Additional Comments by Liberal Senators

1.1 Liberal Party Senators are aware of the historically low rate of finalisation for native title claims, as illustrated by the average age of claims and the alarming projection that the last claim will not be settled until 2035.[1] They therefore support the aims and objectives of the Native Title Amendment Bill 2009, particularly the encouragement of settlement by negotiation and building flexibility into the system, thereby maximising the chances of resolution.

1.2 Liberal Senators make the point however, that the Committee was not provided with any solid evidence as to how the 2007 amendments have operated. One clear piece of evidence that was presented is the welcome news that over the past two years the number of proceedings going to trial has decreased and most proceedings are being settled by consent. No doubt there are many reasons for this, but it cannot be said that the 2007 amendments have operated in a counter-productive fashion.

1.3 The reforms in Schedule 1 have been developed without the benefit of broad consultation, and, as stated in evidence, appear to simply reflect Labor Party policy.[2] While the basis for the amendments has been made clear, the objective rationale for them has not. In the absence of a compelling case for the reforms being proposed, Liberal Senators have a range of concerns about the possible consequences of amendments to the Act.

The role of the Federal Court in managing native title claims

1.4 The stated policy objective of the Bill is to implement institutional reforms to give the Federal Court a central role in managing native title claims. The Registrar and Chief Executive Officer of the Federal Court, Mr Soden, submitted that empowering the Court to take a central role in managing all native title claims and to control the direction of each case would enhance the prospects of resolving matters without the end for protracted litigation processes. [3] He submitted that it was desirable to have resort to a range of alternative dispute resolutions (ADR) options, not just mediation. Liberal Senators note however that the Court already has that role through the 1998 amendments to the *Native Title Act 1993*. Mr Soden acknowledged that the ADR options he outlined were already available to the Federal Court, however his evidence was that '*we have not focused on those kinds of options since 1 July 2007, where the main responsibility has been with the* [National Native Title Tribunal (NNTT)].' [4]

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[1] Committee report, p. 11.

[2] Mr Jeffrey Murphy, *Committee Hansard*, 16 April 2009, p. 43.

[3] Federal Court of Australia, *Submission 1*, p. 2.

[4] *Committee Hansard*, 16 April 2009, p. 51.

1.5 It is not clear why the Court has not been focusing on these options, as the effect of the 2007 amendments was merely to require compulsory referral of applications to the Tribunal for mediation without simultaneous mediation by the Federal Court. In addition, section 86C(1) provides that the Court may, of its own motion, at any time in a proceeding, order that mediation by the Tribunal cease. Parties to proceedings can, pursuant to section 86C(2), at any time from 3 months after the start of mediation by the Tribunal, seek an order ceasing mediation.

1.6 The 2007 amendments did not diminish the central role of the Federal Court in managing native title applications. The Court, post the 2007 amendments, has only been required to send matters to the Tribunal when, and if, it thinks the parties can reach agreement. The Court has discretion when to send a matter for mediation, and when to cease mediation. It is not clear, then, how the 2007 amendments have impacted on the Court's capacity to speed up the resolution of claims, or conversely, how this Bill, actually facilitates that task. Mr Tony McAvoy, the legal representative of the National Native Title Council, shares this concern.[5]

1.7 While the Committee has been presented with submissions suggesting that the reforms will enable the Court to take a central role in managing native title claims, the stark reality is that the Court already has that role and the amendments simply increase the range of available mediators.

Possible implications of expanding the range of mediators

1.8 In its submission to the Committee[6] the NNTT expressed concern that the amendments in Schedule 1 could result in the resolution of native title claims in a less systematic way and that the process could become ad hoc, fragmented, less efficient and more expensive to the Commonwealth. While Liberal Senators note the well established reputation of the Federal Court for efficiently disposing of the cases before it, they are concerned that the extent of the Court's capacity to direct the Tribunal to do certain things, including allocation of particular members to mediate, may result in confusion and lack of clarity about the respective powers and functions of the Court and the Tribunal.

