Submission of the

ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER

on behalf of the

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

to the

SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

on the

INQUIRY INTO THE NATIVE TITLE AMENDMENT (TECHNICAL AMENDMENTS) BILL 2007

26 April 2007

Human Rights and Equal Opportunity Commission

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A. INTRODUCTION

1. This submission is made by the Aboriginal and Torres Strait Islander Social Justice Commissioner on behalf of the Human Rights and Equal Opportunity Commission (HREOC) to the Senate Committee on Legal and Constitutional Affairs in its Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007. The submission is made under section 46C(1)(b) and (d) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

2. As a preliminary matter, the Commission notes the shortness of time provided for this inquiry. This has limited the Commission's ability to provide an extensive consideration of all aspects of the Bill. The Commission has therefore restricted its comments on the Bill to a few matters.

3. Due to the shortness of time, the Commission was unable to finalise its consideration of the following items within the Bill:

    - Schedule 1, Items 55, 58, 59, 60, 61 & 69 – Bank guarantees to replace the payment of compensation into trust;
    - Schedule 1, Item 91 – Amendment of the new provision (s.87A) for partial determinations; and
    - Schedule 3, Item 7 - Financial matters.

4. The Commission's initial consideration of these provisions identified that they would require further analysis as to whether, in their practical implementation, they may raise concerns for native title claimants. The Commission encourages the Committee to ascertain whether these provisions do in fact raise concerns during its public hearing processes for this inquiry.

5. Having given close consideration to the Bill, the Commission is satisfied that most of the provisions are indeed of a minor and/or technical nature and will not have any negative impact on the recognition and protection of native title.

6. There are some provisions which do raise concern. These are discussed in the body of the submission and are accompanied by recommendations to remedy the concerns raised.

7. As a general principle, it is essential at all times when the reform of native title law is contemplated that the historic importance of the recognition of native title, to the building of a more just Australia, be kept squarely in mind. The law of native title provides for the limited recognition and protection of what remains of the traditional property rights of Indigenous peoples. The Act represents a pragmatic compromise by the legislators of this country – at every point of potential friction between native title rights and interests and other property interests, native title has had to give way. It is of great importance that any further changes that are made to the Native Title Act 1993 (the "Act") do not disadvantage or impede the recognition and protection of traditional property rights further.

B. SUMMARY OF RECOMMENDATIONS:

HREOC recommends:

1. Recommendations in relation to Schedule 1 – Amendments to the *Native Title Act 1993*

Item 56 – Multiple Subdivision P future acts notified in the one notice

Recommendation 1

That Item 56 not be enacted unless it is amended so that a notice under s.29 may not give notice of more than one proposed future act unless:

- each of the proposed future acts would affect land subject to claim by the one native title claim group, or to a determination of native title in favour of the one native title holding group; or
- each of the proposed future acts would affect land within the one representative body area.

Item 62 & 63 (and also 127, 138 & 139) – Expansion of the scope of alternative State regimes that may be approved by the Commonwealth Minister

Recommendation 2

That Items 62, 63, 138 and 139 not be enacted.

To the extent that South Australia has granted invalid titles or done other acts which are invalid as a result of the invalidity of the Commonwealth Minister's determinations under s.43, and it is considered necessary to retrospectively validate them:

- Amendments should follow extensive consultations with affected Indigenous peoples; and
- the validating provisions ought not go any further than validating the invalid tenements; and
- just compensation for any loss resulting from doing the acts under the invalid laws should be made payable to the native title holders affected.

2. Recommendations in relation to Schedule 3 – Amendments relating to prescribed bodies corporate

Authorisation of regulations in relation to the determination of the "default PBC" (items 1, 2, 5 and 6)

Recommendation 3

That, insofar as they may authorise the making of regulations that prescribe the body corporate that may determined as either a trust or agent PBC, items 1, 2, 5 and 6 not be enacted.

Authorisation of regulations allowing a person or body other than the Court to determine a trust PBC or agent PBC (items 1, 2 and 6)

Recommendation 4

That the Committee recommend that, insofar as they authorise regulations that would allow a person or body instead of the Court to determine either a trust PBC or an agent PBC, items 1, 2 and 6 not be enacted.

C. SUBMISSIONS IN RELATION TO SCHEDULE 1 – AMENDMENTS TO THE *NATIVE TITLE ACT 1993*

5. Most of the amendments that would result from Schedule 1 are minor and technical and would improve the Act for all parties. However, the Commission is concerned about the following provisions.

