won ground in the process.

IV Conclusion

This paper has presented a guide to the native title reform processes of the previous government and offers some thoughts about where reform might be headed under the new government.

The first part of the paper demonstrated that subsequent to the amendments in 2010, no changes have been made to the *Native Title Act 1993* (Cth) despite a great deal of law reform activity. The explicit incrementalism of the Commonwealth Attorney-General's Department was apparently intended to

achieve certain and lasting changes, in contrast to the risk of large-scale reforms either being defeated in Parliament or repealed later. This article has avoided making the argument that the previous government's attempts at reform stalled either because they were too ambitious or because they were too narrow and obscure to gain sufficient support. The temptation to attempt to explain the outcome should be resisted because there are too many unknown and interacting factors that may have played a part: the government's fragile support in the lower house; the perceived need to appeal to a conservative constituency suspicious of the Indigenous rights agenda; economic imperatives favouring the resources industries; delicate State-Federal relations; leadership tensions, dynamics between Departments and their Ministers; or even simply a newly appointed Attorney-General not having sufficient time to get across the portfolio in time to get the Bill passed. Whatever the reasons, the window for reform under the previous government closed without having achieved the results promised by the incremental approach.

Quite separate from the question of what 'went wrong' with the Labor government's 'incremental approach' is the question of where avenues for future reform may lie. The second part of this article drew some tentative conclusions based on Coalition policy statements and previous positions. Although the ideological distance between the two major parties has narrowed significantly in recent decades, particularly when judged on their actions while in government, the new government is still likely to demonstrate a new set of priorities and approaches to policymaking. The Coalition has voiced a commitment to comprehensive rather than piecemeal reform, and has targeted efficiency and economic development as key objectives for the native title system. There are new opportunities to engage with government on reforms to the *Native Title Act 1993* (Cth), but advocates for native title parties should be aware of the significant risks involved. If the Running Man dance stops and actual movement begins, it will become all the more important to look where we are going.

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* The author writes in a personal capacity and his views are not necessarily those of his employer.

1 In 2009, the then Attorney-General Robert McClelland stated his belief that 'real advances in native title will only come through changes in the behaviour of all parties, rather than legislative overhaul'. Nevertheless, he believed that 'targeted legislative improvements can help encourage a broader, more flexible approach': Robert McClelland (Speech delivered at the 3rd Negotiating Native Title Forum, Melbourne, 20 February 2009) <http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Speeches/Pages/2009/Firstquarter/20February20093rdNegotiatingNativeTitleForum.html>.

2 Nicola Roxon, 'Keynote address' (Speech delivered at the National Native Title Conference, Townsville, 6 June 2012), 3 <http://www.aiatsis.gov.au/ntru/documents/NTNAugust2012.pdf>. Minister Roxon's endorsement of an incremental approach echoed remarks made earlier at the conference by Dr Neil Steritt, a Canadian Aboriginal expert in native title. Her successor as Attorney-General, Mark Dreyfus, similarly denied any intention to introduce a 'revolutionary shift in the processes undertaken, or outcomes achieved' in the native title system: Mark Dreyfus, 'Australia's Native Title Legacy: Delivering Economic Independence to Indigenous Australians' (Speech delivered at James Cook University, Townsville, 24 April 2013) <http://www-public.jcu.edu.au/events/JCU_122002>.

3 Strictly speaking, 13 Acts have amended the *Native Title Act 1993* (Cth) since 2007, but most have done so only incidentally.

4 Changes made to part 11, *Native Title Act 1993* (Cth).

5 New s 87A and associated amendments to ss 64, 87 and others.

6 Amendments to ss 86–86E, new s 94B.

7 Amendments to ss 108–136H.

8 New ss 138A–138G.

9 New ss 190F(6)–(7).

10 While not an exhaustive catalogue, these included: requiring the Registrar to make certain statements about an application's satisfaction of ss 190B and 190C (new s 190D(1B)); changes to the rules for joining as a party (s 84); an amendment to s 183 to allow proponents to apply to the Attorney-General for assistance in developing or reviewing standard-form future act agreements; and changes to the definition and workings of prescribed bodies corporate (ss 58(e), 59A, 253)

