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:35
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Senator David Johnston
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Dear Sir

INQUIRY: EFFECTIVENESS OF THE NATIONAL NATIVE TITLE TRIBUNAL

On behalf of the Northern Land Council I enclose a submission to the Joint Committee regarding the effectiveness of the National Native Title Tribunal.

Yours faithfully

Norman Fry
CHIEF EXECUTIVE OFFICER

Northern Land Council Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

Effectiveness of the National Native Title Tribunal

June 2003

1. Summary of recommendations

It is recommended that:

(i) s 86B of the *Native Title Act 1993* (NTA) be amended such that mediation by the National Native Title Tribunal is not mandatory, and only occurs where requested by the parties or in exceptional cases where so ordered by the Court of its own motion;

(ii) a State/Territory and native title representative body (NTRB) be enabled to enter a process agreement such that registration by the Native Title Registrar of an Indigenous Land Use Agreement (ILUA) is not required where the ILUA has been certified by the NTRB.

These recommendations reflect detailed oral and written submissions made by the Northern Land Council (NLC) in the context of the Parliamentary Joint Committee's 2001 inquiry into "Indigenous Land Use Agreements" regarding the effectiveness of the Tribunal's mediation function and the Registrar's registration function.

In summary the NLC repeats its submissions that there is considerable duplication of functions between the Tribunal/Registrar and NTRBs in circumstances where, particularly in the Northern Territory which has experienced and established Land Councils, NTRBs are the appropriate bodies to perform those functions. Numerous agreements have been negotiated in the NLC's region without mediation assistance by the Tribunal including, for example, the Alice Springs to Darwin railway.

The statutory requirement in s 86B that all native title applications be referred to mediation, regardless of whether such referral is in any practical sense required, is necessarily inefficient in its expenditure of public funds, and should be amended.

2. Introduction

The National Native Title Tribunal was established by s 107 of the *Native Title Act 1993* (NTA) and comprises a President, Deputy President(s), and other members (s 110), and employs staff and may engage consultants (s 131A) in the performance of its functions.

The Native Title Registrar is a statutory office holder appointed by the Governor-General (s 95). The Registrar is not a member of the Tribunal, and has functions which are separate to those of the Tribunal.

Nevertheless in the performance of their respective functions at an administrative level the offices of the Tribunal and the Registrar are, and are intended to be, closely entwined. The President is responsible "for managing the administrative affairs of the Tribunal" (s 128(1)), and is assisted in that regard by the Registrar (s 129). Staff employed by the Tribunal regularly provide administrative assistance to the Registrar (and his delegates), particularly in relation to the registration test, and also have been delegated functions by the Registrar (ie to decide whether native title applications should be registered).

The subject for inquiry by the Parliamentary Joint Committee is the "Effectiveness of the National Native Title Tribunal". No reference is made to the Native Title Registrar. The Northern Land Council (NLC) assumes however that the inquiry is intended to examine the performance of both the Tribunal and Registrar, and these submissions have been formulated on that basis.

The functions of the Tribunal and the Registrar in broad terms include as follows:

(i) registration of native title applications (the Registrar, s 190A);

(ii) registration of Indigenous Land Use Agreements (the Registrar, ss 24BI, 24CK and 24DH);

(iii) mediation between parties to native title applications (the Tribunal, s 136A) including a report to the Federal Court (s 136G);

(iv) deciding whether a minerals exploration application under s 29 should be expedited such that the 'right to negotiate' does not apply (the Tribunal, s 32);

(v) arbitration by means of an inquiry regarding development proposals made under s 29 (the Tribunal, s 38);

(vi) conducting special inquiries as directed by the Minister regarding a particular matter or issue (the Tribunal, s 137);

Each function is considered below.

Before proceeding it is noted that in the context of the Parliamentary Joint Committee's 2001 inquiry into "Indigenous Land Use Agreements" the NLC made detailed oral and written submissions regarding the effectiveness of the Tribunal's mediation function and the Registrar's registration function. In summary the NLC submitted that there is considerable duplication of functions between the

Tribunal/Registrar and NTRBs in circumstances where, particularly in the Northern Territory which has experienced and established Land Councils, NTRBs were the appropriate bodies to perform those functions.

This duplication, given the dual allocation of public funds to two different bodies, is necessarily inefficient. The inherent difficulties of this duplication were exacerbated by the 2001 Budget in which the Tribunal received a substantial increase of funding whereas NTRBs did not. Consequently, particularly in the Northern Territory, scarce funds have been allocated to the Tribunal to purportedly perform functions which should properly be performed by NTRBs.

