

National
Native Title
Council

*spirit
of
Change*

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Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
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Parliament House
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Dear Committee

RE: INQUIRY INTO THE *NATIVE TITLE LEGISLATION AMENDMENT BILL 2019*: RESPONSE TO COMMITTEE QUESTIONS ON NOTICE

Thank you for the opportunity to respond to your questions regarding matters raised in the National Native Title Council (NNTC) submission and other submissions on the *Native Title Legislation Amendment Bill 2019*. The NNTC provides the following additional information in response to your questions.

Question 1

What factors informed the NNTC's position to not support the proposed increased powers of the Registrar of the Office of the Registrar of Indigenous Corporations in Schedule 8 Part 3. What feedback have you received from native service providers and/or RNTBCs on these amendments?

In its submission on the *Native Title Legislation Amendment Bill 2018* the NNTC strongly opposed the nature of the increased powers of the Registrar that were proposed in that Bill. The NNTC also discussed its concerns directly with senior officers from the Attorney-General's Department and the Registrar's Office early last year and expressed the view that consideration of any significant increase in the Registrar's powers should be undertaken in the context of a comprehensive review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

Subsequently, the Minister for Indigenous Australians, the Hon Ken Wyatt, announced a comprehensive review of the CATSI Act to consider if it is serving its intended purpose, including its effectiveness as a special measure under the *Racial Discrimination Act 1976*.

As the NNTC explained in its recent submission regarding the current Bill, the revised proposal to increase the powers of the Registrar affects the rights of self-determination of native title holders and their corporations and this is a concern to the NNTC and its members. The NNTC maintains the position it articulated last year that it is appropriate to consider any amendments to the CATSI Act in the context of the comprehensive review of the Act that is currently underway. The nature and scope of proposed amendments to the Registrar's powers can then be considered in conjunction with other interrelated amendments to the CATSI Act that are likely to be proposed.

This view that the NNTC outlined in its submission of 27 November 2019 reflects the views that its Native Title Representative Body and Service Providers (NTRB/SPs) and RNTBC members expressed in the course of meetings convened by the NNTC in the second half of last year.

Question 2

The National Native Title Tribunal has argued that it be given a new arbitral power in addition to the mediation function proposed in the bill. Do you have a view on that suggestion?

The NNTC has not had an opportunity to consult with its members about the NNTT's proposal regarding an arbitral power, and therefore is not in a position to accurately convey the views of its members to the Committee.

However, the NNTC notes that the current proposal in the Bill to insert section 60AAA provides an option for an RNTBC or a common law holder to request the NNTT to provide assistance to promote agreement about matters relating to native title or the Act. This is an appropriate and welcome amendment that the NNTC supports, as it provides an option for securing additional expertise and support for RNTBCs and common law holders to make their own decisions and agreements about native title matters.

The NNTC's understanding of the NNTT's proposal that it be granted an arbitral power is that if an RNTBC or common law holder has voluntarily sought assistance from the NNTT and there is an unsuccessful mediation (and also, as the NNTT suggests, one of the parties is not prepared to agree to mediation) the NNTT should have the power to make a binding determination about the matter or dispute. The NNTT also suggests that an arbitral power could relate to disputes about decisions of an RNTBC board regarding admission of traditional owners to membership, and disputes about the validity of decisions of the board that have any effect on land and waters within a determination area.

While the NNTT proposal extends beyond the scope of section 60AAA, it also appears to be inconsistent with the intent of the proposed section 60AAA which the Explanatory Memorandum explains is drafted broadly to provide flexibility in how it is used. The Explanatory Memorandum indicates that this provision is intended to enable the NNTT to provide assistance to RNTBCs and common law holders to establish governance processes that are consistent with the Native Title Act and PBC Regulations, support resolution of disputes, and facilitate collaboration between RNTBCs. An arbitral role for the NNTT would appear to be inconsistent with these assistance and facilitation functions envisaged in the Explanatory Memorandum.

