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:21

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

31 October 2002

Dear Madam,

Parliamentary Joint Committee on Native Title

Please find enclosed a submission prepared by the Central Land Council regarding the operation of certain aspects of the *Native Title Act* 1993 in response to the notification of your inquiry called in accordance with s.206(d)(i) of that legislation.

Yours faithfully,

David Ross
Central Land Council - Director

CENTRAL LAND COUNCIL

SUBMISSION

PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND FUND

INQUIRY INTO THE EFFECTIVENESS OF THE NATIONAL NATIVE TITLE TRIBUNAL

28 OCTOBER 2002

This submission deals with two issues arising out of the operation of the *Native Title Act* 1993 (as amended). This is not to suggest that the Central Land Council is in agreement with those other provisions in the legislation that are not dealt with here. Indeed the Central Land Council is on the record strongly objecting to various matters dealt with in the 1998 amendments particularly those that relate to the extinguishment of the Native Title rights and interests by way of the scheduling of certain tenures (see s.23B(2) (c) (i) and s.249C) and the amendments to the provisions concerning the right to negotiate (Subdivision P, Division 3 of Part 2).

In this submission the Central Land Council seeks to draw attention to two aspects of the legislation that experience has indicated require urgent examination.

1. Division 1B of Part 4 - Mediation

It appears to be the practice of the Federal Court to refer all s.61 applications (ie. Applications for a Determination of the existence of Native Title) to the National Native Title Tribunal (NNTT) for mediation under s.86B(1) almost immediately after the conclusion of the "notification period" specified under s.66. Although the Federal Court may, at its own volition or on application of a party, order that mediation not take place, this rarely occurs.

The purpose of mediation is set out in s.86A. However s.86A makes an assumption that the matters referred to therein are known to the parties at the time that the notification period concludes. This is rarely if ever the case. Accordingly mediation, which is intended to encourage the parties to focus on a range of issues and facts with a view to reaching consensus, cannot successfully take place as the issues and facts are not known to the parties. For instance, the identity of the native title group, that is the identity of the "person or persons, holding the common or group rights comprising the native title"

(s.225(a)) will rarely be known until anthropological research has been completed. Anthropology reports are not completed until well after the conclusion of the notification period.

It is our view that mandatory mediation at this early stage of the proceedings does no more than provide the Federal Court with a progress report of the proceedings (see s.86E), rather than bring the parties together to consider the facts and issues. At this early stage the NNTT mediators are not able to focus on facts and issues as they are largely unknown, so instead, the exercise become a search for material to be included in a report to the Court.

We are of the view that mediation should play a role in assisting the settlement of the s.61 applications. We do not believe however, that making it mandatory at a stage when the facts and issues remain unknown to the parties is helpful. Consideration should be given to ordering mediation on the application of the parties or by the Federal Court on its own motion, at a stage in the proceedings when there has been compliance with orders regarding the filing and serving of evidentiary material on which the parties will seek reliance at the trial of the application. It is only when the parties are in a position to identify the facts and issues that mediation may be of assistance. Indeed it is only the parties who are in a position to determine whether mediation may assist them in reaching a decision concerning a consent determination.

Recommendation 1.
That the NTA be amended such that there is no mandatory mediation process under s.61. That mediation be used in assisting settlement of s.61 applications only on the application of the parties.

2. Subdivision P, Division 3 of Part 2 - Right to Negotiate

There is an assumption in Subdivision P, Division 3 of Part 2 (Right to Negotiate) of the *Native Title Act* that registered Native Title Claimants can make an informed decision regarding the affect upon their Native Title rights and interests from the information that a State or Territory includes in s.29 Notices (See *Native Title (Notices) Determination* 1998). However, these Notices only provide details of the act that the State or the Territory will validly do that may be thought to affect Native Title rights and interests. (eg the grant of an exploration licence pursuant to the provisions of the *Mining Act* (NT))

A notification that an Exploration Licence is to be granted in respect of a particular location in no way provides meaningful information upon which the registered Native Title Claimants can determine what will happen to their Native Title rights. Yet the legislation encourages them to act upon this Notice and authorize their representatives to come to an agreement in regard to the grant (see s.31(1) (b)).

In the *Aboriginal Land Rights (NT) Act 1976* there is provision for applicants seeking permission to access "Aboriginal land" for exploration and mining, to provide sufficient

information upon which the traditional owners can make an informed choice (see s.46(1)(a) ALRA). Similar provisions exist in the *Pitjantjatjara Land Rights Act* 1981 (SA) and the *Maralinga Tjarutja Land Rights Act* 1984 (SA).

The *Native Title Act* requires parties to act in "good faith" (see s.31(1)(b)) but permits the common law to determine what constitutes "good faith". This is not good enough. Applicants who wish to conduct activities in accordance with "future acts" granted by State and Territory Governments should be mandated to provide sufficient material to the registered Native Title Claimants. This would ensure that the discussions are conducted in good faith but also that the decisions are made in a climate of informed consent.

We recommend that s.31(1)(a) be amended by requiring the Government party to provide in writing to the Native Title group full particulars of all activities to be undertaken pursuant to the future act. If for example the future act is the grant of an exploration licence, the Government party should be required to provide to the Native Title group the exploration programme as provided to it by the grantee party specifying in particular, the target mineral and what exploration methodology is to be used.

Recommendation 2.
That s.31(1)(a) be amended by requiring the Government party to provide in writing to the Native Title group full particulars of all activities to be undertaken pursuant to the future act.

The Central Land Council is happy to expand upon these points at a hearing of the Committee, as required.