Relevant parts of the NLC's submissions to the inquiry into "Indigenous Land Use Agreements" are repeated below.

3. Registration of native title applications (the Registrar, s 190A)

The purpose of the registration test is to ensure that the 'right to negotiate' or other procedural rights are only available where the application may be supported by material which, in the circumstances, is sufficiently probative of the existence of native title, including that issues such as competing applications and proper authorisation by the group (or groups) which communally claim native title have been addressed.

By contrast, a registration test and associated administrative expense is not a requirement regarding the lodgement of claims under the *Aboriginal Land Rights (Northern Territory) Act 1976*, an approach which reflects the strength of Aboriginal tradition in the Northern Territory.

The registration test is administered by the Registrar who must be satisfied in relation to detailed criteria contained in ss 190A to 190C. These criteria were inserted by the 1998 amendments, in light of the 1995 decision of the Federal Court in *Northern Territory v Lane (the Native Title Registrar)* which resulted in the 'bar' for the original registration or 'acceptance' test being set at a low level (due to an anomaly in the legislation the Registrar was required to register a native title application upon lodgement without examination).

In the context of the NTA the NLC generally accepted that the threshold for registration should be raised by the 1998 amendments, provided that it did not impose requirements which for practical purposes could not be met within the tight statutory timeframes of the NTA. These timeframes require, for example, that a native title application must be prepared, lodged and registered within four months of the notification of a development proposal under s 29. The NLC (and other Aboriginal organisations) sought a role for NTRBs in the registration process, and this proposal was accepted insofar as the Registrar is relieved of the responsibility of considering whether an application has been properly authorised by a native title claim group if the application has been so certified by the relevant NTRB.

Two issues arise for consideration regarding the effectiveness of the Registrar in relation to the registration test:

(i) whether the Registrar has properly and professionally administered the statutory functions bestowed upon him;

(ii) whether the existence of the registration test, in the Northern Territory, has had the effect of ensuring that the 'right to negotiate' or other procedural rights are only available regarding properly formulated and supportable applications.

The Registrar's administration

The operation of the registration provisions, including the Registrar's administration of them, may be usefully considered in light of the NT Government's decision to process the backlog of over 1,000 exploration licence applications from September 2000 (the previous NT Government had chosen to refrain from processing exploration licence applications after the High Court's *Wik* decision in December 1996, but altered its approach after the Senate disallowed its alternative legislative scheme in September 1999).

The exploration licence applications were issued at the rate of about 20 per fortnight over pastoral leases (with slightly more than half in the NLC's area). In most cases traditional owners responded by preparing and lodging a native title application within the three month period, and sought registration within the further month provided in the NTA (ie a total of four months from the s 29 notice to registration. Up until this time few native title applications had been lodged over pastoral leases in the Northern Territory.

The processing of the backlog and associated native title applications required a high degree of organisation and the application of significant resources by both the NLC and the Registrar. For the NLC's part it was necessary to conduct considerable anthropological research and conduct necessary meetings to support the lodgement of the native title applications. For the Registrar's part it was necessary to allocate and train sufficient staff to apply the registration test, often within a one month period. The resultant pressures arising from meeting this workload within tight statutory timeframes required a high degree of organisation and expertise to meet.

In almost all cases the applications were registered within the statutory timeframe. This fact reflects the strength of Aboriginal tradition in the Northern Territory, a fact which in many (but by no means all) cases could be conveniently proved to the Registrar's satisfaction by reference to previous reports by Land Commissioners under the *Aboriginal Land Rights (Northern Territory) Act 1976* over the last 26 years. These claims have invariably been successful in establishing that "traditional Aboriginal owners" exist in relation to the land (being the group which has primary spiritual responsibility for sacred sites and land), being a statutory test which is more onerous than that under the NTA. (In a few claims "traditional Aboriginal owners" were not established regarding some of the land claimed, however it is important to appreciate that this does not mean that native title does not exist since "traditional Aboriginal owners" are not the only persons who possess traditional interests regarding land).

The successful registration of numerous native title applications deriving from the backlog by the Registrar reflects a high degree of organisation and professionalism by the Registrar and his staff. Despite the undoubted pressures for all concerned the Registrar and his staff processed material promptly, were receptive to submissions regarding legal interpretation or other matters, and together with his delegates generally sought to take a consistent approach regarding registration - thus ensuring that the registration system could operate effectively. Of course, on various occasions either the NLC, traditional owners or the Northern Territory have taken a different view than the Registrar regarding particular issues (as has the Federal Court on one occasion),[1] however such disagreements (or judicial clarification of the law) do not detract from the general proposition regarding the professionalism of the Registrar's performance regarding the functions he is required to perform.

