Australian Government

Attorney-General's Department

Legal Services and
Native Title Division

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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

I thank the Senate Legal and Constitutional Affairs Committee for the opportunity to appear before it in relation to its inquiry into the Native Title Amendment Bill 2006. During our appearance on 30 January 2007, we took a number of questions on notice. I attach a response to those questions. I understand the National Native Title Tribunal and the Department of Families, Community Services and Indigenous Affairs will be forwarding additional material to you in response to questions relating to their responsibilities.

During the hearing, Senator Johnston noted concerns raised in the submission from the Aboriginal Legal Rights Movement regarding the operation of sections 203EA and 203EB of the *Native Title Act 1993*. Those provisions fall within the portfolio responsibilities of the Minister for Families, Community Services and Indigenous Affairs. However, I should draw the Committee's attention to the fact that the question of introducing possible amendments to deal with the issue was noted in paragraph 70 of the second discussion paper on technical amendments to the Native Title Act, which was released by the Attorney-General on 22 November 2006. The discussion paper forms Attachment I to the joint submission from this Department and the Department of Families, Community Services and Indigenous Affairs to the present inquiry. We anticipate proposals for technical amendments will be included in a Bill to be introduced in the Autumn 2007 sitting of Parliament.

A number of Senators also raised concerns regarding the competency of members and staff of the National Native Title Tribunal. The NNTT should be able to provide the Committee with further details regarding internal measures being taken in relation to training and development of skills. I note the NNTT has a new outcomes and outputs structure and associated performance indicators, including 'improvement in the quality of ... agreement-making' and 'increase in agreement-making as an alternative to litigated outcomes'. The NNTT intends to report on these matters in its 2006-07 annual report.

From a broader perspective, the Native Title Claims Resolution Review was required, under its terms of reference, to consider 'the dispute-resolution functions of the Court and the NNTT under the Act and the effectiveness and efficiency of each body in performing those functions'. While recognising concerns about the effectiveness of NNTT mediation, the Review found 'the NNTT's present powers are inadequate for it to effectively perform its mediation role' (paragraph 4.34), and stated 'there appears to be no reason to assume that another body with the same constraints as those which presently exist in relation to NNTT mediation could have been more effective than the NNTT' (paragraph 4.33). Accordingly, both consultants recommended the NNTT be given greater statutory powers of compulsion and a number of additional functions and these recommendations have been adopted by Government.

These new powers and functions need to be considered in light of the other measures arising from the Review. In particular, the ability of the NNTT to report to the Court about issues relating to mediation, including progress of the mediation, the behaviour of parties and the priorities of regions will ensure the Court is better informed about the NNTT mediation process and better able to make decisions for the disposition of native title claims.

The Court's ability to order there be no NNTT mediation or to withdraw matters from NNTT mediation will also be clarified. The amendments will make clear that where the Court considers there is no likelihood of parties reaching agreement in NNTT mediation, the Court must order there be no NNTT mediation (see proposed subsection 86B(3)).

The effectiveness of NNTT mediation was also examined in some detail by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (the PJC), which conducted an inquiry into this matter between August 2001 and December 2003. Although the PJC did not recommend any amendments to the Native Title Act resulting from its inquiry, it noted the views of some who considered the role and effectiveness of the Tribunal in mediating would be enhanced if the Tribunal had the power to enforce some of its decisions, and said 'this is particularly the case in relation to missed deadlines in relation to mediation programs' (paragraph 3.57 of the PJC's Report). The PJC expressed the view that the Tribunal should more actively pursue the option it has to apply to the Court for orders to ensure that mediation progresses (paragraph 3.62). The amendments enabling the NNTT to direct parties to attend mediation conferences and to direct parties to produce certain documents, and giving the Court a discretion to make orders in similar terms, will provide a clear statutory basis for this option.

The PJC also noted a concern that the Court only exercised its discretion to order there be no mediation if there were some exceptional reason (paragraph 3.61). As noted above, the proposed amendments will make clear the Court must order there be no NNTT mediation if the Court considers there is no likelihood of parties reaching agreement in such mediation.

The PJC, in its conclusion, recognised that many involved with the native title process remained frustrated but concluded that '... the sense of frustration and, at times, injustice was rarely attributable to the manner in which the NNTT performs its functions' (paragraph 6.16).

The PJC also had a statutory duty to examine the annual reports of the NNTT, a duty to which it discharged and reported on. The PJC generally expressed satisfaction with the NNTT's annual reports and performance reporting.

