National Native Title Council

spirit of Change

Submission

Senate Inquiry: Native Title Amendment Bill 2009

PURPOSE

This Submission is being provided for the Senate Standing Committee on Legal and Constitutional Affairs for their Inquiry into the Native Title Amendment Bill 2009.

SUBMISSION

The Native Title Amendment Bill 2009 provides a range of minor amendments to the *Native Title Act*. The National Native Title Council (NNTC) provided a submission to the Discussion Paper released by the Federal Attorney General in December 2008 and would refer the Senate Standing Committee to that submission for any comments to the proposed minor amendments.

The NNTC would consider the minor amendments generally non-controversial, however seeks this opportunity to pursue more fundamental change to the native title system and more substantial changes to the *Native Title Act.* The following comments are provided in good faith for the consideration of the Committee and will form the basis of the NNTCs opening remarks to the Inquiry Hearing being held on 16 April 2009.

In the Explanatory Memorandum to the *Native Title Amendment Bill 2009*, the Preamble to the *Native Title Act 1993* is highlighted as one of the central objectives of the Act. The Explanatory Memorandum quotes from the Preamble as follows:

> *A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.*

Whilst this excerpt is used to emphasise the importance of mediation rather than litigation, the NNTC would argue that the key premise is the desire to see ***just and proper*** ascertainment of native title rights and interests. It is arguable that going back to this fundamental principle should be the aim of resolving native title and could best be done with a shift away from the heavy burden of proof that is asked of Native Title claimants.

As outlined in his speech to the Negotiating Native Title Forum, Kevin Smith, Chief Executive Officer of Queensland South Native Title Services, outlined that:

> the major issue for the native title party is discharging the crushing burden of proof as required by the *Ward*[1] and *Yorta Yorta*[2] tests. Having to establish concepts of society and continuity and then having to particularize each law and custom and right and interest to the requisite standard borders on cruelty. When Respondents insist upon a strict linear approach in negotiations that the applicant must prove connection to almost a trial standard and then respondents deal with extinguishment in this very long convoluted process, the system is going to and does exact a toll; often to the detriment of the native title party.[3]

Smith goes on to say that this "process virtually accepts that respondents can hang back, and wait to see if the native title party either implodes from the burden of proving connection or is struck out by the Court".[4] Thus the process also becomes unnecessarily long and expensive.

As French CJ has suggested, one possible mechanism for attenuating the burden of making a case for determination is "a change to the law so that some of the elements of the burden of proof are lifted from applicants".[5] This could be satisfied by introducing a rebuttable presumption of continuity, reversing the onus of proof so that the State (or other respondent parties to a claim) bears the burden of rebutting such a presumption. Given that in many instances (particularly in remote locations) there is little foundation for significant dispute over continuity,[6] the adoption of a rebuttable presumption should help reduce the resource burden on the system (especially where continuity is undisputed), helping facilitate the expeditious resolution of native title claims. Moreover, by reversing the onus of proof, the evidential burden is placed more appropriately on the State, which, by virtue of its 'corporate memory', is in a better position to elucidate on how it colonized or asserted its sovereignty over a claim area. This has the additional benefit of placing responsibility for investigating connection and extinguishment in the lap of the one entity; potentially leading to a more comprehensive understanding of the evidence in a given case.[7]

Importantly, the burden placed on the State by virtue of such a presumption may also result in positive behavioural changes; with the State having little incentive to expend resources in difficult disputes over continuity and connection or to assert, for example, that continuity had effectively been broken because of actions that in our modern human rights climate would be considered abhorrent (e.g., genocide or other breaches of international human rights law). In this respect, the introduction of a rebuttable presumption may act as a significant catalyst for change, facilitating a

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[1] *Western Australia v Ward* (2002) 213 CLR 1.
[2] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
[3] Smith, K., *Minefields, Minor Amendments and Modest Changes: an outline of the inherent dangers in native title negotiations and the opportunities to sweep them away,* Negotiating Native Title Forum, Melbourne, 19 February 2009
[4] ibid
[5] Justice French. 'Lifting the burden of native title – some modest proposals for improvement'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008) at para 27.
[6] Justice Mansfield. 'Re-Thinking the Procedural Framework'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008) at 2.
[7] Op Cit, Smith K,

paradigm shift in the way negotiations are conducted and in the quality and quantity of positive outcomes for claimants.[8]

A rebuttable presumption would also have a significant impact on the negotiation process. With State Governments being required to rebut continuity and justify extinguishment with the associated costs involved they may be more inclined to negotiate earlier and more openly with the aim of spending less on the process and more on possible opportunities for Traditional Owners.

The previous Government was heavily criticised by the United Nations Committee on the Elimination of Racial Discrimination (CERD) for its approach to native title since the 1998 amendments to the Native Title Act. The Committee, in particular, raised concerns about the high standard of proof required for the Courts to demonstrate continuous observance and acknowledgement of the laws and customs of Indigenous people, resulting in Traditional Owners not being able to obtain recognition of their relationship with their traditional lands.

Specifically, CERD stated that:

> The Committee is concerned about information according to which proof of continuance observance and acknowledgement of the laws and customs of Indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many Indigenous peoples are unable to obtain recognition of their relationship with their traditional lands.[9]

CERD recommended to the Australian Government that it "review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of Indigenous peoples to their land"[10].

Sadly, the Government has up to now never risen to the challenge laid down by CERD and Traditional Owners have continued to struggle with the onerous burden of having to prove their cultural and traditional connection to their country. Any shift away from the evidentiary burden of proof placed on Native Title Claimants would allay those criticisms of CERD and finally see Australia complying with international standards and obligations.

The NNTC would also argue that the Government uses the *Native Title Act* for any other purpose than for the benefit of Indigenous peoples as was its original intent. A prime example of this is the Northern Territory Intervention whereby other legislation was used to suspend the *Native Title Act* where it related to leases and vestings. Whilst some of the goals of the Intervention are not contested by the NNTC, such as the need to stop the abuse and violence of women and children, the NNTC has argued strongly that rights to land should be protected.

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[8] ibid

[9] Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Australia, 66th Session of the Committee on the Elimination of Racial Discrimination, Document No CERD/C/AUS/CO/14, 21 February-11 March 2005

[10] ibid

Finally, the NNTC welcomes the Australian Government's support for the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration). In order for the Native Title Act to be reconciled with the Declaration, there needs to be a significant shift in the Government's approach to resolution of native title. In a speech early last year, the Attorney General signalled such a shift by announcing a desire to move away from the onerous litigation process that inhibits the rights of native title claimants towards negotiation. This was seen as a fundamental change that was welcomed by the NNTC.

At the Annual Negotiating Native Title Forum held in Melbourne earlier this year, Iain Anderson presented the Attorney General's speech. In the speech, it was stated that "the Australian Government believes that good relationships help to produce the most ideal results, and … Native Title can be a bridge across the gap and assist in forging a new partnership with Indigenous Australians".[11] The NNTC submits that for the native title process to really act as that "bridge" significant changes to the fundamental principles of the *Native Title Act* as outlined in this submission need to be seriously considered and embraced.

The NNTC looks forward to the ongoing process for improving the native title system for the benefit of Traditional Owners and their communities.

[11] The Hon Robert McClelland, Attorney General, Paper presented to the 3rd Annual negotiating Native Title Forum, 20 February 2009, Presented by Iain Anderson.