National Native Title Council

20 April 2007

Ms Jackie Morris
Committee Secretary
Senate Standing Committee on Legal &
Constitutional Affairs
By email: legcon.sen@aph.gov.au

Dear Ms Morris

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

Please find attached the National Native Title Council's (NNTC) submission in response to the Committee's Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007.

This submission is based on the combined and considerable practical knowledge and experience, with the native title system, of native title representative bodies and service organisations across Australia.

The NNTC shares the Federal Government's policy objective of a more streamlined, effective and efficient system that is capable of more quickly settling native title claims.

However, again we reiterate our concerns that many of the amendments will not contribute to this policy objective. We are also concerned that the effect of some amendments will be adverse to the government's stated intention that "substantive rights are not to be reduced". These concerns are discussed in our submission.

Yours sincerely

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Chairperson

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NATIONAL NATIVE TITLE COUNCIL

SUBMISSIONS TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE ON THE NATIVE TITLE AMENDMENT (TECHNICAL AMENDMENT) BILL 2007

INTRODUCTION

The National Native Title Council ("the Council") is the national body of native title representative bodies ("NTRBs") and service providers ("NTSs"). It was informally established in August 2005 and incorporated in 2006. Its objects are, amongst others, to provide a national voice for Native Title Representative Bodies and Native Title Service Providers on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people. The Council has made previous submissions to the Committee on proposed amendments to the *Native Title Act*.

The following submissions only address aspects of the Bill that are of particular concern to the Council. For further detailed submissions concerning these and other aspects of the Bill, the Committee is referred to the Council's submissions to the Government of 22 December 2006 in response to the second discussion paper on the proposed technical amendments.

SCHEDULE 1 –AMENDMENTS OF THE *NATIVE TITLE ACT 1993*

Item 34 – Automatic weather stations to be validated as facility for service to the public (insert proposed s24KA(2)(la)).

To propose validation of such facilities constitutes yet a further incursion into native title rights and interests. It therefore breaches the Attorney General's earlier statement that any technical amendments would not result in a reduction of the native title rights of Aboriginal and Torres Strait Islander people.

The proposal is opposed.

Item 72 - Applicant affidavits in determination applications to include details of authorisation decision-making process (amend s62(1)(a)(v)).

This proposal is opposed. As pointed out in the Council's response to the second discussion paper, this proposal is unnecessary and will only add yet another layer of complexity for native title claimants to an already legally complex process. Clarification of authorisation is already provided for in s190C of the NTA through the certification

process or through proof of authorisation. Schedule R of the current application form ("Form 1") already requires that proof of authorisation be comprehensively set out.

Item 76 - Applicant affidavits in compensation applications to include details of authorisation decision-making process (repeal and replace s62(3)(a)(iv)).

This proposal is opposed on the same basis as Item 72, namely that it adds an extra unnecessary layer of complexity for native title claimants to deal with. The Act already provides multiple avenues for checking up on authorisation. This Bill adds further methods (see for example Item 88).

Item 82 – Extension of circumstances for court order to replace applicant (repeal and replace s.66B(1)).

This is a useful proposal for reform, but needs clarification.

One situation that should be included under the proposal is where a claim group seeks to remove the name of a deceased applicant, without replacing that deceased applicant, whilst leaving the remainder of the applicants in place.

It could be argued that the current proposal does cover this situation by virtue of the definition of "applicant" in s61(2)(c) (the persons are jointly "the applicant"), however it would be useful if the wording of the proposed provision could put the matter beyond doubt.

In this regard it is noted that the Government, in its second discussion paper, stated that it supported recommendation 12 of the Claims Resolution Review which specifically referred to the need to address (amongst other contingencies) the mere removal of a deceased applicant (see paragraphs 11, 12 and 13 of the second discussion paper).

Item 87 – Respondent parties may withdraw without leave at any time prior to commencement of the substantive hearing (insert s84(6A)).

The Council supports the proposal subject to the following:-

(a) There should be liberty for any party (including other respondents) to seek costs upon the withdrawal. This may be necessary because of various unwarranted and expensive interlocutory applications that may have been made, with the question of costs having been deferred to the substantive hearing; and

(b) On the basis of fairness, a like right to withdraw should be accorded to applicants.

Item 88 – (a) Production of evidence of authorisation of applicants may be ordered by the court; and

(b) Court may hear and determine the application despite defect in authorisation (insert proposed s84D).

The Council supports the proposal contained in paragraph (b) above.

In relation to (a) however, as applications for the production of evidence can be made by any party to the proceedings (s84D(2)(b)) or on the application of a member of the claim or compensation group (s84D(2)(c)), without showing cause as to why an order for production of evidence should be made, the provision will be open to abuse. It is suggested therefore that the proposed provision include that the applicant for production of evidence of authorisation should be required to show cause to the Court why such an order should be made.

Item 91 – Consent determinations over parts of claim areas – requirement for parties with "interest" in relation to the land or waters (not only a registered proprietary interest) to consent (repeal and replace s87A(1)(c)(v)).

The Committee reported that in its view the provision relating to this matter introduced by the Native Title Amendment Bill 2006 was inadequate to protect persons with interests relating to land and waters that were to be the subject of consent determination.

The Council considers that the former provision is adequate and appropriate. The definition of "interest" contained in s253 is so wide as to potentially frustrate parties with a real (as opposed to a merely theoretical) interest from being able to negotiate a sensible consent determination. These parties could well be sentenced to litigate their matter on the whim of a largely disinterested person.

The Council suggests that in order to balance the considerations, the proposed section could be amended to vest in the Federal Court a discretion in terms that it could require that consent is required from a party holding an interest in the land or waters where the Court is satisfied that the party's interest is likely to be affected by the proposed agreement.