Item 56 – Multiple Subdivision P future acts notified in the one notice

6. As drafted, it is possible that notices notifying multiple Subdivision P future acts could be issued in a manner that:

   (a) required native title holders and their representative bodies to wade through many notifications that were irrelevant to them; and

   (b) would make it more likely that important notifications will slip through the cracks.

   For example, at least one State has to date commonly given blanket notification to representative bodies of hundreds of licences at the one time. Of the hundreds notified, only a small number, if any, are relevant to any one representative body area, and a smaller number to any one native title holding group. This may be efficient and convenient for the State government but it is not for the native title holders and representative bodies. It significantly hampers their ability to identify proposals of concern and make focussed submissions in relation to them. It also makes it more likely that significant proposals will be missed.

7. The possibility of Subdivision P future acts now being notified in a similar way is a matter of concern. The Commission supports increased efficiency and convenience, but this must not be at the expense of native title holders and their representative bodies.

8. The item could be easily improved by placing conditions or restrictions on the use of s.29 notices that notify more than one proposed future act. The provision as drafted could be modified so that a s.29 notice may only contain notice of more than one Subdivision P future act if each of the future acts notified affects land claimed by the one native title claim group, or, at the least, land within the one representative body area.

Recommendation 1

That Item 56 not be enacted unless it is amended so that a notice under s.29 may not give notice of more than one proposed future act unless:

- each of the proposed future acts would affect land subject to claim by the one native title claim group, or to a determination of native title in favour of the one native title holding group; or
- each of the proposed future acts would affect land within the one representative body area.

Item 62 & 63 (and also 127, 138 & 139) – Expansion of the scope of alternative State regimes that may be approved by the Commonwealth Minister

9. Items 62 and 63 cannot be called technical amendments. There was extended, and often bitter, debate between the representatives of competing interests in the lead up to the enactment of the 1998 amendments. The political compromise which resulted from the debate was a balance between the competing interests. This balance is embodied in the precise wording of the current "right to negotiate" regime. The Commission was among those who believed that the balance finally reached was in contravention of Australia's human rights obligations.[1] The inclusion of the capacity of alternative state and territory regimes to replace the right to negotiate provisions was a particularly controversial matter.

10. The Commission is concerned at the proposed inclusion of provisions to retrospectively validate actions done in contravention of the provisions of the Act.

11. The reasoning for the adjustment being made does not indicate that there is any confusion over the scope of a permissible alternative State regime. It is purely to address the operation of an alternative State regime that was unlawfully made.

12. Retrospective validation of invalidly done future acts (including legislative acts) has been a too common aspect of amendments to this Act. This has served to undermine Indigenous confidence in the Act, and undermines public confidence in Parliament's respect for and commitment to the rule of law. It is wrong in principle that acts done in contravention of the law, and that adversely affect the rights and interests of others, are later retrospectively validated to avoid the consequences of the resulting invalidity. This is especially so when the laws in question are laws intended to help redress historical injustice. After the debates leading to the substantial amendment of the Act in 1998, there ought to be no reason for further validating amendments to this Act in 2007.

13. There are two particularly concerning aspects of the specific validating provisions at item 138 - a provision for the validation of South Australian

[1] See: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, HREOC Sydney 1999; and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, HREOC Sydney 1999.

alternative State provisions contained in the *Mining Act 1971* (SA) and the *Opal Mining Act 1995* (SA). The first is that the validating provision does not stop at validating the grants of the tenements issued by South Australia pursuant to its alternative State provisions, but rather validates the determinations by the Commonwealth Minister under s.43, and hence continues the South Australian provisions in operation.

14. The second is that the provisions being validated not only do not appear to meet the requirements for a valid determination under the current s.43, but neither would they meet the requirements of s.43 as amended by items 62 and 63. This is because of the provision they make for "umbrella" authorisations of all future mining operations within a defined area of up to 200 square kilometres – hence the need for item 138(2)(b) of Schedule 1. The validating provision would continue in operation a state regime that could not, even with the enactment of items 62 and 63, be the subject of a lawful s.43 determination.

15. The Commission urges the Committee to recommend that items 62, 63, 138 and 139 not be enacted. To the extent that it is considered necessary that the invalidity of future acts done under the South Australian alternative State provisions be retrospectively cured, this should be addressed in provisions of the narrowest possible scope and following extensive consultation with Indigenous peoples affected. In particular:

    (a) there should not be any validation of the invalid legislative regime itself; and

    (b) to the extent that native title holders may have been disadvantaged by the acts having been done under the invalid laws (the Commission is not aware of whether this has resulted or not), they must be entitled to just compensation (a broad principle that appears to have been considered and accepted from the inclusion of item 139).

Recommendation 2

That Items 62, 63, 138 and 139 not be enacted.