Two further points may assist. First, the Tribunal has established a geospatial mapping unit to advise as to whether applications comply with the requirements of the NTA. The advent of modern technology (including computing capacity and publicly available mapping information generated through satellite technology) means that the Tribunal's mapping unit is able to examine documentation with seeming microscopic precision. Anything less than the provision of precise coordinates results in advice from the mapping unit that the application, in its view, does not comply with the statutory requirements – meaning that registration will not occur and valuable statutory negotiating rights will not be accessed unless the NTRB devotes resources to resolving the mapping unit's concerns. This advice is ordinarily accepted by the Registrar without question.

The statutory requirements do not require such scientific certainty, a position which is consistent with the fact that the Courts for centuries have had little difficulty in resolving minor errors of description which with the best will sometimes occur in the course of litigation. Section 62(2)(a) requires the provision of information (whether by written wording in the application, a map, or both) that "enables the boundaries … to be identified". The purpose of the required map is to 'show' the boundaries of the area claimed (s 62(2)(b)). There is no requirement under s 62(2)(b) that the map 'identify', with some unspecified certainty (at the discretion of the mapping unit), those boundaries. The function of 'identifying' boundaries arises under s 62(2)(a) (not s 62(2)(b)), namely the provision of information (whether by written wording in the application, a map, or both) that "enables the boundaries … to be identified".

This view, in the context of the registration test, is confirmed by s 190B(2) which states that the "Registrar must be satisfied that the information and map … are sufficient for it to be said with <u>reasonable</u> certainty whether native title rights and interests are claimed in relation to particular land or waters" (underlining added). As recorded in the explanatory memorandum to the *Native Title Amendment Bill 1997* (1996-97-98, p 305, para 29.13) the term "reasonable" was included after amendment in the Senate:

> "so that the provision requires that the Registrar must be satisfied that the information and map contained in the application are sufficient for it to be said

[1] *Risk v National Native Title Tribunal* 2000 FCA 1589, and subsequent related judicial review applications.

'with reasonable certainty' whether native title rights and interests are claimed in relation to particular land or waters. This will make an allowance for normal mapping inaccuracies."

The advent of modern technology means that the NLC now possesses computing technology and mapping information, which has assisted in its capacity to provide the information sought by the mapping unit. This has not applied in all cases, and it should also be noted that some NTRBs may not possess this technology. The point, however, is that significant resources have been expended, at the expense of the taxpayer, not only in providing information but on various occasions in amending native title applications (itself a resource intensive process) to comply with the mapping unit's view in circumstances where the statute does not so require.

It is submitted that the Registrar should reconsider his approach to this aspect of the registration test with a view to ensuring that, as stated in the explanatory memorandum, "allowance [is made] for normal mapping inaccuracies."[2]

Secondly, in October 2002 the Northern Territory commenced judicial review proceedings in the Federal Court regarding the Registrar's decision to register a native title application lodged on behalf of the Wardaman, Liyi, Yingarwurnarri and Narrwan groups. The application, like many lodged in the NLC's area, was certified by the NLC as properly authorised and was registered in reliance on information contained in Land Commissioner's report. The Territory submitted that notwithstanding the NLC's certification the Registrar is required to independently examine whether the application has been properly authorised, and also that the Land Commissioner's reports are not probative of the existence of native title. The review proceedings were heard on 28 April 2003, and judgement has been reserved.

The NLC trusts that the Court's decision will reject the Territory's proposition that the Registrar is required to review the certification functions of an NTRB. Should this not be the case, the NLC will seek a clarificatory amendment to that effect.

Effectiveness of the registration test in the Northern Territory

While the registration test appears to have been effective outside the Northern Territory in reducing competing claims and ensuring that applications are properly lodged on behalf of the correct group, it has not had that effect regarding applications lodged through the NLC (or Central Land Council (CLC)) – since the NLC has in any event taken that approach since the enactment of the NTA. In particular, in 1994 and subsequently the NLC applied the approach developed under the *Land Rights Act* whereby claims are carefully formulated on the basis of anthropological research which identifies the traditional owing group.

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[2] An example of an approach more consistent with the statutory requirements occurred in relation to an application in the NLC's area which was amended at the request of the mapping unit and was registered. An unrelated subsequent amendment meant that the application was reconsidered regarding registration at which time the mapping unit advised that it no longer considered that the area claimed was described with sufficient certainty. On this occasion the Registrar's delegate sensibly took the view that the statutory requirements had been complied with.

