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:24

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Ms Maureen Weeks
Secretary
Parliamentary Joint Committee on Native Title and
Aboriginal and Torres Strait Islander Land Fund
Parliament House
Canberra ACT 2600

Dear Ms Weeks

I enclose submissions to the Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Fund into the effectiveness of the National Native Title Tribunal on behalf of the State of Queensland as the Minister responsible for native title issues.

Yours sincerely

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Submissions on behalf of the State of Queensland to the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund into the effectiveness of the National Native Title Tribunal.

1. Plenary Meetings

In previous years the National Native Title Tribunal (the Tribunal) regularly held plenary meetings of all parties to native title determination applications, usually at the outset of the mediation process. The State considers that if the Tribunal again adopted the practice of holding plenary meetings then that would address some of the confusion and criticism about the claim determination process expressed to the State by parties and stakeholders. It is not clear to the State why this worthwhile practice was ceased.

The key advantage of these plenary meetings is that they bring together in a single forum all the parties to the claim. This forum then allowed parties to the claim to meet, often for the first time, and realise what were perhaps their common or differing interests. This forum also allowed for common information to be provided to all parties about how the mediation of the claim might proceed, individual parties' degree of engagement in the meditation process, and what might be realistic timeframes for that engagement. These meetings also reinforced an open, although confidential, mediation process.

The State considers that much of the frustration parties express about native title claims derives from there not being either an informed or shared understanding of what processes (e.g. mapping of the claim boundaries, tenure histories of the Lots claimed, site visits and inspections, provision of connection material, and assessment of connection material) must occur, in what order they must occur, and what might be realistic timeframes for those processes before there can realistically be any negotiation of issues or discussion about the content of a proposed consent determination .

The Committee should give consideration to recommending that the Tribunal conducts plenary meetings as a device to enhance parties confidence that the time spent and resources expended in mediation are valuable and worthwhile and will contribute to a more effective and efficient resolution of issues between the parties to the native title claim.

2. Mediation Reports

The State is concerned that some practices of the Tribunal may affect the willingness of parties to participate in a free and frank manner in the mediation process and that the important tool of meditation provided by the Commonwealth *Native Title Act* 1993 is being diminished by these practices.

In particular these practices include such things as:

- A lack of consistency by the Tribunal Members as to whether or not the content of a mediation report is made available or communicated to the parties prior to it being provided to the Federal Court; and

- The disclosure of confidential information in mediation reports. In some circumstances particularly where the information has not been provided to the parties, the content of mediation reports has been read in open Court. This means that the content of the confidential meditation between the parties is publicly disclosed.

The Committee needs to ensure that there is an appropriate resolution of these issues to restore parties' confidence in the benefits of the mediation process and so that all parties to the native title claim can participate in its mediation by the Tribunal in a full and frank way. There should be a standard for the provision and content of the reports.

3. Manner in which the Tribunal conducts mediations

The State has concerns that the manner in which the Tribunal has conducted the mediation of some matters has not been conducive to the resolution of the issues between the parties. This has caused the State at times to instead choose to subsequently arrange meetings with parties to the native title claim that exclude the Tribunal.

The State believes that mediation is most successful where the Tribunal provides a mediation forum where parties are empowered to resolve issues for themselves and not where the Tribunal, through the meditation process, attempts to impose a solution on the parties.

There is a greater need for the Tribunal Member to discuss with the parties at the outset of mediation what the role of the Tribunal may be and allow the parties to consider how they may be best assisted in the circumstances of the case.

4. The Tribunal as amicus curiae

The Tribunal has recently been appearing as amicus curiae in directions hearings in native title determination applications before the Federal Court. This has generally been a positive initiative as the Tribunal is able to provide information to the Court about matters such as the timing of notification and registration of claims. The State considers that the role of the Tribunal in this regard should be limited to factual information relating to claim process issues and should not be expanded to comment on any substantive issues or issues in dispute between parties. The confidentiality of the mediation process must be maintained.

The Committee should note this function of the Tribunal and the importance of maintaining the confidentiality of the mediation process.

5. Delay in notification of Indigenous Land Use Agreements (ILUAs)

The State continues to be concerned about any undue delay between the receipt by the Tribunal of an ILUA for the purpose of registration and the commencement of the notification processes by the Tribunal.

6. Further identification of registered ILUA documents

The State is concerned that the Tribunal does not have any current practice that enables the State to easily ascertain whether the document that a proponent purports to be a copy of a registered ILUA is indeed the document that was considered by the Tribunal. This is particularly the case where the State is not a party to the registered ILUA. Those details that may be recorded on the public extract are generally not sufficient for the State's purpose.

This difficulty would, in the view of the State, be easily overcome if the Tribunal were to adopt a practice of providing a sealed copy of the registered ILUA document to the parties to the ILUA upon the registration of the ILUA. The State would then rely upon the sealed status of the document to confirm that it is in fact a copy of the registered ILUA.

The Committee should give consideration to making such a recommendation.

7. Identification of claimed land

The State is aware that the Tribunal provides mapping and technical assistance to prospective native title claimants so that those claimants can better describe the land the subject of their native title claim. Until the State undertakes the process of attempting to analyse and interpret the claim and produce its own map of the external boundary of the claim, which may be some time after the claim is lodged, the State and its agency and departments have to rely upon the mapping attached to the native title claim as lodged.

As a general rule State departments and agencies have constantly expressed frustration at the poor quality and precision of these maps or worse still complete frustration where the claim is described by a meaningless series of co-ordinates that are neither easy to interrogate nor can be easily related to the known geographical features on the land.

A process whereby the Tribunal's assistance to native title claimants produces a description of the claim area that enables the area to be related to known geographical features or regional centres or through superior quality mapping would be most welcomed by the State, its departments and agencies.

8. Openness of Tribunal

The State wishes to publicly recognise the assistance it has received from, and access it has obtained to, the President, the Members and the Staff of the National Native Title Tribunal. The State has always found it helpful to be able to engage with the Tribunal about matters of mutual concern.

The Tribunal in this way has demonstrated its willingness to be involved in emerging issues about native title. For example, the State has welcomed the opportunity to engage the Tribunal in dialogue about potential issues as it examines courses open in relation to mining policy and the Alternative State Provisions. This engagement has allowed the State to make use of the Tribunal's expertise and experience.

This engagement between the State and the Tribunal and identifying certain mutual interests saw the Members and Staff of the Tribunal coming together with Officers from the State to participate in commonly sourced and externally provided mediation and negotiation training.

The State looks forward to continuing this good working relationship with the Tribunal.