



**Senate Standing Committee on Legal and Constitutional Affairs:
Inquiry into the Native Title Amendment Bill 2009**

To Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA

Submission by the Northern Territory Government.
16 April 2009

General Comment

The Committee invites comment on its inquiry into the *Native Title Amendment Bill* 2009 (Cwth). The Territory considers the proposed amendments in the Bill will improve the operation of the native title system, and supports them.

Specific comments

1. Proposal to enable the Federal Court to make consent orders concerning matters beyond native title.

The Northern Territory is committed to consent determinations as a practical and meaningful mechanism to resolve native title, and supports proposals to improve this process.

It is the current policy of the Northern Territory to support consent determinations of native title wherever there is sufficient information concerning the existence of native title holders and native title rights, rather than to seek a litigated outcome.

The Northern Territory accepts and supports the principle that a fundamental purpose of the litigation of native title claims is to provide certainty with respect to the native title rights of native title holders, and therefore the legal obligations of the Northern Territory and other interest holders in land subject to native title.

The Northern Territory also recognizes that an equally fundamental aspect of the recognition of native title rights, within the litigation context, is acknowledging past unlawful interference with those rights and identifying practical outcomes of benefit to those who have had their legal rights infringed. Native title is a communal right, and improved economic and social outcomes for future generations benefits native title holders and flows on to the wider Northern Territory community.

The Territory would caution however, against any measures which would discourage or mitigate against opportunities for good faith negotiations to settle native title without resort to the court.

The Federal Court has an understandable emphasis on legal and technical processes, which may not necessarily fit the timetable or priorities of negotiated settlements. The Territory would encourage the inclusion of caveats that require the court to consider opportunities for negotiated settlements before making any orders.

2. Proposal to confirm that the Federal Court has discretion to rely on an agreed statement of facts between the parties in making a consent determination.

The intention of this proposal is to allow for greater efficiency in the native title process, particularly where there is no disagreement between the key parties about the facts.

The use of agreed statements of facts has been commonplace in all forms of both civil and criminal litigation for a considerable period. Its purpose is to avoid a court

having to spend unnecessary time determining facts which are not in dispute. It is the policy of the Northern Territory to rely on an agreed statement of facts between the parties in the making of a consent determination, and where it is feasible, in the hearing of a litigated native title claim. The Northern Territory supports this proposal.

3. Proposal to expand the rules of evidence to apply to native title proceedings.

The amendments allow a court hearing a native title claim, to rely on evidence that would no longer be admissible in a civil proceeding, specifically

- "hearsay" evidence (a witness cannot give evidence in the form of second-hand conversations purporting to establish a fact);
- opinion evidence (a witness cannot give evidence in the form of an opinion that a fact exists);
- narrative evidence (a witness can only give evidence in the question/answer form, and cannot give evidence in the form of a general narrative of traditional law or events that may place specific facts in a particular context).

The Northern Territory recognizes that, in establishing a case that relies on events occurring in the distant past, or relates to the content of traditional laws and customs, Aboriginal witnesses are significantly disadvantaged by the current legal rules concerning the law of evidence. The transmission of knowledge in traditional societies has occurred by means of oral histories, usually in a narrative form and based on what has been handed down from generation to generation, rather than written documentation, to which the Australian law of evidence gives primacy.

In order to enable a court to determine issues in dispute, it is desirable that Aboriginal witnesses be able to tell their story as far as possible in their own words, rather than being obliged to fracture that knowledge to enable it to fit into the existing categories of the law of evidence.

At the end of the day, it is a matter for the court to weight the value and relevance of all the evidence that has been submitted to it, noting always that the parties to the litigation retain their right to make their arguments about the probative value or relevance of the evidence. The Northern Territory believes the proposed changes to the rules of evidence do not diminish the judicial function to determine whether a case has been established on the evidence submitted to the court. Accordingly, the Northern Territory supports this proposal.

4. Proposal to improve the operation of the representative body provisions by streamlining and improving these processes to allow for more timely and less administratively burdensome arrangements to be put in place.

A number of complexities and overlaps caused by the present legislation, which provides an extremely detailed series of procedures for bodies wishing to act as representatives of native title holders, have been known to exist for some time. By and large, the proposals involve the clarification or consolidation of existing provisions, thus streamlining the process for recognition of representative bodies, and improving administration of the native title system.

The Northern Territory supports these proposals.

5. Proposal to expand the current assistance provisions in relation to all mediations by all mediators.

Extensive proposals in the Bill provide for the rationalisation of the mediation provisions in the legislation, allowing for one body to mediate the whole of a native title claim from beginning to end, as well as allowing the use of referee reports on specific issues.

The Northern Territory believes that these changes will assist judges to reduce the cost and length of trials for litigants by enabling the Court to more effectively manage large litigation. The Northern Territory consequently supports this proposal for the above reasons.

6. Proposal to make a number of minor and technical amendments

The Northern Territory supports these proposals, noting that they are intended to improve the operation of the native title process.