CARPENTARIA LAND COUNCIL ABORIGINAL CORPORATION

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NATIVE TITLE REPRESENTATIVE BODY

23 April 2007

Ms Jackie Morris
Committee Secretariat
Legal and Constitutional Affairs Committee
PO Box 6100
CANBERRA ACT 2600

BY EMAIL: legcon.sen@aph.gov.au

Dear Ms Morris,

RE: SUBMISSIONS TO THE PARLIAMENTARY INQUIRY INTO THE NATIVE TITLE AMENDMENT (TECHNICAL AMENDMENTS) BILL 2007

We refer to the above and your invitation to make submissions in regard to the above Parliamentary inquiry.

The Carpentaria Land Council Aboriginal Corporation (CLCAC) is a Native Title Representative Body (NTRB) for the islands and seas of the lower Gulf of Carpentaria, areas from the Northern Territory border to east of Normanton, down to the South Australian border and east to Julia Creek.

The CLCAC wishes to make limited but specific submissions in relation to the Native Title Amendment (Technical Amendments) Bill 2007.

Item 20 – s 24CI - Suggested amendment pertaining to Indigenous Land Use Agreements (ILUAs)

At this point the National Native Title Tribunal (NNTT) still retains the power through s 24CI(1) to look beyond the certificate provided by an NTRB regarding authorisation of an ILUA when applying the registration test to the ILUA, even where that certificate appears to be valid. Section 203BE provides NTRBs with certification functions for applications for native title determination (s 203BE(1)(a), (2)&(4)) and for applications for the registration of ILUA's (s 203BE(1)(b), (5)&(6)).

Objections to certified ILUAs often incur a great deal of NTRB time and resources. A great deal of NNTT time and resources are also often devoted to addressing objections. Objections are not always clearly set out, often not to the point, at times

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irrelevant, but are usually taken seriously by the NNTT and passed on to the NTRB to respond to or deal with. Obviously this becomes a time consuming process. There is also the issue that in holding the function of certification, NTRBs are required to outlay resources to perform the function and place themselves in a position of potential liability when they use their judgment in deciding whether to certify. The task is an onerous one and one taken seriously by NTRBs, however the legislation does not currently reflect this.

As the NTRBs certification procedure for ILUAS is essentially the same as for native title determination applications and the NNTT cannot look beyond a valid certificate in that instance, the process should be the same for certified ILUA's.

Item 82 – s 66B - Replacement of the applicant

Section 66B is complex in practise and the suggested amendments will not improve the process for any of the parties involved. The process surrounding s 66B (i.e., an authorisation meeting) is an important but onerous one that is crucial for the two situations mentioned in that section as it is currently worded. The two new situations (applicants who consent to their removal and the removal of applicants names who are deceased or incapacitated) inserted into s 66B are so different to those presently (where the current applicant is no longer authorised by the claim group or the current applicant has exceeded their authority) dealt with by that section and its process is far more complex than that required for the two new subsections.

The unfortunate affect of the amended s 66B is that it either impliedly places an impractical meaning upon the word "applicant" that has recently been argued before the Court and rejected by the Court[1], or indicates that the remaining applicant can simply sign affidavits regarding authorisation. If the latter is the case, it is not in line with the case law[2] and confuses the process required by s 66B.

Separate sections to s 66B would better deal with applicants who consent to their removal and the removal of applicants names who are deceased or incapacitated. Essentially, in these last categories (for the deceased and incapacitated) it is a farce to say that an applicant is being removed, as for all practical purposes that applicant no longer exists. It seems an absurdity to require an authorisation process or meeting for their name to be removed.

The amendment of s 66B fails to consider practical implications. As mentioned above, to replace applicants under s 66B an authorisation meeting is generally required. The costs in terms of money, staff and other resources to NTRBs for authorisation meetings are usually high and therefore unlikely to occur in such circumstances as are mentioned in the amended s 66B(1)(a)(i)&(ii)). Therefore, the practical consequences of the amended s 66B will be the same as they are now, that those who no longer wish to be applicants will be applicants in name only and deceased and incapacitated applicant's names will also still remain on the register.

[1] Please see *Doolan v Native Title Registrar* [2007] FCA 192 [73-76] and *Butchulla People v State of Queensland* [2006] FCA 1063 at [38], [42] and [44-45].

[2] Ibid.

This of course causes the register to be inaccurate and proponents and the Native Title Registrar will expect each named applicant to sign agreements causing further issues regarding registration of ILUAs.

The process in these two cases (where an applicant consents to their removal and where an applicant is deceased or incapacitated) should and could be as simple as filing an application (Notice of Motion) in the Court along with a supporting affidavit from an applicant who no longer wishes to retain that role and a supporting affidavit from a legal representative or applicant attaching a death certificate or medical certificate to remove a deceased or incapacitated applicant. It will be up to the remaining applicants and claim group as to whether they wish to replace those applicants. These changes should not trigger the registration test. The Court should possess the power to order the Native Title Registrar to update the register accordingly.

