

**Parliamentary Joint Committee on
Native Title and the Aboriginal and
Torres Strait Islander Land Fund**

OPERATION OF THE NATIVE TITLE ACT

**Inquiry Into The Effectiveness Of
The National Native Title Tribunal**

Submission No:2

Mr Peter Davison

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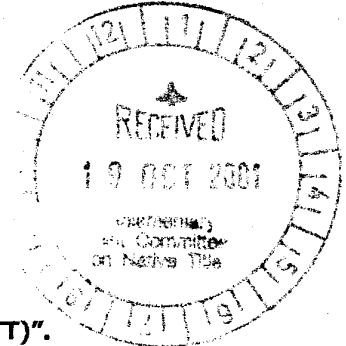


E-mail:

15th October, 2001

Peter WN Davison
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Maroochydore South Qld 4558

Committee Secretary
Parliamentary Joint Committee on Native Title and
The Aboriginal and Torres Strait Islander Land Fund
S1-61
Parliament House
Canberra ACT 2600



Dear Committee Secretary

"The Effectiveness of the National Native Title Tribunal (NNTT)".

The context of the inquiry into matters detailed in S206(d)(i) and the request by the Committee to express views specifically on this matter.

S206(d) refers to a report to both Houses of Parliament upon:-

- (i) The effectiveness of the NNTT,
- (ii) The extent to which they are recognized by State and Territory bodies,
- (iii) The appropriateness of powers of delegation exercisable by the Registrar,
- (iv) The extent of extinguishments or impairment of Native Title rights and interests as a result of the operation of this act,
- (v) The operation of the National Aboriginal and Torres Strait Islander Land Fund,
- (vi) The effect of this Act on land management.

The submissions may be in the form of a substantial paper or a short document. Furthermore, submissions may contain facts, opinions, arguments and recommendations for action, and may cover all parts in the terms of reference.

Submission begins:-

Upon becoming law on 1st January, 1994, the Native Title Act was concerned with Native Title in relation to land or waters, and for related purposes.

The Preamble states "that the people of Australia voted, overwhelmingly to amend the Constitution so that the Parliament of Australia would be able to make special laws for people of the Aboriginal race."

Part V, powers of the Parliament S51(xxvi) of the Commonwealth Constitution was altered in 1967.

"That the Australian Government has acted to protect the rights of all of its citizens, and in particular, its indigenous peoples, by recognizing international standards for the protection of universal human rights and fundamental freedoms through:

- (a) The ratification of the International Covenant. Eliminating all forms of Racial Discrimination and other standard setting instruments such as the International Covenant of Economic, Social and Cultural Rights and the International Covenant of Civil and Political Rights,
- (b) The acceptance of the Universal Declaration of Human Rights,
- (c) Enactment of legislation e.g. Racial Discrimination Act 1975, Human Rights and Equal Opportunity Commission Act 1986.

Furthermore, the High Court of Australia has rejected the doctrine Terra Nullius (belonged to no-one) at the time of European settlement, and held that the common law of Australia recognises a form of Native Title that affects the entitlement of its indigenous inhabitants of Australia in accordance with their laws and customs to their traditional lands.

That the people of Australia intend :-

- (a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed by the Parliament from time to time for securing advancement and protection of Aboriginal people and Torres Strait Islanders.
- (b) To ensure, that Aboriginal and Torres Strait Islanders, receive the full recognition and status within the Australian Nation to which history, their prior rights and interests and their rich and diverse culture fully entitle them to aspire.

The Preamble clearly states "That 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.

THAT :-

The NNTT system with initiatives announced at the time of its introduction, and others agreed on by the Parliament from time to time, is extended to the purposes of Paragraph A – Article 1, of the International Covenant eliminating Racial Discrimination.

THAT :-

Is intended to be a "Special measure" for the advancement and protection of Aboriginal and Torres Strait Islanders and is intended to further advance the process of reconciliation among all Australians.