To the extent that South Australia has granted invalid titles or done other acts which are invalid as a result of the invalidity of the Commonwealth Minister's determinations under s.43, and it is considered necessary to retrospectively validate them:

- Amendments should follow extensive consultations with affected Indigenous peoples; and
- the validating provisions ought not go any further than validating the invalid tenements; and
- just compensation for any loss resulting from doing the acts under the invalid laws should be made payable to the native title holders affected.

Drafting errors in Schedule 1

Item 88

16. The Commission notes that there appears to be a defect in the drafting of s.84D(2)(b) that would be introduced by item 88 of Schedule 1. Presumably this paragraph was intended to read "on the application of a party to the proceedings".

Item 123

17. This item applies the amendments made by items 22 etc. "… in relation to claims in a claimant application under section 63 or subsection 64(4) …". The Commission notes that applications are not, however, made under either s.63 or s.64(4). Rather, these are the provisions under which applications and amended applications are referred by the Court to the National Native Title Tribunal. Presumably, this item ought to be to the effect of "…in relation to claims in applications or amended applications referred to the Tribunal under section 63 or subsection 64(4) …".

D. SUBMISSIONS IN RELATION TO SCHEDULE 3 – AMENDMENTS RELATING TO PRESCRIBED BODIES CORPORATE

18. The Commission notes that the amendments in Schedule 3 in relation to prescribed bodies corporate ("PBCs") have been drafted following the release by the Government of a Report on the Structures and Processes of Prescribed Bodies Corporate dated October 2006 ("the PBC report"). The Office of Indigenous Policy Coordination's website in relation to the native title reforms states that "the Government will implement all of the report's recommendations". Most of the amendments included in Schedule 3 of the Bill are not technical amendments but are rather substantive amendments intended to implement the recommendations in the Government's PBC Report.

19. There are 2 aspects of the amendments in Schedule 3 which give rise to concern. These are:

    (a) the introduction of new provisions allowing regulations to determine not only the kinds of body corporate that may be determined to hold native title on trust (a "trust PBC") and/or perform the agency functions in s.57(3) of the Act (an "agent PBC"), but also, in some circumstances, the body corporate that will be the trust PBC or agent PBC (items 1, 2, 5 and 6); and

    (b) the authorisation of regulations allowing another person or body, instead of the Court, to determine the PBC that will replace the PBC originally determined by the Court as either a trust PBC or an agent PBC (items 2 and 6).

    These concerns are discussed further below.

Authorisation of regulations in relation to the determination of the "default PBC" (items 1, 2, 5 and 6)

20. The Commission is concerned about the prospect that the amended:

- s.56(4)(c) and (e) (item 1);
- s.56(7)(a) (item 2);
- s.59(2) (item 5); and
- s.60(b) (item 6),

are either expressly intended to authorise, or would have the effect of authorising, regulations that prescribe not only the kinds of bodies corporate that may be determined as a trust PBC or and agent PBC, but also, the body corporate that is to be so determined, in the circumstances where these provisions would apply.

21. These provisions would apply in one of four circumstances:

(a) where the common law native title holders fail to nominate an agent PBC within the time allowed by the Court for them to do so (in which case s.57(2)(c) and the amended s.59(2) would apply);

(b) where the common law native title holders wish to replace a trust PBC with either:

(i) another trust PBC (in which case the amended s.56(4)(c) would apply);

(ii) an agent PBC (in which case the new s.56(4)(e) would apply);

(c) where the common law native title holders wish to replace an agent PBC with either:

(i) a trust PBC (in which case the new s.56(7)(a) would apply); or

(ii) another agent PBC (in which case the amended s.60(a) would apply); or

(d) where a liquidator is appointed to:

(i) a trust PBC (in which case the amended s.56(4)(e) would apply); or

(ii) an agent PBC (in which case the amended s.60(a) would apply).

In each case, the amended provision authorising the making of the regulations appears to be, for present purposes, to the same effect. Only in the first of these instances is there a specific reference to the regulation being authorised to prescribe the body corporate which is to be determined. In other cases, the regulation making power is expressed in the form of a power to make regulations about the determination of prescribed body/bodies corporate. The Explanatory Memorandum states that it is currently the Government's intention

that regulations only be made to prescribe the body corporate that is to be determined in the case of the determination of an agent PBC . But there is not any clear material difference between the power to make a regulation in relation to the determination of the body corporate (which is the precise formula used in relation to the determination of an agent PBC) and the power to make a regulation in relation to the determination of a body corporate (which is the formula used in relation to the determination of a trust PBC). The Committee can only assume that in each case the regulation making power is to the same effect.

