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27th May 2011

The Senate
Standing Committee on Legal and Constitutional
Affairs
PO Box 6100 Parliament House
CANBERRA ACT 2600

Dear Madam,

RE: Inquiry into the Native Title Amendment (Reform) Bill 2011

I refer to your letter of 20 May 2011 inviting submissions to the Senate enquiry.

By way of submission, please find enclosed a copy of the letter forwarded to Senator Siewert.

Yours faithfully

Martin Doré
Principal Legal Officer
North Queensland Land Council Native Title Representative Body Aboriginal Corporation

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18th April, 2011

Senator Rachel Siewert
Australian Greens Spokesperson on Aboriginal & Torres Strait Islander Issues
Unit 1, 151 Brisbane Street
NORTHBRIDGE W.A 6000
Facsimile: (02) 6277 5762

Dear Senator,

Thank you for supplying a copy of the Native Title Amendments (Reform) Bill 2011 and the cover of your letter dated 30th March, 2011.

I set out in this letter some concerns that we would have in relation to the Bill.

Whilst we applaud the reforms that have been incorporated into the Native Title Amendment (reform) Bill 2011 we feel that in two significant matters the Bill does not go far enough.

Firstly – The requirement to negotiate in good faith.

Whilst we support the proposed changes we are concerned with the loop hole that is left by excluding confidential or commercially sensitive information.

If the Native Title holders are engaged in negotiations with the possibility that an arrangement may result with a payment to them on a royalty or profit sharing basis [which is also proposed by your reforms] then they should be entitled to have all information relative to predicting what that profit might be.

We accept that this can be very sensitive information but feel adequate protection could be achieved by having very tough sanctions for breach. It would also be of use if the first obligation of the Tribunal presiding was to ensure that participants understood the requirements of confidentiality- perhaps even having a Tribunal approved confidentiality deed signed by all participants.

Further we are concerned that there are many ways companies can artificially effect "profit" for example by paying outrageous amounts to Directors or company officials but perhaps that an issue for general reform of corporations law rather than Native Title law.

Secondly the reversal of the Burden of proof

The proposals put forward do not go far enough and suffer from the same defect as other proposals we have seen which all rely on some trigger.

Here the presumption is triggered by a combination of matters which can be paraphrased as follows:

(a) An application for determination of native title is made
(b) The members of the claim group reasonably believe the laws and customs observed to be traditional
(c) The members of the Native Title group , by the laws and customs observed have a connection
(d) The claim group members reasonably believe that they are descended from ancestors who by their laws and customs had connection pre sovereignty.

The difficulty here is that part of the trigger is the requirement in para (c) that in order to trigger the presumption it must be shown [without benefit of the presumption] that the group has by its laws and customs observed a connection to land. This means that not much has changed in what needs to be proved. The other elements concerning connection are that there has been a continuity of that connection since sovereignty.

If you establish the criteria in paragraph (c) and the other matters are in place to trigger the presumption what is the point of paragraph (b) in the presumption to the effect that it is to be presumed that the native title claim group has a connection with land or waters by those laws and customs. This is the very thing that you had to prove in order to get the presumption so what has been gained?

In my submission the provisions are circulatory and ultimately of little use.

Further there is a real danger in making part of the trigger a reasonable belief in a certain state of affairs.

Where there are Governments or other respondents who do not believe in native title they will simply raise the issue as to whether the requisite belief is in fact reasonably held – they may seek to cross examine members of the claim group.

In order to defend against such cross examination and enquiry as to whether a belief is reasonably held then you would have to introduce much of the same evidence about the existence of native title as you would in a trial ,to demonstrate that not only was the belief held but that it was in all the circumstances *reasonably* held.

Again little appears to have been gained.

Further there is a difficulty in requiring the belief to be held collectively by the claim group. How do you judge a collective belief of a large group of people? Does every member of the group have to depose to holding a belief? Is it a certain percentage? What if under cross-examination 6 members concede they don't hold the requisite belief – is that fatal to the rest of the group?

In our submission it is an error to have the requirement of a belief or reasonable belief as part of the trigger allowing the presumption to apply.

It is also not workable to have to prove connection in order to get the presumption that connection applied at sovereignty.

Quite simply it should be that the presumption applies unless displaced by cogent evidence to the contrary. It should apply without having any particular trigger points [other than purely administrative points].

It should not be such that members of the claim group could be cross-examined on their beliefs.

To require the existence of certain criteria before the presumption is triggered simply serves to transfer the point of enquiry from one position to another and leaves the Native Title holders no better off in terms of proof of their claim.

Whilst we have in the past been most critical of the requirements of the registration test and the inconsistent way it is applied it must be borne in mind that in order to pass the test it must be established that prima facia at least one of the rights or interests claimed is likely to be made out.

We are not supporters of the registration test as it is currently applied but can see that if it is necessary to have something more than mere lodgement of a claim as the point when the presumption applies the passing of registration test is the logical point.

Yours faithfully,

Martin Dore
Principal Legal Officer
North Queensland Land Council Native Title Representative Body Aboriginal Corporation