THAT :-

In presenting this Submission and in studying the Royal Commission into Aboriginal Deaths in Custody 1991, the National Aboriginal Health Strategy 1989, and the Australian Law Reform Commonwealth Report on Aboriginal Customary Law 1986, as part of the rights and interests being considered on Aboriginal and Torres Strait Islanders.

I attended a major conference in Sydney on 16th & 17th May, 1994 titled "Working With The Native Title Act – 1994".

The conference was designed for participants to acquire work-related skills in amongst others, to adopt services due to a changed environment, to rethink strategies, to incorporate consultation and reconciliation into an overall plan.

Numerous experts and influential figures attended this important conference including;

- (i) The Minister for Aboriginal Affairs, Commonwealth
Mr Robert Tickner
- (ii) Deputy General Counsel, Commonwealth Attorney General Department
Mr Robert Orr
- (iii) The Minister for Aboriginal Affairs, Western Australian Government
The Honorable Kevin Prince, MLA
- (iv) The President of the National Native Title Tribunal
His Honour, Mr Justice Robert French
- (v) The Executive Director of the Australian Petroleum Exploration Association
Mr Dick Wells
- (vi) The Assistant Director, Australian Mining Industry Council
Mr Geoffrey Ewing

Continued:

- (vii) Minister for Aboriginal Development, Northern Territory Government
The Honorable Steve Hatton, MLA
- (viii) The Manager of Energy and Natural Resources Group, KPMG Peat Marwick
Mr Alastair Bell
- (ix) Commissioner of the Aboriginal and Torres Strait Islander Commission
Mr Kumantjay Ross
- (x) Assistant Secretary, Aboriginal Reconciliation Unit, Department PM & Cabinet
Mr Tim Moore
- (xi) Director, Resources Futures Pty Ltd
Mr Dennis O'Neill
- (xii) Executive Director, Zapapan N/L
Mr Terry Strapp

& OTHERS.

This Submission is to encourage the Federal Parliament to enact legislation pursuant to Chapter III Rights, the Judicature - Commonwealth Constitution - S77.

- (i) Defining the Jurisdiction of any Federal Court other than the High Court.
- (ii) Defining the extent Court shall be exclusive of that which belongs to or is invested in the Courts of the States.

To empower the Federal Magistrates service as well as the Federal Court with a reconciliatory and negotiatory role in Native Title tribunal issues.

The Federal Magistrates service has a broad based, accessible, user friendly dispute resolution mechanism within the jurisdiction of the Commonwealth, namely Family Law, Consumer Protection, Human Rights, Anti-Discrimination and Equal Opportunity, Migration and Bankruptcy.

It deals specifically with matters written into the Preamble of the Native Title Act, yet cannot deal with any matters specifically relating to Aboriginals and Torres Strait Islanders.

THAT :-

The Federal Magistrates Services (either a full time or part time Magistrate) in unison with the Registrar of the NNTT, expiate a more speedy resolution of Native Title issues.

The involvement of the Federal Magistrate Service is seen as necessary, because the service is designed to hear and determine matters in rural and remote regions, not just the Capital cities.

The history of many Native Title cases is that they become protracted and acrimonious, furthermore, they are seen as addressing only some of the issues affecting indigenous people, and that land entitlement is only part of the overall picture.

The greater or fuller picture is expressed in the four cardinal areas of Aboriginal Justice issues namely;

Custody and Imprisonment – The Royal Commission into Aboriginal Deaths in Custody,
Morbidity and Mortality – The National Aboriginal Health Strategy,
Empowerment over Culture and Spiritual Life – The Australian Law Reforms Commission Report on Customary Law, and
Land and Heritage – The National Native Title Tribunal.

The Federal Magistrates Service shares the jurisdiction with many matters under Commonwealth Law but not Aboriginal Affairs, yet Aboriginal Affairs is an equal opportunity and human rights issue.

