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Ms Jackie Morris  
Acting Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Ms Morris

### **INQUIRY INTO THE NATIVE TITLE AMENDMENT BILL 2006**

Thank you for inviting the Office of Native Title to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006 ("the Bill").

The Office of Native Title understands that the Bill incorporates amendments arising from four of the six elements of the Commonwealth's native title reform package, namely the Claims Resolution Review, Native Title Representative Body reforms, the examination of Prescribed Bodies Corporate and the review of the respondent funding guidelines.

Overall, the Office of Native Title considers the amendments proposed in the Bill have the potential to improve the practical operation of the native title system. However, the Office of Native Title does have concerns with some provisions of the Bill, which are addressed in the attached submission.

Please do not hesitate to contact the Office of Native Title with any queries about this submission on 08 9222 9506.

Yours sincerely

**GARY HAMLEY  
EXECUTIVE DIRECTOR  
OFFICE OF NATIVE TITLE**

**Att**

## Introduction

The Office of Native Title (the ONT) considers the provisions of the Native Title Amendment Bill 2006 ("the Bill") on the whole have the potential to improve the practical application of the *Native Title Act 1993* (NTA). Nevertheless, several recommendations are proposed in respect of the Bill and its implementation that would further enhance its potential to improve the efficiency and effectiveness of the native title system. In particular, it is recommended that:

- (i) the Commonwealth provide further information about the need for and objective of proposed amendments that would remove satisfactory representation and consultation as criteria for NTRB recognition;
- (ii) the Commonwealth commit to providing appropriate funding to any NTRBs affected by the proposed amendments that would enable extension of representative NTRB areas without agreement of the relevant NTRB;
- (iii) the parties to a native title mediation, rather than the presiding NNTT member, be responsible for raising alleged breaches of the good faith obligation in proposed section 136GA;
- (iv) the presiding NNTT member be required to notify and consider the responses of parties considered to be in breach of the good faith obligation for native title mediation in proposed section 136GA before reporting or publishing details of an alleged breach;
- (v) agreement of the relevant State or Territory government be a pre-condition of any review under proposed Division 4AA of Part 6, or any inquiry under proposed Subdivision AA of Division 5 of Part 6 that would consider matters capable of review under proposed Division 4AA of Part 6;
- (vi) a provision be included in proposed Division 4AA of Part 6 making clear the findings of such reviews would not be binding;
- (vii) the criteria upon which the NNTT would assess connection in any review under proposed Division 4AA of Part 6 be made publicly available;
- (viii) draft regulations giving effect to the recommendations of the Commonwealth's Report on the *Structures and Processes of Prescribed Bodies Corporate* be publicly released to enable stakeholder consideration in conjunction with the Bill; and
- (ix) the Commonwealth undertake to review the impact of proposed amendments to section 183 of the NTA to ensure there are no detrimental impacts on the ability of third parties to effectively participate in native title determination application negotiations, and the ability of native title claimants/holders and their representatives to participate in future act negotiations.

These recommendations are further discussed in the following schedule-by-schedule analysis.



**Schedule 1 - Amendments relating to representative Aboriginal/Torres Strait Islander bodies**

*Items 13, 18 – 20, 24 - proposed amendments to criteria for NTRB recognition*

2. Items 13, 18 – 20 and 24 would amend the NTA to remove the requirement for the Commonwealth Minister, when considering whether to recognise or withdraw recognition from an eligible body as a Native Title Representative Body, or to vary, reduce or extend a body's representative area, to be satisfied as to whether the body:
  - (a) would or is satisfactorily representing native title claimants and holders in the relevant area, and
  - (b) would or is consulting effectively with Indigenous peoples in the relevant area.

The need for and objective of these proposed amendments is not clear. It is recommended that the Commonwealth provide further information about the rationale for these amendments.

3. Under the proposed amendments NTRBs would still be required under the NTA to perform their functions in a manner that maintains structures and processes that promote the satisfactory representation of, and effective consultation with, relevant native title claimants and holders and Indigenous peoples. However, apart from consultation required in respect of NTRB's facilitation and assistance functions, there would be no requirement that satisfactory representation actually occur. Further, if satisfactory representation does not occur, NTRB recognition could no longer be withdrawn on those grounds.
4. Many NTRBs perform important representative functions within their areas and, following the abolition of ATSIC, are one of the few remaining representative structures for Indigenous Australians. It is unclear whether NTRBs and those they represent support these amendments, which appear to be aimed at reducing the representative role of NTRBs.

*Items 18 and 19 - proposed amendments to provisions governing the extension of NTRB representative areas*

5. It is proposed to amend the NTA to enable the Commonwealth Minister to extend or vary NTRB representative areas without the agreement of the relevant NTRB or NTRBs. While the Commonwealth Minister would be required to provide reasons for the proposed extension or variation to the relevant body, the amendments do not place any conditions on the circumstances in which an extension or variation at the Minister's initiative could occur. It is recommended that in order to provide some certainty to NTRBs, those they represent and those they engage with, including State and Territory governments, the circumstances in which the Minister can vary or extend the representative area be prescribed in the NTA.
6. Further, given a variation or extension in representative area could have a significant impact on the priorities and expenditure of NTRBs, it is further recommended that the Commonwealth commit to providing appropriate funding



to any NTRBs affected by the provisions to ensure they are able to effectively perform their functions in respect of any new areas.