Thank you for the opportunity to respond to the Committee on these matters. If you wish to discuss any aspect of our submission or the inquiry, please do not hesitate to contact me.

Yours sincerely

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SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE NATIVE TITLE AMENDMENT BILL 2006

Senate Payne asked the following question at the hearing on 30 January 2007:

What response, if any, does the Department propose to make to the particular matters raised in the submission from the Registrar of the Federal Court of Australia?

The answer to the honourable Senator's question is as follows:

As noted in the Registrar's submission, the comments provided by the Registrar 'reflect, in general, the views that were expressed by [the Registrar] and by other representatives of the Federal Court to the consultants engaged to conduct the Native Title Claims Resolution Review.' Those views were also raised with the Department during preparation of the drafting instructions to implement the Government's response to the Review. However, the Court considered it inappropriate to provide detailed input into the legislative drafting instructions.

2. The Department took into account the general concerns raised by the Registrar and the Court in finalising the Bill, and – in consultation with the Australian Government Solicitor and the Office of Parliamentary Counsel – made adjustments to the relevant provisions in order to address specific concerns. The operation of the proposed provisions is detailed below.

The power to issue directions regarding attendance at mediation conferences and production of documents

3. The Registrar's submission states that 'ultimately, under our constitutional arrangements, it is simply not possible to set up a system under which an administrator may give binding statutory directions which do not attract a need for judicial enforcement and which are exempt from judicial review.' The Department agrees with this assessment. Accordingly, the Bill does not enable NNTT members to give *binding* directions. Instead, proposed subsection 86D(3) provides a mechanism for the Court to enforce a direction given by the member presiding over a mediation conference. In summary, that mechanism will provide that if the Court receives a report informing it of non-compliance with a direction, the Court *may* make an order in similar terms to the direction. The power is entirely discretionary – the Court is under no obligation to make such an order - and its existing powers to make orders in relation to the proceedings are not disturbed. In the event of breach of the Court order it is this order that would be enforced. It would not be the situation of a judicial body enforcing an order made by an administrative body.

4. This mechanism was included in preference to other possible models (see, for example, the 'summons process' for witnesses under section 61 of the *Administrative Appeals Tribunal Act 1975*, which enables enforcement by *any* court) in recognition that the purpose of NNTT mediation is to reach agreement on matters relevant to a Federal Court determination of native title (see section 86A of the *Native Title Act 1993*). In essence, it was developed to ensure the Federal Court could maintain appropriate oversight of the mediation process, given that all matters in the NNTT are matters filed in and under the ultimate control of the Court, while recognising that any statutory powers of direction may only be enforced through judicial measures. We consider this addresses the Court's concern that implementation of the relevant recommendation from the Native Title Claims Resolution Review *potentially* raises the question of 'a confusion of the mediation role of

the NNTT with other functions of a determinative nature, particularly the power to make coercive directions.'

5. In theory, the making of a direction by an NNTT member could be subject to collateral forms of judicial review (for example under section 39B of the *Judiciary Act 1903* or the provisions of the *Administrative Decisions (Judicial Review) Act 1977*). However, as the Registrar's submission indicates, the presumption is that the enforcement action would take place in the Court which has the conduct of the relevant proceeding, and this is how the provisions would normally be applied in practice. It should also be noted that – under the existing provisions of the Native Title Act – NNTT members are able to make certain directions regarding the conduct of mediation conferences, including directions to exclude or limit parties to the native title determination application from attending conferences (see section 136B) and directions governing the disclosure of information given at conferences (see section 136F). We are not aware of any constitutional concerns having been raised in relation to these provisions, which were enacted in 1998, nor of any collateral litigation in respect of these provisions.

6. The Court has also queried the competence of NNTT members to make directions. There are many provisions in other legislation which relatively successfully empower non-judicial personnel to make directions that may or may not ultimately be upheld by a Court if enforced or challenged. While in the case of the NNTT it will not be its directions that are enforced but rather any subsequent orders the Court may make, like other non-judicial personnel the NNTT will be able to draw upon assistance from, for example, internal legal staff, in formulating simple directions going to attendance and production of documents. The amendments also envisage as a general theme that the Court and the NNTT will work together to ensure more effective management of native title claims, and if the Court has views generally upon the formulation of directions it is able to convey those to the NNTT.