Interestingly enough, the advertisement by this Parliamentary Joint Committee (Saturday 8th & 9th September, 2001), was presented at the same time that expressions of interest were called by the Attorney General's Department for Federal Magistrates (1st & 2nd September, 2001). Similarly, a report on the Heads of Government for land use on Cape York Peninsula (18th September, 2001 – Courier Mail), indicated that a five year period had transferred since original notification and the Premier of Queensland, Mr Peter Beattie clearly indicated that cooperative negotiations among relevant parties rather than confrontation was the only way ahead.

Whatsmore, an article entitled, "Statistics Highlight Aboriginal Tragedy" on Morbidity or Mortality appeared in the Courier Mail on Friday, 31st August, 2001 – page 2. This article called for more political support and leadership at a national level.

These broad based considerations are within S206(d)(i) and within the directions of the Preamble to the Native Title Act.

The four (4) cornerstones; (Royal Commission into Aboriginal Deaths in Custody, National Aboriginal Health Strategy, Aboriginal Customary Law and Native Title are pursuant to the Preamble which establishes the Tribunal :-

- (i) Rights and interests,
- (ii) Related purposes,
- (iii) Part of universal rights and fundamental freedom,
- (iv) Entitlements of Indigenous inhabitants in accordance with their laws and customs to their traditional lands,
- (v) Capable of being agreed upon by Parliament from time to time,
- (vi) Part of securing advancement and protection of Aboriginal and Torres Strait Islanders,
- (vii) Recognising their rights and interests in a rich and diverse culture, and
- (viii) "A Special Procedure" to develop the process of reconciliation.

The Federal Magistrates Service is new and continuing to develop. It is intended to not be an expensive new Court with its own staff buildings and infrastructure, but rather likely to share facilities with other Courts in various places.

It is expressly intended to conduct regular circuits to regional areas and will hear cases as a service to regional and remote areas.

Aboriginals occupy rural and remote areas. Already, the Federal Magistrates Court has a discretion to transfer proceedings to Federal Court and a discretion to determine whether the resources are sufficient to determine the proceedings.

It was established by the Australian Government, which is "committed to providing all Australians with user friendly, affordable options for resolving disputes".

In this 1994 address, the President of the NNTT, Mr Justice Robert French – said "There is a steep learning gradient for all who are involved in the work of the Tribunal. That it is not limited to its members of staff. Its approaches and procedures will evolve in response to experience and input from various groups".

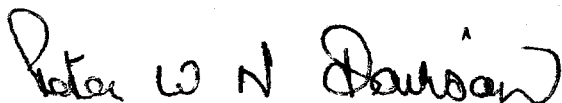
Furthermore, this Honour stated "That Native Title is ambulatory, its content depends upon its traditional laws and systems of the people for whom it is intended. It is organic in the sense that the rights and interests which define it in a particular case can change according to changes in the laws and customs of the community in which it subsists".

His Honour also stated that "Because of the complexity of the Tribunals work and the variety of skills it requires, it will be unusual to find in any one person all the abilities which are desirable. It will be necessary to provide induction and in-service training to new members and staff in relation to Aboriginal and Torres Strait Islanders culture, land use management, alternative dispute resolution and ancillary topics".

Finally, the Commonwealth Government is now endeavouring to establish the Judicial College of Australia – a proposal was prepared in September 1999 for the Australian Institute of Judicial Administration. Part of its orientation programs were upon Aboriginal issues and the Australian Institute of Judicial Administration has been presenting Aboriginal cultural awareness training since 1994.

In conclusion, the Parliamentary Joint Committee see fit to recommend that both the Federal Court and the Federal Magistrates Service have a role to play in Aboriginal Affairs, specifically, Aboriginal Customary Law, and in reference to S206(d)(i) National Title Act – a mediating, negotiating and facilitating role in the National Native Title Tribunal and help to avoid acrimonious and expensive situations and help develop a more conciliatory attitude in settling disputes.

Yours faithfully

A handwritten signature in black ink that reads "Peter W N Davison". The signature is written in a cursive, slightly slanted style.

PWN Davison