11 Among the more important technical changes are those to the registration process: ss190–190F.

12 The amending Act replaced references to mediation by the National Native Title Tribunal with references to 'an appropriate person or body' and specified that this may include Federal Court Registrars, District Registrars, Deputy Registrars or Deputy District Registrars; see *Native Title Act 1993* (Cth) ss 86A–86E, ss 94B–94S. Many other sections were amended accordingly. The new 'inquiry' function was passed to the Federal Court: ss 138B–138E. The *Courts and Tribunals Legislation Amendment (Administration) Act 2012* (Cth) had additional constraining effects

on the Tribunal's distinct role in the native title system.

13 Section 183 was repealed and a new s 213A was inserted.

14 The Court's powers under ss 87 and 87A were expanded to include the making of orders necessary to give effect to an agreement between the parties. Further, the amendments to those two sections specified the Court may rely on a statement of facts agreed by the parties.

15 These included specifying the procedures for ordering money to be held on trust by way of guarantee: ss 28(2) and (5B), 41–3, 52A. Further changes were also made to the process for recognising native title representative bodies and service providers in part 11, and to the manner in which the rules of evidence apply to native title hearings that commenced before certain changes were made to the *Evidence Act 1995* (Cth): s 214.

16 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2009' (Report, No 2, Australian Human Rights Commission, 2010) 78-79.

17 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2007' (Report, No 2, Australian Human Rights Commission, 2008) 30.

18 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008' (Report, No 2, Australian Human Rights Commission, 2009) 44-50.

19 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011' (Report, Australian Human Rights Commission, 2012) 157.

20 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2010' (Report, Australian Human Rights Commission, 2011) 41-44.

21 Justice Robert French, 'Lifting the Burden of Native Title – Some Modest Proposals for Improvement' (Speech delivered to the Federal Court Native Title User Group, Adelaide, 9 July 2008) <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/3.html>. The influence of these proposals on the reform program was acknowledged a number of times by Mr McClelland, including in the introduction to the exposure draft for amendments relating to historical extinguishment: Robert McClelland, 'Proposed Amendment to Enable the Historical Extinguishment of Native Title to Be Disregarded in Certain Circumstances' (Exposure Draft Legislation, Commonwealth Attorney-General's Department, 2010) <http://www.ag.gov.au/LegalSystem/NativeTitle/Documents/ProposedHistoricalExtinguishmentAmendmenttotheNativeTitleAct1993-January2010.pdf>. It is interesting that his Honour's emphasis on the 'modesty' of his proposals – a caution entirely in keeping with the position of a sitting member of the judiciary – was picked up and even amplified in the government's approach. See for example the characterisation of the Native Title Bill 2012 by an officer of the Attorney-General's Department as 'a modest set of proposals': Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill 2012* (2013) 35 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/nativetitle2012/report/~/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/native_title_2012/report/report.ashx>.

22 *Native Title Act 1993* (Cth) s 87(8)–(11), which was introduced by the *Native Title Amendment Act 2009* (Cth) sch 2, Item 5. While there are many judges who may not have felt comfortable making consent determinations on the basis of an agreed statement of facts without such an amendment, there were also a great many consent determinations made before the amendment in which findings of fact about the substance of native title were regarded as unnecessary or else as secondary to the task of giving effect to the parties' agreement: see *Nangkiriny v Western Australia* [2004] FCA 1156 [15] (cited in some 30 subsequent consent determination judgments); *Munn for and on behalf of the Gunggari People v State of Queensland* [2001] FCA 1229 [29]–[30] (cited in about 40 consent determination judgments). See, eg, *Trevor Close on behalf of the Githabul People v Minister for Lands* [2007] FCA 1847 per Branson J.

23 McClelland, above n 21.

24 Interestingly, paragraph (4)(b) of the proposed section would also operate to disregard the extinguishing effect of any other interest in the land that was created prior to the setting aside of the park or reserve.