On balance, the NNTC considers it very likely that its NTRB/SP and RNTBC members would strongly oppose the NNTT proposal that it be granted an arbitral function to deal with the matters referred to above. The NNTT exercising an arbitral role in these circumstances may seriously undermine the self-determination rights of native title holders and RNTBCs to make their own decisions about a range of significant native title matters.

Question 3

Please elaborate on your concerns with the proposed amendments in Schedule 5.

The proposed amendments in Schedule 5 of the 2019 Bill concerning the intervention of the Commonwealth in native title proceedings are substantially the same as those that were proposed in the 2018 Bill.

The NNTC explained its concerns about the proposed amendments in Schedule 5 in some detail in its submission in December 2018 and we reiterate these concerns below.

The NNTC notes that the Explanatory Memorandum describes the proposed amendments in Schedule 5 as technical amendments to clarify the role of the Commonwealth Minister as intervener in native title proceedings. The NNTC considers that some of these amendments are more than technical, as they increase the significance of the Commonwealth Minister's intervention in native title matters.

Clause 1 amends subsection 84A(1) by clarifying that the Commonwealth can intervene in proceedings before the High Court. This provision reflects current practice and is supported by the NNTC.

Clauses 2 and 3 amend section 87(1)(a) to require that the Commonwealth, if it has chosen to intervene in proceedings, be a party to any agreement on the terms of an order of the Federal Court. The effect of this provision is to allow the Commonwealth to prevent orders that are consented to by the parties in circumstances where the Commonwealth does not agree to the course proposed by the parties. Clauses 4 and 5 propose consequential amendments to section 87(1) to give effect to the proposed amendments to 87(1)(a).

The effect of these amendments would be to give the Commonwealth a veto over an agreement in relation to a Federal Court order reached by the actual parties to the proceedings. This provision will only impede negotiated agreements reached by those parties actually affected, and it is not supported. To the extent the proposed provision reflects current practice it is unnecessary and imposes further technicality upon an already highly complex statutory regime.

Clauses 6 and 7 propose amendments to section 87A. This section deals with consent determinations. Currently section 87A requires the Commonwealth to be a party to an agreement for a consent determination if at any stage the Commonwealth had intervened in the proceedings. The proposed amendments would require the Commonwealth to be a party to such an agreement only if the Commonwealth is intervening at the time the agreement is made. The NNTC supports these amendments.

Clause 8 deals with the commencement of the Schedule's provisions. It provides that the proposed amendments would apply to any proceedings commenced after the amending provisions commence and any proceedings on foot at the time the amending provisions commence.

Parties are entitled to certainty in the administration of proceedings currently before the Court. The NNTC therefore considers that it is inappropriate for the amending provisions to apply to proceedings already on foot.

The amendments proposed in clauses 9 to 11 of Schedule 5 clarify the operation of s87A and are supported.

Question 4

The Law Council of Australia submits that the dichotomy between 'traditional' processes of decision-making and 'agreed to and adopted' in proposed section 251BA results in a 'narrowing' of the use of traditional laws and customs for practical reasons. They argue that rather than having a mandated decision-making process, native title claim groups should be enabled to pursue a decision-making process of its choice. Does your organisation have any comments on this position?

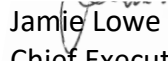
The NNTC has made it clear in its submissions that it supports the proposed amendments in Schedule 1 including those in proposed section 251BA that clarify that native title holders may impose 'conditions on authority' when authorising the making of indigenous land use agreements and native title determination or compensation applications.

The NNTC has not had an opportunity to consult its members about the concerns and analysis presented by the Law Council of Australia in its submission and therefore is not in a position to accurately represent their views to the Committee.

Conclusion

I hope these responses to your questions clarify the views that the NNTC expressed in its submission of 27 November 2019. Please do not hesitate to contact me if you require any further information.

Yours faithfully,


Jamie Lowe
Chief Executive Officer