Australian Government
Attorney-General's Department

14 APR 2009
Senate Legal & Constitutional Committee

7 April 2009

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

**Inquiry into the Native Title Amendment Bill 2009**

Thank you for your letter dated 26 March 2009 inviting the Attorney-General's Department to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the Native Title Amendment Bill 2009.

Please find attached a joint submission by the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs.

I have copied this letter to Mr Greg Roche, Branch Manager, Portfolio Governance Branch, Program Performance Group, Department of Families, Housing, Community Services and Indigenous Affairs.

Yours sincerely

Bill Campbell QC
Acting Deputy Secretary
Civil Justice and Legal Services Group

**Senate Standing Committee on Legal and Constitutional Affairs**

**Inquiry into the Native Title Amendment Bill 2009**

**Submission by the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs**

**April 2009**

## Introduction

The Native Title Amendment Bill 2009 (the Bill) would amend the *Native Title Act 1993* (NTA) to implement institutional reforms by giving the Federal Court (the Court) the central role in managing native title claims, as well as implement other measures that will assist in achieving quicker, more flexible settlements of native title claims.

The Attorney-General has responsibility for all parts of the Bill, except Schedule 5 which relates to representative bodies and is the responsibility of the Minister for Families, Housing, Community Services, and Indigenous Affairs.

## Objectives

The key objectives of the reforms set out in the Bill are to improve both the operation of the native title system and the outcomes that parties can achieve in that system. The Bill would encourage mediation by making it more effective, through allowing the Court to manage the process more closely. Having the Court control the direction of each native title case in a proactive and efficient manner would also mean that opportunities for resolution can be more easily identified and pursued, and the efforts of parties better focussed.

The Bill would allow the Court to determine whether the Court, the National Native Title Tribunal (the Tribunal), or another individual or body, should mediate a claim.

It is anticipated that the Court will use its powers to more closely manage native title cases and to break deadlocks. Further amendments contained in the Bill are aimed at facilitating the efficient management of claims, including:

- allowing the Court to consider the training, qualifications and experience of potential mediators
- allowing the Court to cease a mediation and refer it to another mediator, and
- allowing the Court to make other orders in relation to mediation.

Other changes in the Bill aim to make the native title system work more efficiently and to encourage agreement-making. One amendment would allow the Court to rely on an agreed statement of facts between the key parties—an amendment designed to simplify connection processes in consent determinations. The Bill would also give the Court the ability to make orders about matters beyond native title. This amendment recognises the broad nature of agreements currently being negotiated and entered into by some parties who are already looking for flexible ways to resolve native title claims. These broader settlements can deliver real economic and other benefits for claimants.

Further reforms contained in the Bill would allow the amended evidence rules made by the *Evidence Amendment Act 2008* that concern evidence given by Aboriginal and Torres Strait Islander people to have a wide application to native title claims. The new evidence rules would apply where evidence has been heard and either the parties agree the rules should apply or the Court has considered the views of the parties and considers it is in the interests of justice for the rules to apply.

The Bill also contains a number of amendments to Part 11 of the Act, which deals with representative Aboriginal and Torres Strait Islander bodies. The amendments are designed to reduce administrative time and cost while maintaining a fair and open system of recognition for representative bodies and their clients. The Bill would remove the transitional provisions included when the Act was amended in 2007 to establish the current recognition arrangements. These provisions are no longer required and removing these provisions would make Part 11 of the Act easier to read. The Bill would simplify the procedures for recognition of representative bodies, withdrawal of recognition of representative bodies, and varying the area of representative bodies.

Finally, the Bill would also make minor and technical amendments to improve or clarify the operation of existing provisions.

**Consultation**

The Attorney-General released a discussion paper in December 2008 on possible minor amendments to the NTA (**Attachment A**). The discussion paper was published on the Attorney-General's Department's website and was distributed to over 70 stakeholders, including:

- Native Title Representative Bodies
- the Federal Court, the National Native Title Tribunal and the Australian Human Rights Commission
- representatives from the mining, agricultural and fishing industries
- State and Territory Governments
- the Law Council of Australia
- State and Territory Bar Associations, and
- native title barristers and anthropologists.

The Attorney-General's Department received 27 submissions following the eight week consultation period, which were broadly supportive of the proposed amendments. The submissions will be published shortly on the Attorney-General's Department's website.

**Conclusion**

The reforms contained in the Bill aim to foster broader, more flexible and swifter approaches to resolving native title claims and are intended to benefit Indigenous claimants and other stakeholders.