Item 107 – Internal review of registration decisions and dismissal of unregistered claims (repeal and replace s 190D and insert proposed ss190E and 190F).

The Council strongly objects to the idea of the dismissal of claims that do not happen to pass the registration test (s190F). It repeats its submissions made on this topic to the Committee in the context of the *Native Title Amendment Bill 2006*.

The Council notes that in 1998 when the registration test was introduced the Government gave an assurance that it would not use it for the purpose of dismissal in the substantive determination proceedings. It has flagrantly gone back on this assurance.

At a drafting level, s190F(1) does not clearly indicate that applicants can first seek internal reconsideration of a registration decision and then, if not satisfied, apply to the Federal Court for formal review. Instead, the prerequisite for application to the Court is,

by s190F(1), "a notice under subsection 190D(1)" which refers to the Registrar's notice of decision prior to any reconsideration.

The scheme, understandably, clearly states that an applicant cannot seek internal reconsideration after making application to the Court, however the ability to seek court review after either stage has not been made clear.

The Council therefore suggests that the point be clarified in the drafting.

Item 112 – Registrar to remove expired ILUA from Register (repeal and replace s199C(1)(c)(i)).

The Council supports this amendment. It notes however that proposals referred to in the second discussion paper (paragraphs 16 – 20) to provide for amendments of ILUAs have not been addressed. These are equally as important, and the Government should be encouraged to include those proposals in the Bill.

SCHEDULE 3 – AMENDMENTS RELATING TO PRESCRIBED BODIES CORPORATE

Item 5 – Regulations may prescribe prescribed bodies corporate (repeal and substitute s 59)

Whilst the major change to s 59 that is proposed by this item is the introduction in subsection (2) of a "default" prescribed body corporate where there is the absence of a nomination of a prescribed body corporate by native title holders, the Council is concerned that a change is also necessary to subsection (1) (prescription of "kinds" of prescribed bodies corporate).

Currently Regulation 4(1) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* provides that a prescribed body corporate must be an Aboriginal or Torres Strait Islander association incorporated under the (now repealed) *Aboriginal Councils and Associations Act 1976.*

It would be likely that new regulations under the proposed s59 would require that prescribed bodies corporate now be Aboriginal or Torres Strait Islander corporations under the new *Corporations (Aboriginal and Torres Strait Islander) Act 2006.*

The Council is concerned that by s29.1 of the latter Act non-Aboriginals can now be included as members (up to certain specified levels) of Aboriginal corporations. Such a situation would be entirely inappropriate for native title bodies. Native title is based upon Aboriginal traditional laws and customs (see for example NTA s223).

The Council therefore submits that s59(1) should restrict the regulation making power by stating the proviso in s59(1) that bodies that may be prescribed bodies corporate must not be bodies that have non-Aboriginal or Torres Strait Islander members.

Such a proviso would still be consistent with the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* as s141.10 of that Act permits a body's constitution to provide for less that the specified maximum number of non- indigenous members.

Item 7 – Fees for service (insert proposed s60AB and 60AC)

The proposal relating to a fee regime for RNTBCs is regarded by the Council as discriminatory.

The starting point is that as incorporated bodies, RNTBCs can charge fees for services which they provide just as any other incorporated bodies can. The proposed fee regime in reality therefore only restricts their ability to charge fees, rather than enables them to do so. This is an unfair restriction on the ability on RNTBCs' ability to operate

The proposed restrictive regime is in any event uncertain.

Proposed s60AB(1) sets out functions where fees, statutorily, can be charged. Subsection (2) then provides that regulations can set out other functions where fees can also be charged. Subsection (5) sets out functions where, statutorily, fees cannot be charged. Paragraph (5)(c) then states that regulations can prescribe "any other circumstances" where fees can't be charged.

It is a commonplace of administrative law that there are inherent dangers in excessive use of regulations. In relation to s60AB this vice is exacerbated by the curious mix of statutory enabling/prohibiting provisions with superadded regulatory ability in respect of the same matters.

A key feature in ensuring the long term viability of RNTBCs is absolute certainty in the ambit of its authority and the removal of unfair limitations which may potentially disadvantage it vis á vis its dealings with other entities. Without properly outlining those "any other circumstances" which may be prescribed by the regulations under the proposed s60AB(5)(c), a wide discretion exists for the future imposition of unfair limitations upon RNTBC.

Super-added to this regulatory regime is the availability of the binding "opinion" of the Registrar of Aboriginal and Torres Strait Islander Corporations as to whether fees are or are not payable in any given situation (s60AC). This section is overly intrusive and lacking in certainty. On its face there is no requirement to be met before an entity can lodge a request for an opinion and the provision would appear to allow an entity to lodge an application simply to avoid paying a fee to an RNTBC. In order to avoid the potential

for abuse, it is necessary to outline the specific circumstances where such an application could or could not be made.

Similarly, it is not appropriate to have such limiting and intrusive provisions without a clear framework for the timely resolution of such an application. It is submitted that without such a framework, fees properly owed to a RNTBC can remain outstanding for an unlimited period of time and without any right of redress by the RNTBC to either compel the assessment of the application in a timely manner, or to seek payment of fees owing. Additionally, when an application for an opinion is made it appears that no opportunity is afforded in the proposed provisions for a RNTBC to make submissions to the Registrar on the reasonableness of the fee charged.

To top it all, regulations may make provision for the withholding of payment of fees where the opinion is sought (s60AC(5)(c).

The fee regime does not accord respect to Aboriginal and Torres Strait Islander people in its construction, and is reflective of the lack of detailed consultation with them, on a partnership basis, by the Government. This lack of approach applies to this and other rounds of amendments to the *Native Title Act*.