A small number of unmeritorious applications have been lodged other than through the NLC or the CLC. These applications, which are mostly in the Darwin region, were lodged by sub-groups of an acknowledged traditional owning group and reflected an internal dispute. The registration test enabled these applications to be deregistered or struck out (the Registrar, in error, originally registered such applications but was overruled by the Federal Court: see *Risk v Native Title Registrar & Ors* No D9 of 2000 (10 November 2000), *Quall v Risk & Ors* No DG6044 of 1998 (6 April 2001) and *Tilmouth v Northern Territory* 2001 FCA 820 (ex tempore ruling dated 12 April 2001)).

As stated above an analogous registration process does not exist in relation to the lodgement of claims under the *Land Rights Act*, an approach which reflects the strength of Aboriginal tradition in the Northern Territory and the fact that the legislation is limited to the Territory. It is noted that under a process ILUA it is possible for a State/Territory to reach agreement with an NTRB regarding particular matters where the registration test for native title applications may be replaced by an alternative and more efficient approach.

By contrast this is not possible regarding the registration of an Indigenous Land Use Agreement, which lacks effective legal certainty until registered by the Tribunal. This appears to be an anomaly, and it is submitted (see below) that the Act should be amended so that, by a process agreement between an NTRB and a State/Territory, the registration requirement for ILUAs may in appropriate cases be replaced by an alternative and more efficient approach.

4. Registration of Indigenous Land Use Agreements (the Registrar, ss 24BI, 24CK and 24DH)

The NLC's experience of the ILUA provisions highlights an important policy issue regarding the considerable duplication of functions between NTRBs and the NNTT. The statutory functions of an NTRB include to facilitate the negotiation of ILUAs or other agreements regarding native title (s 203BB). To fulfil these functions NTRBs employ, or engage, lawyers and anthropologists to provide professional advice regarding the identification of native title groups, and of the traditional or other applicable decision making processes of such groups (ss 251A and 251B). Plainly the proper and comprehensive performance of these functions require that NTRBs be properly resourced, professional, and well organised.

These functions are the same as those which have been performed by the NLC for over twenty years under the *Aboriginal Land Rights (Northern Territory) Act 1976* (the *Land Rights Act*). Consequently the NLC (together with the Central Land Council) has substantial experience in ensuring that its representative functions are properly and comprehensively performed. This includes resolving disputes within a traditional group, especially by identifying and recognising traditional or applicable decision making processes for that purpose. In other words, the existence of a dispute generally will not prevent the negotiation of an agreement which has the support of the group as a whole.

Under the *Land Rights Act* an agreement, once executed, is legally binding. The Minister's consent is required in relation to agreements involving the payment or

receipt of an amount exceeding $100,000 (s 27(3)), where an interest is greater than 10 years (s 19(3)), and in relation to exploration and mining agreements (ss 40(b) and 45(b)). Such consent may be obtained prior to execution, and was originally intended to operate as a safeguard to protect Aboriginal interests should some error occur. This safeguard, in contrast to the checks and balances vested in the NNTT, has not operated in a bureaucratic or onerous fashion. (NB The limit of $100,000 has not been altered since the enactment of the *Land Rights Act* in 1976. The NLC has submitted that the limit be increased to $500,000).

By contrast an agreement negotiated under the ILUA provisions of the NTA, once executed, is not legally binding until registered by the Registrar. Notwithstanding that an NTRB, pursuant to its statutory functions, is required to have identified native title groups and decision making processes (including by formal certification under s 203BE(5)), and to have investigated and resolved disputes, the registration process provides an additional opportunity for aggrieved or disgruntled members of a native title group to ventilate their position by means of objection to the Registrar. Consistent with the theme of the amended NTA regarding representative bodies, this is an exercise in over-accountability. The NTRB will be required to provide comprehensive information, which experience shows will probably include the allocation of significant resources for meetings and submissions, to satisfy the Registrar that it has properly performed its functions regarding the agreement. The Registrar, in turn, needs to be resourced such that he can employ professional staff to assess whether the professional staff or consultants engaged by the NTRB have properly performed their functions.

In other words, the registration process requires that the Registrar duplicate the statutory functions which have already been performed by the NTRB, and contemplates that both the Registrar and the NTRB may expend significant additional resources for that purpose. (This comment also applies regarding the registration of native title applications.) Where there is a dispute within a native title group and consequent lodgement of an objection, these additional resources may well be considerable.

The process, in its allocation of public funds, is necessarily inefficient.