**ATTORNEY-GENERAL**

THE HON ROBERT McCLELLAND MP

# DISCUSSION PAPER

## Proposed minor native title amendments

**December 2008**

***Consultation and feedback:***

The Government invites you to make comments on the possible amendments outlined in this discussion paper. If you would like to make a submission, please forward it **no later than Monday, 16 February 2009** to:

The First Assistant Secretary
Territories and Native Title Division
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

You may also email your submission to native.title@ag.gov.au or send your submission by facsimile to (02) 6218 6889.

This paper is available at: www.ag.gov.au.

***Confidentiality:***

All submissions will be treated as public, and may be published on the Department's website, unless the author clearly indicates to the contrary.

A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with the Act.

## Introduction

The *Native Title Act 1993* (the Act) came into operation on 1 January 1994. Its main purpose is to recognise and protect native title. The Act provides for the recognition of pre-existing rights to land and waters, the making of future acts and the resolution of claims for compensation.

Native title can play a real role in helping to close the gap between Indigenous and non-Indigenous Australians. Native title negotiations can provide opportunities to facilitate the reconciliation process and to forge new, enduring relationships. However, real change in native title will only come through adjustments in the behaviour and attitudes of all participants and in how we engage with the opportunities native title can present. The Government is committed to resolving native title claims through negotiation and mediation, rather than litigation, where possible.

To facilitate negotiated settlements, I have announced that the Government will next year introduce amendments to give the Federal Court a central role in managing all native title claims. The Court has significant alternative dispute resolution experience and has achieved strong negotiated results in past native title matters by taking an active role in the mediation process. This change will give the Court control over all native title claims brought before it from start to end. Having one body control the direction of each case means that the opportunities for resolution can be more readily identified. This reform has the potential to significantly improve the operation of the native title system.

The Act already allows for creative and flexible outcomes. The native title system has matured significantly and the participants have increasingly shown what can be achieved by embracing the opportunity native title agreement-making presents. Negotiated agreements are the key to achieving practical outcomes in native title. While a change in the attitudes and behaviour of all parties is crucial to making the native title system work to its potential, this discussion paper considers options for other minor legislative changes that can also assist to improve the operation of the system.

I welcome suggestions about how the Act could be changed to improve the operation of the native title system. A number of other more significant changes to the Act have already been suggested to the Government. The Government will consult on such changes if it wishes to consider such changes further.

## 1. Enable the Court to rely on a statement of facts agreed between parties

Section 87 of the Act provides that the Federal Court may make consent determinations where it is satisfied that to do so is within its power. The section does not specify how the Court should satisfy itself. A possible amendment to the Act could give the Court discretion to accept an agreed statement of facts from the parties as the evidence for a consent determination. This could allow greater efficiency in the native title process, particularly where it is clear that there is no disagreement between the parties about the facts.

*Questions*

a) Should the Federal Court be able to rely on a statement of facts agreed between parties in making a consent determination?

b) Should the agreement of all parties be required or just the agreement of the claimants and the primary respondent (a Government, usually State or Territory)?

c) What limitations, if any, should be placed on the Court's discretion to accept an agreed statement of facts?

## 2. Enable the Court to make determinations that cover matters beyond native title

This proposal would enable the Court to make determinations that cover matters beyond native title, to recognise the broader nature of agreements currently being made which the Government wishes to encourage. Section 86F of the Act currently recognises that such agreements can be negotiated but does not clearly provide that it is within the Court's jurisdiction to make determinations dealing with matters beyond native title, or recognise that the Court may be able to assist the parties to negotiate side agreements covering matters that go beyond native title.

*Questions*

a) Would it assist the operation of the native title system if the Federal Court was able to make determinations that cover matters beyond native title?

b) Should an amendment specify the types of matters that could form part of broader determinations? If so, what types of matters? Or should the Court be given a wide discretion?

## 3. Evidence

The Evidence Amendment Act 2008 makes a number of changes to the *Evidence Act 1995* that are relevant to the giving of evidence by Aboriginal and Torres Strait Islanders in native title matters. The amendments recognise the manner in which Indigenous communities record traditional laws and customs.

The Evidence Amendment Act will apply to native title hearings that commence post 1 January 2009. Of particular relevance to native title matters are amendments regarding the hearsay and opinion rules and narrative evidence.