## **Schedule 2 – Claims resolution review**

### *Item 52 - proposed sanctions for breach of good faith obligation*

7. The inclusion of a good faith requirement in the NTA in respect of native title mediation is supported. However, to preserve the impartiality of the presiding National Native Title Tribunal (NNTT) member, parties to the mediation rather than the NNTT member should raise any alleged breaches in the first instance.
8. Further, and more significantly, the proposed sanctions would see the NNTT empowered to make reports about potential breaches of the good faith requirement to certain entities (according to who is considered to be in breach) including the Court, and to include details of alleged breaches by government parties in its annual report. It is a matter of concern that the proposed amendments would not accord natural justice to parties allegedly contravening the good faith requirement, in so far as there is no requirement for the NNTT to advise and/or seek the views of parties considered to be in breach before it reports or publishes details of an alleged breach. It is recommended the proposed provisions be amended to require the presiding NNTT member to advise a party if he or she considers they are not acting in good faith and give that party an opportunity to respond.

### *Item 53 - proposed Division 4AA of Part 6 - NNTT connection review function*

9. The proposed amendments to enable the NNTT to undertake a review of connection material have the potential to undermine State and Territory government connection assessment processes, cause further delays in the resolution of native title claims and place increased pressure on an already limited pool of experts in the system.
10. It is understood the main intent of the provisions is to facilitate the agreement of non-government third parties to proposed consent determinations, where they are reluctant to accept the relevant State or Territory government's assessment that connection is met. Consistent with the Commonwealth's push for States and Territories to adopt transparent practices, the Western Australian Government has released connection guidelines and, in the case of positive assessments, provides respondent parties with a 'position paper' outlining the basis upon which the Government considers connection is met. Despite participation in the proposed NNTT connection reviews being voluntary, native title parties could nevertheless use the provisions as a means of "forum shopping" if the State Government considers that connection is not met, potentially undermining the transparent processes the Western Australian Government has put in place.
11. In addition, if claimants seek an NNTT review following a decision by the relevant government that connection is not satisfied, the resolution of the claim, whether by an agreed or litigated outcome that native title does not exist, will also be further delayed. The amendments also anticipate the NNTT relying on consultants to conduct a review, which could further increase demand on an already limited pool of qualified experts, such as anthropologists. The Commonwealth Attorney-General's recent comments acknowledged that the current shortage of anthropologists in the native title system is contributing to the



delay in resolving native title claims. If the NNTT also seeks to rely on anthropologists in undertaking reviews of connection, the demands on anthropologists and the associated delay in resolving claims would increase.

12. As noted in a speech delivered on the Federal Attorney-General's behalf<sup>1</sup>, State and Territory governments are best placed to assess connection issues in native title negotiations. Accordingly, reviews under proposed Division 4AA of Part 6 should only occur with the agreement of the relevant State or Territory government. Given the State or Territory government's agreement is necessary in order to proceed to any consent determination, an NNTT review of connection would be an inefficient use of resources where it does not have the support of the relevant State or Territory government.
13. The Western Australian Government also recommends a provision be inserted making clear the findings of such reviews would not be binding, as neither the Bill nor the Explanatory Memorandum confirm this at present. It is further recommended that the criteria upon which the NNTT would assess connection be made publicly available.

*Items 57 to 75 - proposed Subdivision AA of Division 5 of Part 6 - NNTT native title application inquiry function*

14. Similar concerns to those outlined above in respect of the NNTT's proposed review function arise in relation to the proposed NNTT native title application inquiry function, under which it is envisaged the NNTT could conduct an inquiry into connection (see paragraph 2.130 of the Explanatory Memorandum to the Bill). Accordingly, the Western Australian Government recommends that where such an inquiry would be about matters that are capable of review under proposed Division 4AA of Part 6, agreement of the relevant State or Territory government must be obtained.

**Schedule 3 – Amendments relating to prescribed bodies corporate**

*Item 3 – proposed amendments to enable an existing PBC to be determined as a PBC for subsequent determinations*

15. The proposed amendments in schedule 3 are supported in-principle. However, in respect of item 3, which would enable an existing PBC to be determined as a PBC for subsequent determinations of native title, it appears significant elements may be left to the PBC Regulations. In conjunction with recommendation 8 of the Commonwealth's Report *Structures and Processes of Prescribed Bodies Corporate* ("PBC Report"), which was accepted by the Commonwealth, this amendment would enable a PBC to manage the rights and interests of different native title holding groups. Without draft regulations, it is difficult to assess whether appropriate protections will be in place to complement the NTA amendments and ensure protection of native title rights and interests. The draft regulations giving effect to the PBC Report recommendations should be publicly released for stakeholder consideration in conjunction with the Bill.

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<sup>1</sup> *Native Title: The Government's Proposals for Reform* delivered at the AIATSIS Native Title Conference 2006: Tradition and Change, Culture and Commerce, Darwin.

**Schedule 4 – Funding under section 183 of the Native Title Act 1993**

16. Moves to better direct the respondent funding towards agreement making, including broadening it to cover future act negotiations is supported. However, it is suggested that the Commonwealth undertake to review the impact of the changes to ensure the shift in funding does not detrimentally impact on either the ability of third parties to affectively participate in native title determination application negotiations or the ability of native title claimants/holders and their representatives to participate in future act negotiations. For example, the increased capacity of third parties to participate in future act negotiations may place increased demands on NTRBs in the context of those negotiations, as well as Prescribed Bodies Corporate, for whom there is currently no dedicated funding available.