NATIONAL NATIVE TITLE TRIBUNAL

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20 April 2007

Ms Jackie Morris
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Morris

Inquiry into Native Title Amendment (Technical Amendments) Bill 2007

I refer to your letter of 30 March 2007 inviting the Tribunal to make a submission to the Committee's inquiry into the above Bill.

The Tribunal wishes to make a submission, by means of this letter, in relation to one aspect of the Bill and although outside the terms of reference, on a matter related to the *Native Title Amendment Act 2007*, which the Committee considered as a Bill earlier this year.

Item 107 of Schedule 1 to the *Native Title Amendment (Technical Amendments) Bill 2007* — Reconsideration by the Registrar

The proposed s. 190E provides that where a claim made in an application is not accepted for registration under s. 190A, the applicant may apply to the Registrar to reconsider the claim under s. 190A (see proposed s. 190E(3)).

The Tribunal submits that a reconsideration under proposed s. 190E should be conducted by a Member of the Tribunal rather than the Native Title Registrar. The reason for this submission is that the ramifications of not being accepted for registration are now potentially greater than they were prior to the amendment of s. 190D by the *Native Title Amendment Act 2007*. Not being accepted for registration because of a failure to meet one or more of the merit conditions of the registration test may lead to dismissal of the application by the Federal Court pursuant to ss. 190D(6) and (7) of the *Native Title Act 1993*.

While it is not the same scheme as the 'acceptance test' under the original Native Title Act (the old Act), there are similarities. Under s. 63 of the old Act, where the Registrar did not consider that an application met the requirements of s. 62, he or she was obliged to refer it to a Presidential Member for consideration. If the Presidential Member considered that the application met the requirements of s. 62 he or she was required to direct the Registrar to accept the application (s. 64 of the old Act). Conversely, if the Presidential member did not consider the requirements were met the Registrar was directed not to accept the application.

Having the reconsideration under s. 190E conducted by a Member would ensure that the reconsideration is undertaken by a statutory office holder who is independent of the Registrar and could give the applicant greater confidence that the application was considered afresh without regard to the previous decision.

Order dismissing an application relating to a future act (s. 94C)

As this matter relates to Item 36 of Schedule 2 to the *Native Title Amendment Act 2007*, it may be outside the terms of the Committee's Inquiry. I raise it now, for the benefit of the Committee, as it concerns a provision of a related Bill, now an Act, that was recently before the Committee. The current Bill could be amended to remedy an apparent 'defect' in s. 94C that was inserted into the *Native Title Act 1993* by the *Native Title Amendment Act 2007*.

Section 94C requires the Federal Court to consider dismissing certain claimant applications that are deemed to be lodged in response to a future act notice where the relevant future act has been finalised. The apparent policy behind that provision intends that the section would apply to all relevant applications including:

- applications lodged in response to a s. 29 notice given before 30 September 1998 when the relevant provisions of the *Native Title Amendment Act 1998* commenced; and
- applications lodged in response to future act notices given under alternative provisions of a law of a State or Territory (see s. 94C(6)).

For an application to be caught by s. 94C it must, among other things, have been made within a period of 3 months after the 'notification day' specified in the future act notice and registered before the end of 4 months after the 'notification day' specified in the future act notice.

Under the *Native Title Act 1993*, prior to 30 September 1998, the future act notices (s. 29 notices) did not contain a notification day and thus it would appear that no application made before that date would be covered by s. 94C. Further, the future act notices under the alternate provisions applying in South Australia, in respect of which the Commonwealth Minister made a determination under s. 43(1), do not contain a notification day and therefore no claimant application lodged in response to those notices would be covered (see for example ss. 63M and 63N of the *Mining Act 1971* (SA)).

Thus to achieve the original policy intent, s.94C would require amendment so that where applications:

- were lodged in response to a s. 29 notice given before 30 September 1998 and registered within 2 months of when the notice was given; or
- were lodged in response to a South Australian future act notice and registered within 2 months of when that notice was given;

and the relevant future act is now finalised as provided for in s. 94C(1)(d), those applications are also covered by s. 94C.

If the Committee wishes to follow up any aspect of this letter, please contact the Native Title Registrar, Mr Chris Doepel, on (08) 9268 7259

Yours sincerely

Graeme Neate
President

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