25 Attorney-General's Department, *Past Native Title Reforms*, Australian Government's Attorney General's Department <http://www.ag.gov.au/LegalSystem/NativeTitle/Pages/Pastnativetitlereforms.aspx>.

26 Jenny Macklin and Robert McClelland, 'Leading Practice Agreements: Maximising Outcomes from Native Title Benefits' (Discussion Paper, July 2010) 12–14 <http://www.dss.gov.au/sites/default/files/documents/05_2012/native_title_discussion_paper.pdf>. See also Robert McClelland (Speech delivered at the Native Title Representative Bodies and Native Title Service Providers Chief Executive Officers and Professional Officers' Forum, Melbourne, 29 October 2010) <http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Speeches/s/2010/29October2010NativeTitleRepresentativeBodiesandNativeTitleServiceProvidersChiefExecutiveOfficersandProfessional.html>.

27 Minerals Council of Australia and National Native Title Council, Submission to the Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper – Leading Practice Agreements: Maximising*

Outcomes from Native Title Benefits, 30 November 2010 <http://www.ag.gov.au/LegalSystem/NativeTitle/Documents/MineralsCouncilofAustraliaandNationalNativeTitleCouncil.pdf>; Association of Mining and Exploration Companies, Submission to the Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper – Leading Practice Agreements: Maximising Outcomes from Native Title Benefits*, 30 November 2010 <http://www.ag.gov.au/LegalSystem/NativeTitle/Documents/AssociationofMiningandExplorationCompaniesAMEC.pdf>.

28 National Native Title Tribunal, Submission to the Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs, *Discussion paper – Leading Practice Agreements: Maximising Outcomes from Native Title Benefits*, 30 November 2010 <http://www.ag.gov.au/LegalSystem/NativeTitle/Documents/NationalNativeTitleTribunalNNTTSubmission.pdf>.

29 New South Wales Department of Premier and Cabinet, Submission to the Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs, *Discussion paper – Leading Practice Agreements: Maximising Outcomes from Native Title Benefits*, November 2010 <http://www.ag.gov.au/LegalSystem/NativeTitle/Documents/NewSouthWalesDepartmentofPremierandCabinet.pdf >.

30 Government of Western Australia, Submission to the Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs, *Discussion paper – Leading Practice Agreements: Maximising Outcomes from Native Title Benefits*, November 2010 <http://www.ag.gov.au/LegalSystem/NativeTitle/Documents/WesternAustraliaGovernment.pdf>.

31 Government of Western Australia, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title (Reform) Amendment 2011*, August 2011 <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=73467d20-fe20-4964-ab3e-fbe962310b9e>. Minerals Council of Australia, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title (Reform) Amendment 2011*, 26 July 2011 <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=480ffdeb-f02b-4040-9f09-76242f1a152c>.

32 National Congress of Australia's First Peoples, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title (Reform) Amendment 2011*, October 2011 <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=311c7ee2-fe94-4522-88fa-01c1a41e520f>.

33 See, eg, Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title (Reform) Amendment 2011*, 10 August 2011 <http://www.aiatsis.gov.au/ntru/docs/2011inquiryntab.pdf>. Another submission raising practical issues was: National Native Title Tribunal, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title (Reform) Amendment 2011*, 29 July 2011 <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=7c45d134-2dea-4b2d-94d5-c6f6c2375512>.

34 Commonwealth Attorney-General's Department, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title (Reform) Amendment 2011*, 29 July 2011, 2 <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=05f0867a-5784-4620-a5d2-5a43bd342aa4>.

35 Certainly, it seems that the comment was interpreted as having that literal meaning: for example, the Chamber of Minerals and Energy of Western Australia criticised the Native Title Amendment Bill 2012 (Cth) on the grounds that it did not meet the government's objective of not substantially changing the balance of rights: Chamber of Minerals and Energy of Western Australia, Submission to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs, 31 January 2013, 2 <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/native%20title%20bill/subs/sub%20007.pdf>.

36 A more usual approach was expressed by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in its report on the Native Title Amendment Bill 2012:

> Submissions to the inquiry raised a number of wider concerns about the native title system. ... The Committee does not necessarily endorse nor concur with these views; however, it has been clear through the course of this inquiry that there is a need for the issues below to be brought to the attention of the Government.

