Additional Comments from the Australian Greens

1.1 The Australian Greens support the findings of the majority report of the Senate Standing Committee on Legal and Constitutional Affairs but do not believe that either the legislation or the committee report go far enough in addressing the need for more fundamental reform to the Native Title Act. In particular, we share the concerns of a number of witnesses (including the National Native Title Council (NNTC) and the Australian Human Rights Commission (AHRC)) that these relatively minor amendments represent a missed opportunity to address the current limitation of the Native Title Act and to deliver on the intent of the Act to deliver justice and tangible benefits to Australia's first peoples[1].

1.2 Native title should offer an opportunity for Aboriginal Australians and Torres Strait Islanders to participate in the management of their land, maintain and enhance their cultural responsibilities and spiritual connection to it, and benefit from the sustainable use of its resources. The fact that the system of native title law to date has not enabled them to do so is an indictment on the legal framework for native title, and the way it has facilitated misuse of its processes by state and territory governments to frustrate the rights of the traditional owners of the land.

Proposed Amendments

1.3 The amendments proposed in the Native Title Amendment Bill 2009 were considered to be minor and non-controversial by most of the witnesses to the inquiry, with the National Native Title Tribunal (NNTT) raising some concerns over how the changes would potentially impact on their ongoing operations.

1.4 As Tony McAvoy on the NNTC put it:

> …the amendments that are proposed in this amendment bill are not controversial. They may make some small difference but they are not going to make any vast change in the way in which native title matters are dealt with. There is not going to be any rush of settlement of native title applications as a result of any of these amendments.[2]

1.5 These comments reflect the recent analysis of (now) Chief Justice Robert French, who argues that the heavy burden on the principal parties to native title litigation is a result of these claims being proceedings conducted in the Federal Court and so '… their resolution is, to a degree, constrained by the judicial framework…' particularly its requirement that '…applicants prove all elements necessary to make

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[1] Preamble to the *Native Title Act 1993*.

[2] *Committee Hansard*, 16 April 2009, p. 20.

out the continuing existence of native title rights and interests *within the meaning of the NTA and their recognition by the common law*.'[3]

1.6 The AHRC also argued that further reforms were necessary to realise the human rights of Aboriginal and Torres Strait Islander peoples and to enact our international commitments. The Australian Greens consider that the amendments suggested by the AHRC have merit, and recommend that the Government consider their adoption.

1.7 The AHRC also drew to the attention of the committee the latest statement from the United Nation's Human Rights Committee, which '…notes with concern the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act. It regrets the lack of sufficient steps taken by the State party to implement the Committee's recommendations adopted in 2000.'[4]

1.8 The small number of submissions to this inquiry by Aboriginal organisations possibly reflects both the minor nature of these changes and the short timeframe the inquiry allowed for submissions. Given the current problems, costs and delays faced by parties to the native title process and the significant concerns with other aspects of the native title process that have been highlighted over the last decade it is disappointing that more significant reforms have not been brought forward by the Rudd Government at this point.

Burden of Proof

1.9 The most significant relatively simple amendment that could be made at this time to help with actually '…achieving more negotiated native title outcomes in a more timely, effective and efficient fashion'[5] (as the Attorney General claims is the intent of this Bill) was, in the view of the vast majority of the witnesses who addressed this issue the burden of proof placed onto native title claimants to prove connection and continuity.

1.10 The AHRC argues that:

> It cannot be disputed that Indigenous peoples lived in Australia prior to colonisation and that the Crown was responsible for the dispossession of Indigenous peoples throughout Australia. It has also been acknowledged by governments over time through various policies, laws and statements of recognition, including the creation of land rights regimes and other mechanisms, that Indigenous peoples are the Traditional Owners of the land.

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[3] Justice Robert French, *Lifting the burden of native title – some modest proposals for improvement*, Federal Court, Native Title User Group, Adelaide, 9 July 2008, p. 1. *(emphasis added).*

[4] Australian Human Rights Commission, submission 8, p. 4.

[5] Hon. Robert McClelland MP, Second Reading speech, *House Hansard* 19 March 2009.

> It is in this context that the Commission argues that it is unjust and inequitable to continue to place the demanding burden of proving all the elements required under the Native Title Act on the claimants.[6]

1.11 The NNTC argued that the burden of proof placed onto native title claimants unfairly ties them up in long-winded and costly research and litigation, arguing that in the Federal Court:

> The state is a party and is entitled in the way that the law is presently structured to demand that the party seeking the remedy prove its case; it is entitled to do that. It can sit in mediation and require the applicant to prove each point to a level of satisfaction. Whilst in a spirit of settlement that might seem to be unreasonable, it is a long way short of being in bad faith or of there being an absence of good faith.[7]

1.12 On these grounds the NNTC argues that improving mediation processes and referrals or making changes to 'good faith' provisions will not result in a dramatic increase in the number of successful native title claims or the speed with which they are resolved, because:

> Unfortunately, for many traditional owners, simply reaching the point of getting into substantive negotiations with any of the respondent parties is a hurdle that many have been unable to attain as yet. In many cases, the state will not even talk to them about serious settlement because they have not presented a connection report.[8]

1.13 The NNTC further argued that:

> The longest delay is in getting into discussions and concluding discussions with the respondent parties, and invariably the primary respondents are state governments or the Commonwealth. That is where the real delays and problems are, and that is where this shifting of the onus of proof will have great effect.