22. The Commission's concern with these provisions is with the notion that regulations might be used, in any circumstances, to dictate to the common law native title holders the body that will:

(a) hold their native title; and/or

(b) act as their exclusive agent in relation to the protection and management of the native title.

Clearly there will be circumstances in which it will be necessary to determine, perhaps as a matter of urgency, a PBC or replacement PBC. But it would be a radical shift in the current policy embedded in the Act and in the current regulations, if the choice of the body to be so determined were made not by the Court (having every possible regard to the wishes of the native title holders), but rather by the regulations.

23. This shift in policy is being proposed apparently as a result of a recommendation made in its October 2006 PBC Report that:

> The Office of Indigenous Policy Co-ordination should develop a comprehensive proposal for the establishment of 'default' bodies corporate to perform PBC functions in circumstances where there is no functioning PBC nominated by the native title holders.

The Government has announced that it intends to adopt this and all other recommendations made in the PBC Report and the Explanatory Memorandum announces that: "A proposal has now been developed under which a particular government funded body or bodies (a default PBC) could perform the functions of an agent PBC (but not those of a trust PBC) …" . The details of that proposal have not, to the Commission's knowledge, been made known. Nor has the development of the proposal been the subject of consultation with native title holders or claimants or their representative bodies.

24. These proposed provisions may reflect a desire to find a cost-effective means of addressing the current situation (which has regularly been the subject of concern, including from HREOC as reflected in successive *Native Title Reports*) of PBCs having no financial means to protect and manage determined native title rights.

25. To the extent that there is a need to provide for stop gap arrangements to apply in limited circumstances where there is no PBC, this should be addressed by another means, such as by providing for a Court appointed official to perform

limited duties in the short term until an appropriate new PBC can be established and/or determined.

26. I therefore urge the Committee to recommend that these amending provisions not be enacted.

Recommendation 3

That, insofar as they may authorise the making of regulations that prescribe the body corporate that may be determined as either a trust or agent PBC, items 1, 2, 5 and 6 not be enacted.

Authorisation of regulations allowing a person or body other than the Court to determine a trust PBC or agent PBC (items 1, 2 and 6)

27. The provisions of concern here are the proposed new:

- s.56(4)(e) (item 1);
- s.56(7)(a) (item 2); and
- s.60(b) (item 6).

28. These provisions would apply in one of three circumstances:

(a) where the common law native title holders wish to replace a trust PBC with:

(i) another trust PBC (in which case s.56(4)(c) would apply); and

(ii) an agent PBC (in which case s.56(4)(e) would apply);

(b) where the common law native title holders wish to replace an agent PBC with:

(i) a trust PBC (in which case s.56(7)(a) would apply); or

(ii) another agent PBC (in which case s.60(b) would apply);

(c) where a liquidator is appointed to:

(i) a trust PBC (in which case s.56(4)(e) would apply);

(ii) an agent PBC (in which case s.60(b) would apply)

29. It is important to keep in mind that one of the contexts in which the circumstances in paragraphs (a) and (b) above might arise, would be where a so-called "default PBC" (that is, a PBC specifically prescribed by the regulations as discussed above) has been determined and the native title holders wish to then seek to regain control of the protection and management of their native title. This is described in the Explanatory Memorandum as a "transfer out" situation .

30. In each case, the regulations may make provision in respect of the determination of the replacement PBC including the determination by the Federal Court. The Explanatory Memorandum confirms that the intention of this was to allow the regulations to provide that another person or body, *rather than* the Federal Court, would make the determinations.

31. Again, this is another radical departure from the existing legal policy by which the determination of the trust or agent PBC is exclusively within the jurisdiction of the Court. The Commission is concerned about this change of policy. Recognised native title is all that remains to contemporary traditional owners of the legal title to land that their ancestors had prior to the acquisition of sovereignty by the Imperial Crown. A formal determination of native title is the end point for the common law native title holders of arduous litigation and/or negotiation (in which there is every likelihood that the Commonwealth and the relevant State or Territory will have been a major active respondent party).

32. The Court is the appropriate body to determine which body corporate will hold the native title and/or perform the agency functions in relation to the native title. It is not appropriate that power to re-determine that body corporate be potentially vested in a Commonwealth (or State or Territory) public servant. This is particularly so where that public servant could be determining a request by the native title holders to "transfer out" of a Commonwealth sponsored prescribed default PBC.

Recommendation 4

That the Committee recommend that, insofar as they authorise regulations that would allow a person or body instead of the Court to determine either a trust PBC or an agent PBC, items 1, 2 and 6 not be enacted.