7. The Court is further concerned that the issue of directions by the NNTT will impact upon State and Territory Governments in the exercise of their Governmental functions. If any party, including a government, believes that a direction issued by the NNTT is inappropriate, it can put that to the Court if the matter subsequently comes before the Court to consider itself making an order. It is not clear why the Court sees a risk of second order litigation, given that the only order to be enforced is to be issued by the Court. A government or other party will also be able to seek to have the Court remove the matter from the NNTT, and under subsection 86C(3) the Court must order the mediation to cease on the application of a governmental party, unless the Court is satisfied the mediation is likely to be successful.

Simultaneous mediation by the Court and the Tribunal

8. The Registrar has raised concerns about the scope of proposed subsection 86B(6) and – in particular – queries whether it would preclude the Federal Court from ordering a conference of experts while a matter is in NNTT mediation. The provision is not intended to exclude such conferences, which are normally directed pursuant to Order 34A Rule 3 of the Federal Court Rules in circumstances where two or more parties to a proceeding call, or intend to call, expert witnesses to give opinion evidence about the same, or a similar, question. The provision is instead intended to preclude the Court from referring a matter to mediation (which is currently done under section 53A of the *Federal Court Act 1976*, as well as Order 72 Rules 1 and 3 of the Federal Court Rules) or from making orders for parties to attend conferences before a Court Registrar 'with a view to satisfying the Registrar that all reasonable steps to achieve a negotiated outcome of the proceeding have been taken'. This latter reference relates to a specific power contained in Order 10 Rule 1(2)(h) of the Federal Court rules, and is in substantively identical terms to that rule.

Removal of discretion as to whether to refer a matter to NNTT mediation

9. The Registrar states that 'generally speaking, an overly rigid referral process would unreasonably limit the ability for the Court to make referrals in an orderly and (where appropriate) staggered manner and for parties to work together to target matters as efficiently as possible.' While the proposed process for referral strengthens the existing presumption in favour of mediation before the NNTT, it ensures the Court retains broad discretionary power in relation to the native title determination proceedings. This includes the ability to order mediation other than by the NNTT in appropriate circumstances. Thus, for example, paragraph 86B(3)(b) of the Native Title Act will require the Court to order there be no mediation by the NNTT if the Court is satisfied that there is no likelihood of the parties being able to reach agreement in the course of mediation by the NNTT. Similarly, paragraph 86C(1)(b) will enable the Court to order mediation by the NNTT cease if the Court considers there is no likelihood of the parties being able to reach agreement in the course of mediation by the NNTT. Subsection 86D(3) provides that if an applicant or a Government party seeks cessation of NNTT mediation, the Court must so order unless it is satisfied the mediation is likely to be successful. Finally, subsection 86B(3)(a) continues to provide that the Court can order that there be no mediation if it considers that agreement between the parties about the proceedings mean that mediation will be unnecessary. Above all, and consistent with the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, the Court will retain a discretion as to whether or not to make any order based on an agreement which has resulted from mediation before the NNTT.

10. The Northern Land Council states that 'case management (including mediation) functions . are fundamental to the proper performance of a Court's judicial functions'. In view of the above provisions, the Department does not consider that the presumption in favour of NNTT mediation would interfere with the capacity of the Federal Court to perform its functions as a court. In particular, the provisions would not require the Court to exercise judicial power in a manner inconsistent with the essential character of a court or with the nature of the judicial process (compare *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27).

Dismissal of matters brought in response to future act notifications

11. In relation to the proposed provisions governing dismissal of claims made in response to future act notices, the Registrar states the identification of such matters 'would be the subject of evidence in the course of the dismissal hearing and could not be predetermined by advice from the NNTT'. The Department agrees with this proposition. As outlined in paragraph 2.4 of the Explanatory Memorandum, the relevant provision enabling the NNTT to provide advice to the Court (proposed section 66C) is intended to 'enable the Native Title Registrar to assist the Court in making an order under section 94C by providing information about four specific conditions'. The relevant conditions are objectively framed and do not themselves involve a judgment on the Native Title Registrar's part as to whether a matter has been filed 'as a genuine expression of a claim for the recognition of native title'.

12. The provisions will make clear the Court must not dismiss an application without first ensuring the applicant is given a reasonable opportunity to present his or her case about why the application should not be dismissed (proposed subsection 94C(2)), and the Court must not dismiss the application if there are compelling reasons not to do so (subsection 94C(3)). The Court's power to order dismissal under this provision will be subject to certain preconditions. In particular, the claimant must first fail to produce evidence in response to a direction by the Court to do so, or fail to take some other step to resolve the claim where ordered to do so by the Court (subparagraph 94C(1)(e)(i)), or the Court must otherwise consider the person has failed, within a reasonable time,

to take steps to have the claim resolved (subparagraph 94C(1)(e)(ii)). All of the above conditions will be matters for the Court to consider, and may not be predetermined by advice from the Native Title Registrar or the NNTT.