It was assumed by some practitioners that s 64(5), which is to be repealed, was the relevant section to carry out the above process. However, again, this section was not utilised for this purpose because of confusion about its use and because the registration test would have been triggered. For most claim groups it is easier and safer in terms of the registration test, to leave the names of such applicants on the application and deal with associated hurdles when they arise.

In the Explanatory Memorandum for the present Bill (2007), at p. 45 [1.248], it was stated that the "interaction between the provisions in section 66B and subsection 64(5) is unclear." Some native title practitioners saw a direct link between these provisions, with s 66B holding the power to remove and replace applicants and s 64(5) simply detailing the documentary process to be followed, rather than containing a power.

Order 6 rule 9 of the Federal Court Rules is an option that exists to remove those who no longer wish to be an applicant[3], to remove the names of deceased and incapacitated applicants and even recalcitrant applicants.[4] This may be the best option if the NTA is not to be amended to implement a simpler process, but again, a lack of clarity remains regarding the changing of the named applicants on the register and whether the registration test is triggered.

Item 88 – s 84D - Possible defective authorisation

The proposed s 84D provides some clarity regarding situations where there are questions surrounding authorisation of applications. It would have been helpful if the section addressed situations where a defective authorisation may be rectified and how this could occur. If the section remains as is, it will be up to the Court to determine these issues. We understand that this is the intention, however, this may be unhelpful for those claim groups who are aware that they may have issues surrounding the authorisation of their claim and want to be proactive in addressing the issue. It is assumed that such claims could be authorised and or amended so that they can remain on foot, however this is unclear.

[3] *Central West Goldfields People v State of Western Australia* [2003] FCA 467, 129 FCR 107 at [11]
[4] *Button v Chapman* [2003] FCA 861, Kiefel J, 20 August 2003 at [7]

Guidance on the process in s 84D would also be prudent. It is questionable as to whether s 66B could apply given that it would probably be the case that the applicant/s were not authorised to make the application, therefore the subsections in s 66B if applied strictly, could not apply to such situations. This is a live issue and the confusion is illustrated in the case of *Davidson v Fesl* [2005] FCAFC 183 where notably, the different practitioners involved had quite different views and approaches as to how to address the issue of authorisation. For s 84D to assist all parties to undertake a process that they understand, further information must be included addressing the issues mentioned above.

Item 101 - s 190A - Provision relating to the Native Title Registrar using their best endeavours in applying the registration test

The amendment of s 190A is welcomed to include encouragement for the Native Title Registrar to apply the registration test in a timely manner to newly received applications in more situations (e.g., where s 24MD(6B)(c) applies). However, given that procedural rights regarding future acts cannot be held and exercised by traditional owners until they have a registered native title claim, the wording in s 190A should reflect the importance of this. Requiring the Native Title Registrar to "use his or her best endeavours to consider, or finish considering"… is too weak given what is at stake for traditional owners. The wording should be definite, such as "the Registrar must consider, or finish considering"… This ensures that traditional owners will gain their procedural rights in a timely manner, or if there is an adverse decision, can decide what action they need to take, if any.

Definitive wording such as that mentioned above would assist in speeding up the process which is in line with the reform process of making the NTA more efficient in practise. The focus should be based on what is best for the parties involved, being the traditional owners and proponents.

Item 107 - Procedures for Reconsideration and Review of ILUA and Native Title Determination Application Registration Test Decisions

Sections 190E&F are silent on whether, after the Native Title Registrar reconsiders a decision, an application can then be made to the Federal Court within 42 days from the date of the reconsidered decision. However, s 190F(5)(b)(i) indicates that an application to the Court for review may be made after receiving a negative reconsideration. This needs to be clarified. There is nothing to stipulate that an application cannot be made to the Federal Court while the application is also with the Native Title Registrar. Although this may be unlikely to occur, it should be made clear.

It would be helpful if wording was inserted either in s 190E or in a note under that section referring to s 24FE(b)(ii). This is important to alert practitioners that for s 24FA protection to occur, reconsideration of an adverse registration test decision must be applied for within 28 days of the s 190D(1) notice.

As there is still no mention of the *Administrative Judicial Review Act* (ADJR Act), it is assumed that this remains an option for review. This should remain the case as there may be circumstances where it is found to be of greater benefit (e.g., where only questions of law are at issue, it may be timely to apply under the ADJR Act.

Claims should not be in a position where they can be dismissed on the basis that they have not passed the registration test (s 190F(6)). There may be claims that do not pass the registration test, however the claim groups are unconcerned as procedural rights are not at issue due to the land tenure in the claim area (e.g., where claims are over National Parks). The amendment now requires such claim groups to seek a reconsideration of the registration test decision and possibly a judicial review of the decision or risk their claim being dismissed. There is already a section (s 84C) in the Act for parties to apply to dismiss claims. The registration test process should not be confused with the role of the Court.

We thank you for the opportunity to make the above submission and advise that the CLCAC would be pleased to discuss any aspect of this submission with you. If you have any queries, please contact Fiona Campbell on (07) 4041 3833.

Yours faithfully

Fiona Campbell
Principal Legal Officer