1.9 Mr Soden gave evidence that the Court will be issuing a Practice Note to provide some guidance as to how the Court will be exercising its discretion.[7] This would be a welcome development, as one of the well documented problems facing the native title system is the inconsistency of approach by Judges of the Federal Court in the native title jurisdiction. Given this experience, Liberal Senators consider there is a likelihood of inconsistency since the Bill, in effect, de-regulates mediation by

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[5] *Committee Hansard*, 16 April 2009, p. 26.

[6] NNTT, *Submission 3*, p. 1.

[7] *Committee Hansard*, 16 April 2009, p. 54. Mr Soden said that the proposed Practice Note will be '*very comprehensive'* and '*will give an explanation of what is expected and will list a whole lot of options that the court will focus upon'.*

allowing individual Judges considerable discretion by referring matters to mediation by private mediation service providers. In the context of a totally deregulated private mediation service market, vesting the Court with an unlimited discretion and then allowing it to be exercised by individual judges has the potential to result in a number of serious unintended consequences.

The identification, payment and support of private mediators

1.10 The Bill removes references to the NNTT mediating from the Act, and instead simply refers to a person or body mediating. The only statutory guidance is contained in proposed subsection 86B(5B) which provides that the Court may refer matters to a Registrar, Deputy Registrar, District Registrar or Deputy District Registrar of the Federal Court for mediation. The Bill therefore takes a minimalist approach in terms of specifying qualifications of private mediators. In contrast, Tribunal members are appointed by the Governor General,[8] a Presidential member must be a Judge, or former Judge or have been enrolled as a legal practitioner for more than five years. Ordinary members must have special knowledge in relation to Aboriginal or Torres Strait Islander societies, or land management, or dispute resolution or any other class of matters considered by the Governor-General to have substantial relevance to the duties of a member.[9]

1.11 Without appropriate clarification, Liberal Senators are concerned that private mediators may not possess qualifications and experience of practices which might actually be important in ensuring their honesty, their integrity and their capacity to do the work required of them. Tribunal members are statutorily required to have a range of skills, with dispute resolution being only one. In an unregulated mediation market, it is not clear what particular skills a mediator will bring to the process. Having regard to the range of interests involved, including indigenous, mining, pastoral and infrastructure, the risk of conflicts of interest are ever present. Deregulating mediation service delivery in such proceedings without any regulatory standards to protect the parties is unsatisfactory.[10]

1.12 The Bill is also unclear as to whether a Judge could appoint an organisation to mediate, resulting possibly in a person other than a Judge determining who would carry out the mediation. Proposed subsection 86B(1) allows the Court to refer an application to '*an appropriate person or body*' for mediation. The Bill provides no significant guidance on the appointment of private mediators. This is inconsistent and inappropriate in a Bill which it is claimed will facilitate greater Court case management.

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[8] s. 111 *Native Title Act 1993.*

[9] s. 110 *Native Title Act 1993.*

[10] In his submission for example, the Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC) notes that '*it is possible that the Court could chose a mediator who is entirely inappropriate for the Indigenous claimants. For example, if a mediator has intimate knowledge of the area and the claimant group, or other Indigenous groups residing in the area, then he or she may run the mediation with a predetermined outcome in mind*'.

1.13 Liberal Senators note that all existing coercive powers vested in the Tribunal will be vested in private mediators.[11] The powers given to these private mediators include: to require parties to attend conferences, or to exclude parties or their representatives from conferences (s. 94E), directing parties to produce documents (s.94G), referring questions of fact or law to the Court (s.94G), referring a question to the Court whether a party should be dismissed (s.94J), prohibiting the disclosure of information given or disclosed at a conference (s.94L), reporting breaches of the requirement to act in good faith (s.94P) and granting to such private mediators the same protections and immunities as a High Court Judge (s.94S).

1.14 To seek to give to an individual Federal Court judge the untrammelled right to appoint a person to mediate, when such a person is thereby vested with such broad powers and given the protections of a High Court Judge, is both surprising and concerning. Such extensive powers should only be exercised by persons acting under strict statutory guidelines and appointed according to well defined rules, and with such appointment having elements of both transparency and accountability.