Dismissal of applications which fail to meet the registration test

13. The Registrar suggests the proposed provisions for dismissal of unregistered claims may involve 'an impermissible intrusion of executive power into the judicial power of the Commonwealth'. As noted in paragraph 2.124 of the Explanatory Memorandum, 'the new power conferred upon the Court to dismiss the application is discretionary'. Thus, proposed subsection 190D(7) provides that the Court *may* dismiss the application provided certain conditions are met, including whether the Court sees any other reason why the application should not be dismissed. The administrative decision regarding registration is essentially a pre-condition for the exercise of this particular discretion, but the exercise of the discretion is entirely a matter for the Court. Thus, the administrative decision does not involve the exercise of judicial power by an administrative or executive body.

Allowing the Court to adopt evidence and recommendations from NNTT reviews and inquiries

14. The Northern Land Council indicates that the reference in the Report of the Native Title Claims Resolution Review (paragraph 4.37) to the Court's ability to receive evidence and adopt recommendations from NNTT inquiries raises constitutional issues. The Department does not consider the proposed amendments imply 'that it would as of ordinary practice be a proper exercise of the Court's judicial function to simply adopt the belief of a Tribunal member ... performing administrative functions regarding complex issues of property law'. The Court's *ability* to receive evidence and findings from such inquiries would be governed by the existing provision in section 86 of the Native Title Act. This power has been included a feature of the Court's functions since the Act was originally enacted in 1993 (although the provision was amended in 1998 to make clear that the power is subject to subsection 82(1), which provides that the Court is bound by the rules of evidence except to the extent the Court orders otherwise). Previous judicial consideration of this provision makes clear that the Court is not obliged to give any weight to the findings of other bodies, and the Court will still be under a duty to investigate and adjudicate on the merits of native title claims (see, for example, *Phillips v Western Australia* [2000] FCA 1274). The Explanatory Memorandum (paragraph 2.15) notes the Court will 'retain a discretion about whether to draw any conclusions of fact from that transcript that it thinks proper and whether to adopt any recommendation, finding, decision or determination of the NNTT in a native title application inquiry'. The provision simply makes clear that, if the Court believes that it would be appropriate to do so in a particular matter, and without determining the weight the Court will place upon it, it is able to do so.

15. The Northern Land Council also suggests the statutory requirement for the Court to consider and take into account the Tribunal's mediation report may involve an interference in the Court's judicial functions. As noted in the Explanatory Memorandum (paragraph 2.17), the Court will retain a discretion as to what weight the report should be given. The provision is in similar terms to existing subsection 86C(5), which requires the Court to take into account relevant reports from the NNTT when deciding whether to make an order for cessation of mediation. The provision does not require the Court to adopt or act upon a recommendation in the relevant report. The report is simply information before the Court, in addition to submissions the parties may make.

INQUIRY INTO THE NATIVE TITLE AMENDMENT BILL 2006

Senate Payne asked the following question at the hearing on 30 January 2007:

What evidence was provided by the consultants conducting the Native Title Claims Resolution Review to the Steering Committee in relation to the statement in the Report of the Review that it has been reliably reported that there is a growing tendency for parties to mediation to exhibit a lack of good faith during mediation?

The answer to the honourable Senator's question is as follows:

The Steering Committee overseeing the Native Title Claims Resolution Review did not receive any direct evidence in relation to this statement. While the Steering Committee received copies of most written submissions provided to the Review, these did not include any examples of 'bad faith' on the part of those participating in NNTT mediation. Two of the submissions provided to the Steering Committee recommended the NNTT have a role in reporting about bad faith.

2. The Steering Committee was not present during in-person consultations conducted by the Review and specific detail of the consultations was not provided to the Steering Committee.

3. The NNTT has informed the Department that members of the NNTT had experienced instances of the following:

- abusive and threatening behaviour
- personal violence during a mediation conference
- persistent non-compliance with agreed actions, leading to stalling of the process
- persistent failure to respond to reasonable requests (for example to contact parties, to provide documents or to obtain instructions from clients)
- arbitrary refusal to negotiate with particular parties for no apparent reason
- refusal to comply with agreed negotiation procedures
- persistent last minute non-attendance at meetings
- persistent refusal to agree on meeting times agreed by other parties
- publicly releasing confidential material in contravention of agreement reached about non-disclosure in relation to the mediation process, and
- adopting a negotiation position contrary to the instructions of clients.