



20 April 2007

Ms Jackie Morris|
Committee Secretary
Senate Legal & Constitutional Affairs Committee
Department of Senate
Parliament House
CANBERRA ACT 2600

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Dear Secretary

Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007

Ergon Energy is a major electricity infrastructure provider in Queensland.

Amongst other things, Ergon Energy has responsibility for the generation and distribution of electricity in remote Aboriginal and Torres Strait Islander communities. Native title is an issue which Ergon Energy needs to address in the provision of its services.

There are a couple of aspects of the *Native Title Amendment (Technical Amendments) Bill 2007* on which Ergon Energy would like to make a submission. A copy of the submission is **attached**.

If you have any queries, please contact me on (07) 4727 6773 or email neil.c.webley@ergon.com.au

Yours faithfully

A handwritten signature in black ink, appearing to read 'Neil Webley', written over a horizontal line.

Neil Webley
Property Acquisition Manager

encl



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SUBMISSION

Native Title Amendment (Technical Amendments) Bill 2007

To: Committee Secretary
Senate Legal & Constitutional Affairs Committee

From: Ergon Energy Corporation Limited

Re: Review of the *Native Title Amendment (Technical Amendments) Bill 2007*

Date: 20 April 2007

1. Background

- 1.1 Ergon Energy Corporation Limited ("Ergon Energy") is a Government owned corporation responsible for the distribution of electricity throughout regional Queensland. Its operational activities and infrastructure extend over an area six times the size of Victoria. In fact, its service area is one of the largest covered by any electricity distributor in the Western world.
- 1.2 An important part of Ergon Energy's operations is the supply of electricity in all of Queensland's Aboriginal and Torres Strait Islander communities. Ergon Energy is both the sole generator and distributor of electricity in the Torres Strait and in Aboriginal communities on the mainland.
- 1.3 To address its existing interests in claim areas and its ongoing projects and operational activities, Ergon Energy is involved in both the *resolution of native title claims* and implementation of *compliance requirements* under Part 2 Division 3 of the *Native Title Act, 1993*. Ergon Energy always seeks to resolve its involvement in claims issues by agreement and has consented to all of native title determinations where it has been a party.
- 1.4 Agreements about native title are sometimes also required in relation to compliance for projects and activities - particularly new electricity generation infrastructure in the communities. Ergon Energy has successfully negotiated a large number of *Indigenous Land Use Agreements* ("ILUA") in both a claims resolution and a project compliance context.
- 1.5 There are two aspects of the *Native Title Amendment (Technical Amendments) Bill 2007* where Ergon Energy suggests variations.

2. Section 87A(1)(c)(v) - Consent to Determinations where a Respondent has Untenured Infrastructure in Land or Waters

- 2.1 Ergon Energy agrees with the proposed amendment to section 87A(1)(c)(v). The rationale in paragraphs 1.301 to 1.303 of the *Explanatory Memorandum* is correct.
- 2.2 The example given in paragraph 1.302 of the *Explanatory Memorandum* applies to Ergon Energy. In relation to both electricity generation and

distribution infrastructure, Ergon Energy has extensive electricity infrastructure interests on land within claim areas. More importantly, much of the infrastructure is *untenured*. That is to say, when the infrastructure was constructed (often many decades ago), no estate or interest was taken in the land on which the infrastructure was built. That is often the case even for very substantial and expensive infrastructure such as remote area powerstations.

- 2.3 The background to untenured electricity infrastructure in Queensland is complex. A decision of State Cabinet in approximately 1992 unilaterally transferred responsibility for electricity supply in indigenous communities from a State Government Department to Ergon Energy (through a predecessor company). Ergon Energy in effect *inherited* infrastructure constructed by other entities often decades before.
- 2.4 Few, if any, records are available to Ergon Energy about the original construction. The basis on which the infrastructure was installed (whether under statutory powers or on any other basis) is unknown. In some instances it may be that former Government Departments or agencies constructed the infrastructure without statutory power to do so.
- 2.5 This means that the link between section 87A(1)(c)(v) and the definition in section 253 of *interest in relation to land or waters* may well be insufficient. Under the amendment, only respondent parties with an interest in relation to land or waters must consent to a determination under that provision.
- 2.6 The current definition in section 253 is as follows:

"Interest in Relation to Land or Waters" means:

- (a) *a legal or equitable estate or interest in the land or waters; or*
- (b) *any other right (including a right under an option and a right of redemption), charge, power or privilege over, or in connection with:*
 - (i) *the land or waters; or*
 - (ii) *an estate or interests in the land or waters; or*
- (c) *a restriction on the use of the land or waters, whether or not annexed to other land or waters."*

- 2.7 This definition is certainly sufficient to cover land or waters on which infrastructure was installed through the exercise of statutory powers. It is also sufficient to cover infrastructure in relation to land or waters over which the infrastructure operator has a legal or equitable estate or interest. *However, Ergon Energy is concerned that the definition would not be sufficient to cover its interest in electricity infrastructure in the circumstances referred to in paragraphs 2.3 and 2.4 of this submission.*
- 2.8 This concern can be addressed simply and without wider ramifications by an amendment which inserts the following additional paragraph into the definition of "*interests in relation to land or waters*" in section 253:

"(d) a legal or equitable interest in, or right to operate, any infrastructure facility on the land or waters."

- 2.9 In addition to the limited terms of this suggested amendment, the effect of the amendment is limited by the definition of "*infrastructure facility*" in Section 253.

3. Section 60AB - PBCs Statutory Right To Charge A Fee For Costs

- 3.1 Ergon Energy agrees with the thrust of this amendment. Usually, a native title agreement (including an ILUA) is sought by a person (other than in a claims resolution context), for a purpose which relates to advancing the interests of that person (for example a new mine, land development project etc). In those circumstances, where a Registered Native Title Body Corporate ("RNTBC") is asked to expend its time and resources on negotiating an agreement to enable the project or activity to proceed, it is reasonable that the RNTBC's costs be recovered from the person seeking the benefit.
- 3.2 The same rationale does not however, apply where the person is seeking a native title agreement for the purpose of providing a benefit, not for themselves but solely or primarily for the benefit of the RNTBC or the common law native title holders which the RNTBC represents.
- 3.3 Although not a common occurrence, that can be the case on some occasions. An example is where a person seeks an ILUA (or other relevant native title agreement) for the purpose of constructing infrastructure or providing a service in indigenous communities which primarily comprise the common law native title holders themselves.
- 3.4 The amendment already envisages that there should be an exemption from fees in some cases. Section 60AB(4) specifically provides that fees should not be charged to the common law native title holders or to other entities which act on their behalf (eg, PBC's, native title representative bodies, registered native title claimants, etc).
- 3.5 An example of this situation in Ergon Energy's context would be the negotiation of an ILUA with a PBC for purposes of constructing a new remote area power station or other infrastructure in an indigenous community where it will provide electricity primarily for the benefit of the native title holders themselves. Again, such ILUAs are not common and in some cases other native title compliance avenues may be available (eg, section 24KA in relation to electricity *distribution* infrastructure).
- 3.6 However, the situation does arise from time to time and an example is an Ergon Energy ILUA which was registered by the NNTT on 20 April 2007 for the purpose of constructing a new powerstation (ie, electricity *generation*) on Mer Island.
- 3.7 It should be noted that in such cases, Ergon Energy already makes payments to, or on behalf of, the native title holders in various respects. For example, a payment is often made to the native title holders as consideration for their consent to the project. Also, where the ILUA provides for the grant of tenure for a project (eg, a lease over the project site), the lease or other ancillary documents usually contains a clause requiring Ergon Energy to meet the native title parties' costs in relation to those documents.
- 3.8 Creating a statutory right on the part of an RNTBC to charge an additional fee for negotiating an ILUA also does not take into account other considerations either. For example, the costs of constructing the infrastructure or providing the

service to native title holders (particularly in remote locations) is already heavily subsidised. Ergon Energy does not achieve anything like full cost recovery for electricity supplied in the communities. It would be incongruous to require another cost to be added to the supply of electricity where that supply benefits the native title holders or the RNTBC and where the service is already provided on a heavily subsidised basis.

- 3.9 The issue could be easily addressed by including the following additional exemption in section 60AB(4):

"(f)A person who is undertaking the negotiations mentioned in subsection (1) for the purpose of constructing an infrastructure facility, or providing a service, which is solely or primarily for the benefit of the registered native title body corporate or the common law holders for whom the registered native title body corporate is an agent or holds native title rights and interests in trust."

4. Conclusion

- 4.1 Ergon Energy submits that the Committee should recommend variations to the Technical Amendments Bill along the lines suggested in paragraphs 2.9 and 3.9.
- 4.2 If the Committee would like any additional information regarding these submissions, please contact Ergon Energy's Distribution Property Acquisitions Manager.