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8 April 2009

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100, Parliament House
Canberra ACT 2600

Dear Mr Hallahan

Inquiry into the Native Title Amendment Bill 2009

I refer to the current inquiry by the Standing Committee on Legal and Constitutional Affairs into the Native Title Amendment Bill 2009 and enclose a submission.

The submission reflects my views and, in general, what I believe to be the views of the Judicial members of the Federal Court's Native Title Practice Committee. In summary I welcome the proposed amendments. I also acknowledge the opportunities and important challenges they present. The Court will take up the opportunities in its usual efficient and innovative way and will also meet these challenges with an increased sense of responsibility and accountability.

I am also confident that the judges with particular list management responsibility for Native Title cases will, together with our senior staff and in consultation with other people , particularly those within the National Native Title Tribunal, work cooperatively and effectively to implement the proposed improvements.

I would be pleased to attend before the Committee to clarify or expand upon the matters mentioned in the submission.

Yours sincerely

Warwick Soden
Registrar and Chief Executive Officer

Submission - inquiry by the Standing Committee on Legal and Constitutional Affairs into the Native Title Amendment Bill 2009

1. Background

In October 2008, the Attorney-General, Robert McClelland, announced that the Government had approved changes to the *Native Title Act* 1993 (Cth) (the Act) to further improve the operation of the native title system.

In December 2008 the Attorney-General wrote to the Chief Justice of the Federal Court of Australia advising his Honour of the proposed new arrangements for the management of the Native Title jurisdiction by the Federal Court (the Court).

At the same time the Attorney-General released a discussion paper on the amendments to the Act necessary to complement the proposed institutional change.

The discussion paper sought views on a number of matters including the desirability of the Court being able to rely on a statement of facts agreed between parties, enable the Court to make determinations that cover matters beyond native title, and empower the Court to use recent changes in evidence laws in native title matters. The Court made a short submission on the issues raised in the Discussion Paper, annexed for your information.

Following the Attorney-Generals announcement the Court met with officers of the Department and the National Native Title Tribunal (the Tribunal) on three occasions. The purpose of these meetings has been to discuss the proposed amendments and the likely impact on the work of the Court, the Tribunal and on the resolution of native title claims.

In general, it was noted that the Bill's intention is to give the Court a central role in managing claims by, amongst other things, empowering it to refer a matter to a mediator; as opposed to a mandatory referral to the Tribunal.

This change is welcomed by the Court as it supports its long held view that results are obtained through a flexible and responsive approach to mediation. This view is based on the Court's experience of the beneficial results of active case management by the Court in some native title proceedings. By way of example the Court's management of mediation in the Gunditjmara matter (VID6004/98 and VID655/06) yielded highly regarded outcomes; the Court's management of the conflicting views of experts assisted in the timely resolution of Yankunytjatjara/Antakirinja (SAD 6022/98); the Court's innovative approach to the management of connection in a number of claims in South Australia.

Under the proposed amendments the Court will be able to apply innovative approaches to the emerging issues, including referral of a matter to the Tribunal for mediation, court-

annexed mediation, the management of expert evidence**,** early neutral evaluation, case conferences and other practical ADR procedures.

2. Native Title Amendment Bill 2009 (the Bill)

In the second reading speech in support of the Bill the Attorney-General said that the key amendments are intended to support the Government's objective of achieving more negotiated native title outcomes in a more timely, effective and efficient fashion.

It has been the long held view of the Court that native title determination applications are proceedings in the Court and that mediation (and/or any other ADR process) is an adjunct to those proceedings, to be directed to the prompt resolution of the matter. Further, empowering the Court to take a central role in managing all native title claims and to actively control the direction of each case with the assistance of case management powers, will enhance opportunities for resolution of the case without the need for protracted litigation processes, or if necessary, a trial on only the real issues in dispute.

The Court has achieved strong results in mediating native title matters and is confident that it has the necessary skills to actively manage native title claims in a manner intended by the Bill which will lead to resolution of claims in the shortest possible time frames. We anticipate undertaking this very important role with the continued assistance of the Tribunal. Judges will continue to supervise matters in mediation with the Tribunal or refer new matters to it if they are of the view that the Tribunal is the appropriate body to resolve the matter.

Importantly the Bill recognises that negotiated outcomes can extend beyond the bare recognition of legal rights as they can include sustainable benefits that deliver improved economic and social outcomes for generations of native title claimants.

To assist in facilitating broader agreements the Bill will empower the court to make consent orders concerning matters beyond native title. This initiative is welcomed by the Court as is the specific provision that confers on the Court the discretion to rely on an agreed statement of facts between the parties in making a consent determination.

3 The Court's Revised Approach to the Management of Native Title

The Court is currently reviewing its approach to the management of the jurisdiction to ensure that improvements continue to be made to the efficient, effective and just resolution of claims and matters related to or arising out of those claims in the spirit of the Bill.

The key assumptions that underpin this review are:

- Active Judicial management of the caseload in a manner designed to achieve the desired outcomes is required;
- A realistic targeting of resources is required.

- Highly effective ADR practitioners are required to implement the proposed case management strategies and ADR initiatives.

In summary it is agreed that this requires coordination, consistency, and a refined focus on appropriate case management and ADR responses with a view to arriving at consent determinations that encompass broad outcomes, as soon as possible.

If the Bill is passed in its current form then the Court proposes that its native title list judges review each State and territory caseload for the purpose of promoting a consistent approach to the management of the caseload, whilst taking into account the resources available to all stakeholders in the system.

The current practice of each list judge, either separately or jointly, convening regional callovers of all cases for the purpose of reviewing the status of mediations, identifying priority cases and considering the application of ADR initiatives that are needed to resolve cases would continue and indeed be improved where necessary.

The Court, as with the Tribunal and others, has been and continues to be mindful of the resources available to all in the jurisdiction and as such understands the need for a coordinated approach to the management of the list. It is anticipated that the native title list judges, through reviewing every case on a case specific or regional basis, and by applying a number of appropriate ADR responses, will lead to an increase in the results achieved. Referral to ADR at a time to be determined by the Court and when the parties are ready to properly engage, will result in an effective use of time and resources and be outcome focussed. The Court sees it as desirable to have recourse to a range of ADR options; not just mediation.

The ADR options may include:

- Remain in NNTT mediation
- Intensive timetabling of the mediation in the NNTT
- Referral to a Registrar for mediation or to an external mediator
- Referral to a case management conference
- Management of claims on a grouped or regional basis
- Referral to a compulsory conference of experts
- Referral of an issue or question to a referee
- List for a separate hearing on a limited question
- Referral of questions arising for the purpose of an inquiry or a report.
- The taking of early evidence or preservation evidence
- Early Neutral Evaluation

To be effective this approach requires coordination and sound management and as such the Court will improve its existing case management strategy. This will include the convening of user group meetings, regional call overs and the identification of a priority cases to ensure that a coordinated approach is taken to the timetabling of these matters and that resources are available to support their resolution.

Managing priority matters in the manner intended will require the assistance of experienced ADR practitioners. One of the strengths of the Court's approach to the management of its general litigation and to native title matters is that it employs flexible, responsive means of identifying the real issues in dispute and deciding, in consultation with the parties, the strategies to resolve those issues.

The Court's case management strategies under the new arrangements are likely to retain flexibility and creativity as foundational elements and ensure that ADR processes are designed according to the parties' views and the needs of the case.

As acknowledged in my covering letter the Court recognises the opportunities and challenges this Bill presents. It is ready to take up the opportunities in its usual efficient and innovative way and will also meet the important challenges with an increased sense of responsibility and accountability.