1.15 In summary, the appointment of private persons (and organisations) inevitably raises questions of accountability insofar as those persons and organisations operate outside the framework of a government institution with all of the relevant regulatory checks and balances.

Limiting the capacity of the NNTT to provide information to the Court

1.16 The proposed amendments remove the capacity of the NNTT to provide the Court with voluntary regional mediation progress reports and regional work plans if the President considers that such a report or work plan would assist the Court in progressing proceedings. In its submission to the Committee, the NNTT noted that '*if the Act is amended by proposed s 94N and the repeal of s 136G(3A), the Tribunal will lose the capacity to volunteer such reports, and the Court may be deprived of a valuable source of information for case management in regions where most or all claims have been referred to the Tribunal for mediation.*'[12]

1.17 The Explanatory Memorandum states[13] that it is unnecessary for the Tribunal to provide such reports or work plans given the purpose of the amendments is to give the Court the overall control of native title claims. Liberal Senators were not persuaded by this argument, which appears to be part of a pattern to try to justify all manner of changes on the basis that the Court should be given basically unrestricted discretion to run its proceedings. The NNTT pointed out[14] that the provision of such reports in no way diminishes the Court's control of its proceedings. The Court can

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[11] ATSISJC, *Submission 8*, p. 16.

[12] NNTT *Submission 3*, p. 12.

[13] Native Title Amendment Bill 2009, *Explanatory Memorandum* para 1.78.

[14] NNTT, *Submission 3*, p. 13.

give such weight as it considers appropriate to the contents of such a report or work plan.

1.18 Liberal Senators see the force of the Tribunal's view. The legislation currently confers on the Tribunal the *right* to appear before the Federal Court at a hearing in relation to any matter that has been referred for mediation. The Bill inserts a provision (s.86BA) that only *permits* the Tribunal to appear before the Court if '*the Court considers that the mediator might be able to assist the Court in relation to a proceeding.'* The Explanatory Memorandum concludes by justifying the removal of the right of appearance on the basis that this '*would be consistent with granting the Court control over native title proceedings.'*[15] Liberal Senators do not understand the logic of removing the Tribunal's right of appearance. It was inserted in the 2007 amendments with the aim of facilitating better communications between the Court and the Tribunal, and there is no evidence before the Committee that this has not proved to be the case.

Schedule 2 – Powers of the Court

1.19 Schedule 2 contains some provisions designed to facilitate consent determinations of native title. One proposed reform would allow the Court to make orders that cover matters beyond native title, while another would enable the Court to rely on a statement of facts agreed between the parties. Liberal Senators see some merit in this reform, recognising that a determination of native title is part of a bundle of issues that parties want resolved as part of a broader settlement. We consider however, that the application of this proposal will need to be carefully monitored, and that any constitutional or serious procedural issues are dealt with proactively and in consultation with the relevant States and Territories.

Lack of prior consultation and evidence to support the proposals

1.20 Finally, Liberal Senators are concerned by evidence to the Committee suggesting an absence of consultation in developing these reforms. The Government states it used an evidence-based approach to policy development. While this is welcomed, we are concerned that little attention has been paid to the view of the NNTT. In his evidence to the Committee, Mr Neate, the President of the Tribunal, stated that he '*was advised of the announcement of the proposed changes immediately prior to them – the day before.'*[16]*…'But this was really advising me of what was about to be announced.'*[17] It is of concern to Liberal Senators that the Attorney-General would develop and then announce substantive changes to the *Native Title Act 1993,* impacting on the core mediation function of the National Native Title Tribunal, without even consulting with the President of that Tribunal.

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[15] Native Title Amendment Bill 2009, *Explanatory Memorandum*, para 1.36.

[16] *Committee Hansard,* 16 April 2009, p. 3.

[17] *Committee Hansard,* 16 April 2009 p. 4.

Senator Guy Barnett
Deputy Chair

Senator Russell Trood

Senator Mary Jo Fisher