House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Advisory Report: Native Title Amendment Bill 2012* (2013), 33 <http://parlinfo.aph.gov.au/parlInfo/download/publications/tabledpapers/67899/upload_pdf/committee_atsia_native%20title%20bill_report_final.pdf;fileType=application%2Fpdf#search=%22publications/tabledpapers/67899%22>.

37 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011), 37–9 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/nativetitlethree/report/index>.

38 Ibid 37.

39 Ibid 37.

40 This contrast was picked up in the Coalition Senators' minority report on the Native Title Amendment Bill 2012: ibid 41–2.

41 Native Title Amendment (Reform) Bill (No. 1) 2012 (Cth).

42 Roxon, above n 2.

43 Two things may be noted about this. Firstly, it does not reflect the Attorney-General's commitment in June 2012 to 'legislate criteria' for good faith negotiations, since indicia are a weaker form of regulation than criteria. Secondly, notwithstanding the Bill's use of indicia from the industrial legislation rather than from the existing native title law, the two sets of indicia are very similar in substance. The legislative stipulation of the proposed indicia would not have altered the law in any significant way. That said, other aspects of the proposed changes would have had greater impact on good faith negotiations, particularly the requirement to use 'all reasonable efforts' to reach agreement, the Tribunal's power to consider the reasonableness of offers, and the shift of burden of proof to the party seeking to establish their own good faith.

44 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 37.

45 The 'Njamal indicia' refers to the legal test set out in *Western Australia v Taylor* (1996) 134 FLR 211. Given that that test is already a settled part of native title law in Australia, it is not clear what purpose would have been served by codifying the indicia in legislation.

46 Senate Legal and Constitutional Affairs Legislation Committee, above n 21.

47 The Coalition members complained that '[s]ufficient time and resources were not made available' for consultation beyond a 'narrow list of those agencies which have the significant resources to act as national advocates on behalf of their stakeholders'. It is not clear whether this was a reference to native title representative bodies, or peak industry bodies, or both. No specific recommendations were made as to the kind of consultation process that would have satisfied the Coalition members: House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Advisory report on the Native Title Amendment Bill 2012* (2012) 50–1.

48 Ibid.

49 Ibid 50.

50 Ibid 51–2. The counter to this observation, of course, is that agreements are reached and challenges to good faith are rare *precisely because* native title parties know their chances of succeeding at the Tribunal are slim. Given that native title parties' complaint is that the existing law is inadequate, it seems like a non-sequitur to argue against reform based on the number of instances of 'bad faith' identified by reference to the existing law.

51 Ibid 51.

52 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill 2012* (2012) 42.

53 Ibid.

54 Ibid.

55 Ibid 42–6.

56 *Income Tax Assessment Act 1997* (Cth) s 59.50.

57 *Income Tax Assessment Act 1997* (Cth) s 59.50(3).

58 *Income Tax Assessment Act 1997* (Cth) s 59.50.

59 *Charities Act 2013* (Cth) s 9.

60 Jenny Macklin, Mark Dreyfus and David Bradbury, 'Benefiting Indigenous communities through native title reform' (Joint Media Release, 3 August 2013) <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2013/150.htm&pageID=003&min=djba&Year=&DocType=>.

61 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2010' (Report, No 2, Australian Human Rights Commission, 2011) 55; Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011' (Report, Australian Human Rights Commission, 2012) 14; The House of Representatives Committee Report on the Native Title Amendment Bill 2012 (Cth) also recommended a comprehensive review, although it recommended that the review be conducted by the Standing Committee on Aboriginal and Torres Strait Islander Affairs: House Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives, *Inquiry into the Native Title Amendment Bill 2012,* (2013) <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/native%20title%20bill/report.htm>.

62 Mark Dreyfus, 'Draft Terms of Reference: Review of the Native title Act 1993' (Draft Report, Australian Government Attorney-General's Department, 6 June 2013) <http://www.ag.gov.au/Consultations/Documents/AustralianLawReformCommissionnativetitleinquiry/Review%20of%20the%20Native%20Title%20Act%201993%20-%20draft%20terms%20of%20reference.PDF>.