The apparent rationale for this duplication of functions may include to provide a safeguard to protect native title interests in light of the fact that many NTRBs, being new bodies, lack experience or professional expertise. In those terms, at least in the immediate period as experience and professional expertise is developed (for new or inexperienced NTRBs), the concept of a safeguard (perhaps a registration process) might not be objectionable. This rationale however should not prevent recognition that inherent inefficiency exists, since a significant factor restricting relevant NTRBs from developing experience and professional expertise is that they are substantially underresourced. Resolving the statutory inefficiency and the resultant inefficient allocation of scarce resources, would create an opportunity to assist in relation to resource issues faced by NTRBs.

As stated above, under a process ILUA it is possible for a State/Territory to reach agreement with an NTRB regarding particular matters where the registration test for native title applications may be replaced by an alternative and more efficient

approach. this is not possible regarding the registration of an Indigenous Land Use Agreement, which in effect lacks legal certainty until registered by the Registrar.

This appears to be an anomaly, and it is submitted that the Act should be amended so that, by a process agreement between an NTRB and a State/Territory, the registration requirement for ILUAs may in appropriate cases be replaced by an alternative and more efficient approach.

5. Mediation between parties to native title applications (the Tribunal, s 136A) including a report to the Federal Court (s 136G)

The inefficient duplication of functions between the Tribunal/Registrar and NTRBs is not limited to the concept of registration of ILUAs and native title applications (both of which involve the Registrar attempting to assess whether a representative body has properly performed its functions regarding the identification of native title groups and preparation of claims).

A more serious example arises in relation to the concept of mediation. The usual means by which complex legal disputes are resolved is by the engagement of legal or other professional persons whose role is to represent a party to the dispute in relation to a negotiated settlement (litigation being a last resort). The legal profession as a whole is skilled at identifying and negotiating settlements to disputes without unnecessary or inappropriate recourse to litigation. This process is known as negotiation by means of representation. Mediation, by contrast, contemplates that a professionally qualified person will not represent either party (or parties) but will endeavour to encourage or facilitate an agreement between the parties.

In recognition of this position the concept of negotiation by means of legal representation of parties remains the dominant paradigm in Australia (and elsewhere) for resolving complex disputes regarding property and related matters. While the Federal and Supreme Courts conduct limited mediation processes regarding commercial and other disputes (which are conducted by experienced legal practitioners or the Court's Registrar), these processes are not analogous to the processes conducted by the Tribunal which are mandatory and which emphasise process.

The statute effectively requires that the Tribunal conduct mediation in a mandatory fashion regarding all native title matters – regardless of whether established representative bodies exist which are properly performing their functions such that mediation will not usually be beneficial. While the Court is empowered under s 86B(2) of the NTA to dispense with mediation, this rarely occurs. (It should be noted that, given that NTRB processes already exist, inefficiency will also arise should the Federal Court seek to conduct its own mediation processes as a matter of practice.)

Accordingly it is submitted that s 86B of the *Native Title Act 1993* (NTA) be amended such that mediation by the National Native Title Tribunal is not mandatory, and only occurs where requested by the parties or in exceptional cases where so ordered by the Court of its own motion.

6. Expedition of minerals exploration applications such that the 'right to negotiate' does not apply (the Tribunal, s 32)

The NLC generally supports the submissions of Angus Frith, counsel, dated 18 October 2002, regarding the Tribunal's approach to expedited procedure applications. In particular, the NLC is concerned that the Tribunal incorrectly draws a distinction whereby only sites of "particular significance", as distinct from other sites of cultural importance, are regarded as relevant in determining whether the expedited procedure should apply. The term "particular significance" derives from s 237 of the NTA.

The NLC considers that the term "particular significance" is not intended to mean that only some sacred sites will receive protection, whereas other sites are subject to the expedited procedure such that negotiation does not occur. Rather, the term is intended to emphasise that an area of land (ie a site) which is not of cultural importance (ie not a sacred site) or "particular significance" is not covered by s 237 (ie meaning that the expedited procedure may apply). Judicial consideration, or a clarificatory amendment, may be required regarding this issue.

7. Arbitration (the Tribunal, s 38)

Only one matter has been referred to arbitration in the NLC's region, namely the LNG Plant at Wickham Point. An arbitration was conducted in 1997 in which it was recommended that the compulsory acquisition proceed with the question of compensation being deferred. Separate to the arbitration, the Larrakia people reached agreement with the proponent, Phillips Oil Pty Ltd, regarding the development which provides for compensation in various forms including employment and business opportunities.

8. Special inquiries (the Tribunal, s 137)

The NLC has no experience of any special inquiries conducted by the Tribunal in its area, and understands that the provision has not yet been used.