## NATIONAL NATIVE TITLE COUNCIL

## Extra information to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006

### Transcript p 15

**Senator JOHNSTON**—I note that you say in here that the council 'absolutely opposes the idea that non-Indigenous bodies should take up the role of representative bodies'. What is wrong with calling for tenders for claims? Before you answer that, what are the figures with respect to Indigenous people employed by rep bodies as both professional and salaried officers?

**Mr Vincent**—I do not have those figures but I can perhaps find them out, through this body, and send them in.

**Senator JOHNSTON**—As a percentage I think it is important.

**Mr Vincent**—I think that most representative bodies have administrative and project officers employed, and the majority of CEOs are Indigenous as well. The professional staff are probably non-Indigenous—the lawyers and the anthropologists. But that is an important aspect of why you should not just give up on representative bodies. They are taking over, in a sense, some of the functions of ATSIC. They are becoming the major organisations, in the regions, that Aboriginal people relate to. One of the other submissions made that point.

Part of the deal is about trying to teach the principles of governance and having Indigenous employment—which is very scarce. We want an environment where, rather than punishing representative bodies by deregistering them immediately for some breach—which is what the proposal is—you have a department which comes in and, in strict terms, gives them support to get their governance back on track, then monitors them. Gradually, you get a better and better process there. The Goldfields Land and Sea Council was one of the finalists in corporate governance in Australia and it was very proud of itself.

**Senator JOHNSTON**—We need to see some figures. We need to have some basis for us to argue in support of that. We are arguing in a vacuum at the moment. We do not know how you are going. We do not know what you are doing. We do not know the contribution you are making. We have a gut feel in some cases—positive or negative—but we need the council to provide some benchmarking as to how you are going.

**Mr Vincent**—Madam Chair, I wonder if we could have leave to produce some figures and send them in.

**CHAIR**—You may respond to Senator Johnston's question on notice. That would be helpful. Thank you.

### NNTC response

On average, 42 per cent of the 17 native title representative bodies and native title service organisations' staff members are Indigenous. Across the 17 organisations, Indigenous employment ranges from 24 per cent of total staff numbers to 78 per cent.

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### Transcript p 16

**Senator SIEWERT** There is so much in your submission that I want to ask questions about but I know that time is limited. I want to ask—and you might want to take this on notice—about the registration test. On page 13—and you referred to it briefly a moment ago—you mention the fact that they do not ask the right questions. I understand from what you said that what is contained in the act now is different from what is being asked for in terms of registration tests. Could you take on notice providing us with the questions that they are asking that are wrong and what they should be asking.

**Mr Vincent**—Yes, I can do that.

### NNTC response

It is inappropriate to use the registration merits test as a basis for summarily striking out native title claims before the courts, because, as shown below, the requirement for the registration merits test of showing physical connection by a living member of the claim group is inconsistent with the substantive law concerning recognition of native title.

***"Summary strike out of native title claims***

(b) Claims that fail the Tribunal's registration test"

There, the NNTTC had made the point (pp12 – 13):

> *"The Bill proposes (Item 73 s.190D(6)) to empower the court to dismiss native title claims that do not pass the merits aspect of the NNTT-administered "registration test". It can also dismiss claims, if the NNTT states that it was not able to consider their merit because of procedural deficiencies.*
>
> *The registration test of claims is carried out within the NNTT to allow claimants in native title claims that have some prima facie merit to have negotiating rights pending determination of the question of native title being resolved in the Federal Court (see for eg NTA ss 25, 30 and 30A). Currently, the Federal Court can hear and determine unregistered applications in the same way as registered ones – i.e. on their merits and subject to the court's own regulatory mechanisms.*
>
> *The NNTT registration test is not, and never has been, determinative, but merely procedural in nature. Indeed, it can be argued that the merits aspects of the registration test do not even ask the correct and relevant questions that a court would need to consider in determining whether native title exists (see for example s.190B (7)) – a point conceded inferentially by the Hiley-Levy Report at Fn 39 (page 38)."*

The committee question was directed to the last sentence.

The “merits” aspects of the registration test is found in current s190B of the *Native Title Act* 1993 (Cth) (“NTA”) S190B includes the requirement (amongst others) to show the following:-

**“s190B (7)** The Registrar of the Tribunal must be satisfied that at least one member of the native title group:

(a) currently has or previously had a traditional **physical** connection with any part of the land or waters covered by the application (extra emphasis added); or

(b) previously had and would have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by:-

(i) the Crown in any capacity; or

(ii) a statutory authority of the Crown in any capacity; or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.”

It is useful to immediately compare the above registration test requirement in s 190B(7) with section 223 of the NTA that sets out the actual requirements for a finding by the court of native title, namely:-

> *s223 (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:*
>
> *(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and*
>
> *(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and*
>
> *(c) the rights and interests are recognised by the common law of Australia.*
>
> **Hunting, gathering and fishing covered**
>
> (2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests.”

In *Northern Territory v Doepel* [2003]FCA 1384 Mansfield J considered, amongst other things, the ambit of s190B(7) in the context of an appeal against the Registrar’s registration test decision in that case. He said (@[18]):

> *The focus* (of s190B(7)) *is, however, a confined one. It is not the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration.*

Mansfield J’s, above assertion that the focus of this registration test subsection is “not the same focus” as that of a Court in native title determination proceedings, is supported by

*Western Australia v Ward* (2000) 99 FCR 316 where the Full Court of the Federal Court rejected a submission that physical occupation of land is a necessary requirement for continuing connection with the land (cf s190B(7) above, where showing some physical connection is mandatory) .

The High Court in the further appeal in that case (*Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28) did not differ from the views of the Full court and emphasised (at [64]) that it is not necessary to show evidence of recent use of the land or waters to prove connection as required by s223 (1)(b) of the NTA for a determination of native title, stating:

> *In its terms s223(1)(b) is not directed to how Aboriginal people use or occupy lands or waters. Section 223(1)(b) requires consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a 'connection' with the land or waters.*

In *De Rose v State of South Australia* [2003] FCAFC 286 (16 December 2003) the Full Court of the Federal Court held that the trial judge in that case had fallen into error in placing inappropriate emphasis on alleged abandonment of the claim area by senior claimants, whilst not giving weight to spiritual links. The court said:

> *316 We think, too, that because his Honour did not address the question posed by s 223(1)(b) of the NTA, he placed too much emphasis on the absence of physical contact with the claim area after 1978. The Full Court in* Ward (FC)*, in a passage (at 382 [243]) not dissented from in the High Court, held that a spiritual connection and the performance of responsibility for land can be maintained even where Aboriginal people have been hunted off the land or it has become impracticable for them to visit. The Full Court said that physical presence is not essential in circumstances where it is no longer practicable or access to traditional lands is prevented or restricted by European settlers. We see no reason to depart from these propositions and indeed we were not invited to do so.*
>
> *317 Although his Honour referred to the judgments in* Ward (FC)*, he clearly gave considerable weight to what he regarded as Peter De Rose's "absence from the claim area" after 1978. Leaving aside the fact that Peter De Rose (as his Honour found) made "the occasional hunting visit" to De Rose Hill Station, his Honour appears to have given little weight to Peter's spiritual links with the land in the manner contemplated by Ward (FC).*

In our submission the above cases show that the requirement for the registration merits test contained in s190B(7) of showing physical connection (either past or former) by a currently living member of the claim group is inconsistent with the substantive law concerning recognition of native title. It is therefore inappropriate to use the registration merits test as a basis for summarily striking out native title claims before the courts.