1.14 Instead the NNTC argue for a rebuttable presumption of continuity, along the lines suggested by Justice French.

> …if the parliament is interested in bringing forward settlement of native title applications and reducing the cost associated with the hundreds of applications that are presently before the court then a simple measure—one which is described by Chief Justice French in his paper as a modest proposal—would be to introduce a presumption of continuity. It would require a number of small provisions to be inserted into the legislation.

1.15 It is my submission that having inserted those provisions the initial premise for the establishment of the presumption could be made out in the application itself

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[6] Australian Human Rights Commission, submission 8, p. 48.

[7] Mr Tony McAvoy, NNTC, *Committee Hansard*, 16 April 2009, p. 23.

[8] Mr Tony McAvoy, NNTC, *Committee Hansard*, 16 April 2009, p. 23.

and the section 62(1) affidavit which supports the application, and then the burden would automatically shift to the states.[9]

1.16 The form of such a provision recommended by Justice French is as follows:

- (1) This section applies to an application for a native title determination brought under section 61 of the Act where the following circumstances exist:
    - (a) the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group;
    - (b) members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional;
    - (c) the members of the native title claim group, by their laws and customs have a connection with the land or waters the subject of the application;
    - (d) the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.
- (1) Where this section applies to an application it shall be presumed in the absence of proof to the contrary:
    - (a) that the laws acknowledged and customs observed by the native title claim group are traditional laws and customs acknowledged and observed at sovereignty;
    - (b) that the native title claim group has a connection with the land or waters by those traditional laws and customs;
    - (c) if the native title rights and interests asserted are capable of recognition by the common law then the facts necessary for the recognition of those rights and interests by the common law are established.[10]

1.17 As the AHRC argues, such an approach is consistent with the stated intent of Native Title Act (as expressed in the preamble) and in line with a number of current Australian laws which shift the burden of proof to the respondent, including the *Sex Discrimination Act 1984* and the *Workplace Relations Act 1996*.[11] Furthermore, given that governments are both the party that granted interests in traditional lands to others

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[9] Mr Tony McAvoy, NNTC, *Committee Hansard*, 16 April 2009, p. 20.

[10] Justice Robert French, *Lifting the burden of native title – some modest proposals for improvement*, Federal Court, Native Title User Group, Adelaide, 9 July 2008, pp 11–12.

[11] AHRC, submission 8, p. 49.

and are the holders of the vast majority of relevant records, it would seem both fitting and appropriate that they bear the burden of proof.[12]

1.18 The main procedural benefit of including a presumption of continuity would be the manner in which it encouraged governments to progress native title claims without first insisting claimants present comprehensive connection reports.[13] It would also provide much greater incentive for them to access their records and provide to the court at a much earlier point the information they hold that could clarify areas that are under dispute.[14] A respondent party, including a state or territory government could choose to challenge such a presumption and present evidence to make its case, but it could also choose not to challenge and disregard any substantial disruption in continuity of acknowledgement of traditional laws and customs should it desire.[15]

1.19 The AHRC says that 'it does not consider that shifting the burden of proof to the primary respondent in native title cases would result in opening the 'flood-gates' for native title claims'[16] provided that existing procedural mechanisms within the Native Title Act that act as safeguards are retained – such as the current notification provisions and registration test.

1.20 The existing registration test, which requires claimants to specify the details and merits of their claim, should act to limit ambit and spurious claims. The Commission cautions against toughening the existing registration test, arguing that this would simply shift the current problem to an earlier stage and place the assessment of evidence outside of the Court.[17] It recommends instead that that Commonwealth and the National Native Title Tribunal draft a clear and comprehensive guide to the registration test.

Recommendation 1

1.21 That the Native Title Act is amended to include a rebuttable presumption of continuity.

Senator Rachel Siewert

Australian Greens

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[12] AHRC, submission 8, p. 50.

[13] AHRC, submission 8, p. 51.

[14] AHRC, submission 8, p. 51.

[15] Justice Robert French, *Lifting the burden of native title – some modest proposals for improvement*, Federal Court, Native Title User Group, Adelaide, 9 July 2008, p. 11.

[16] AHRC, submission 8, p. 50.

[17] AHRC, submission 8, p. 50.