63 Commonwealth Attorney-General's Department, *Review of the Native Title Act 1993 by the Australian Law Reform Commission: Scope of Review,* 4 <http://www.ag.gov.au/Consultations/Documents/AustralianLawReformCommissionnativetitleinquiry/Review%20of%20the%20Native%20Title%20Act%201993%20by%20the%20Australian%20Law%20Reform%20Commission%20-%20scope%20of%20review.PDF>.

64 Mark Dreyfus, *Terms of Reference: Review of the Native Title*

Act 1993 (3 August 2013) Australian Law Reform Commission, 2 <http://www.alrc.gov.au/inquiries/native-title-act-1993/terms-reference>.

65 These numbers are based on information as at the time of writing; challenges or recounts may change the distribution of seats.

66 Governor-General, *Administrative Arrangements Order*, 18 September 2013 <http://www.dpmc.gov.au/parliamentary/docs/aao_20130918.pdf>.

67 Governor-General, *Amendments to the Administrative Arrangements Order*, 3 October 2013 <http://www.dpmc.gov.au/parliamentary/docs/aao_amendments_20131003.pdf>.

68 Senator Scullion was speaking in his capacity as Shadow Minister for Aboriginal and Torres Strait Islander Affairs, on the assumption that should the Coalition take government his role would be similar to Jenny Macklin's, overseeing funding for native title representative bodies and prescribed bodies corporate: Nigel Scullion (Speech delivered at the National Native Title Conference, Alice Springs, 5 June 2013) <http://www.nigelscullion.com/media-hub/indigenous-affairs/speech-national-native-title-conference-alice-springs>.

69 Ibid.

70 Ibid.

71 Robert McClelland (Speech delivered at the Negotiating Native Title Forum, Brisbane, 29 February 2008) <http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Speeches/Pages/2008/Firstquarter/29February2008NegotiatingNativeTitleForum.html>.

72 The Nationals, *Our Plan for Regional Australia* (September 2013) 54 < http://www.nationals.org.au/Portals/0/2013/policy/Policy_Platform_August2013.pdf >.

73 Ibid.

74 The policy platform states that 'Under Labor, Native Title is convoluted and uncertain' and that Labor's 'application of Native Title has resulted in frustration, conflict and lengthy delays': ibid 54. In light of the minimal nature of the changes made since Labor took government in late 2007, compared to the substantial changes made by the Howard government in 1998, this claim seems tenuous at best. But its significance lies in its expression of greater dissatisfaction with the native title system than had been expressed by the Labor government.

75 Ibid 54.

76 Ibid 55.

77 Ibid 55.

78 Ibid 53.

79 Similarly, the policy platform expresses support for constitutional change, but without going so far as to endorse the current model for recognition: ibid 53.

80 Ibid 57.

81 Liberal-National Coalition, *The Coalition's Policy on Indigenous Affairs* (September 2013) 6 <http://lpaweb-static.s3.amazonaws.com/Coalition%202013%20Election%20Policy%20%E2%80%93%20Indigenous%20-%20final.pdf>.

82 Patricia Karvelas, 'George Brandis says regime installed by the Howard government doesn't need change', *The Australian* (online), 6 February 2013 <http://www.theaustralian.com.au/national-affairs/policy/george-brandis-says-regime-installed-by-the-howard-government-doesnt-need-change/story-fn9hm1pm-1226571158665#>.

83 See the comment of the National Native Title Tribunal that codifying existing indicia would 'serve little purpose': National Native Title Tribunal, above n 29, 28.

84 This shorthand is intended to refer to native title holders and non-native title holders; it is recognised that diverse interests and objectives are held by the States and Territories, the Commonwealth (in its many roles), industry respondents, the Tribunal and the Federal Court.

85 Scullion, above n 70.

86 ABC TV, 'Iron and Dust', *Four Corners*, 18 July 2011 (Kerry O'Brien) <http://www.abc.net.au/4corners/content/2011/s3272125.htm>.