The Evidence Amendment Act provides that the hearsay rule and the opinion rule will not apply to evidence of a representation about the existence or non-existence, or the content, of traditional laws and customs of an Aboriginal or Torres Strait Islander group (see s72 and s78A of the Evidence Act). 'Traditional laws and customs' of an Aboriginal or Torres Strait Islander group (including a kinship group) are defined to include any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

The intention behind these amendments is to make it easier for a court to hear evidence of Aboriginal and Torres Strait Islander traditional laws and customs, where appropriate.

The exception to hearsay shifts the focus away from whether there is a technical breach of the hearsay rule, to whether the particular evidence is reliable. Factors relevant to reliability or weight will include the source of the representation, the persons to whom it has been transmitted, and the circumstances in which it was transmitted.

The amendment in relation to the opinion rule allows members of an Aboriginal or Torres Strait Islander group to give evidence of the traditional laws and customs of that group by virtue of their

membership of, and involvement with, that group. The requirement of relevance in sections 55 and 56 of the Evidence Act may operate to exclude opinions which do not have sufficient indications of reliability, for example, where the person is a member of the group but has had little or no contact with that group.

The Evidence Amendment Act also amends the law in relation to witnesses giving evidence in narrative form. Standard question and answer format may be unsuitable for some witnesses, including Aboriginal and Torres Strait Islander people, who may prefer to give evidence as a narrative. Prior to the amendment, a witness could give evidence in narrative form upon successful application to the court. The amendment extends the use of narrative evidence by providing the court with the power to direct a witness to give evidence wholly or partly in narrative form. This gives the court flexibility in receiving the best possible evidence.

The transitional provisions provide that the amendments do not apply in relation to proceedings the hearing of which began before the commencement of the amendments. This is due to the cost to parties in collation of evidence. Parties make decisions on tactics, calling of witnesses and disclosure of evidence based on the rules of evidence existing at the time the hearing of the proceedings began. There are a significant number of native title claims lodged with the Court, many of which are in the process of mediation. For the purposes of the Evidence Amendment Act, a hearing may have commenced as soon as any evidence has been taken. The Native Title Act could clarify that the hearing for the purposes of the Evidence Amendment Act does not include the taking of 'early evidence' in a native title matter. The amendments to the Evidence Act would therefore apply to the large number of cases that are in the process of mediation where no evidence has been taken and cases where only early evidence has been taken.

The Native Title Act could be amended to provide that, in a case where early evidence has been taken prior to the commencement of the amendments to the Evidence Act, if a party objects to the hearing proper taking place under the amended evidence rules, the party could apply to the Court for an order that the hearing proper will take place under the evidence rules as they were when the early evidence was taken. The Court would be granted the discretion, taking into account the interests of justice, to make a decision whether the hearing proper should take place under the former evidence rules or the rules as amended. This proposal is designed to allow a party who believes they are disadvantaged by the hearing proper operating under different evidence rules to those that applied when the early evidence was taken to apply to the Court for a decision that the former evidence rules will apply.

The Native Title Act could also be amended to provide exceptions to the transitional provisions. These exceptions would allow the new evidence provisions to apply to native title cases that have already commenced hearing in the following circumstances:

(a) where the parties consent that the amended evidence provisions apply, or
(b) where the Court makes a decision, taking into account the views of the parties, that in the interests of justice the amended evidence rules will apply.

However, such exceptions have the potential to disadvantage a party by changing the applicable evidence rules mid-litigation.

*Questions*

a) Do you have any views about the operation of these new evidence provisions in the native title context?

b) If you consider there should be exceptions:

- What is an appropriate cut off point for the Evidence Act amendments to apply to native title proceedings that have already commenced hearing? For example, should the amendments not apply when hearings are substantially progressed?
- Should the Evidence Act amendments apply to native title cases where early evidence has been heard prior to the commencement of the amendments?
- Is a judicial discretion that takes into consideration the views of the parties desirable and/or sufficient as a safeguard?
- Should the consent of the parties be required?

## 4. Native Title Representative Bodies

Possible amendments could streamline the recognition and re-recognition provisions in the Act. The changes could include:

- Removing the requirement that the Minister issue formal invitations before extending the recognition period for an existing Native Title Representative Body (NTRB), because NTRBs already provide relevant information to the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) as part of regular reporting requirements. This will mean that NTRBs do not have to submit detailed applications for re-recognition, which will result in significant savings in time and paperwork. The process for new applicants will also be significantly streamlined to remove any perceived barrier new entrants.
- Adding a power for the Minister to extend the time or date by which certain actions must be done. This additional flexibility will be useful to both the Minister and applicants for recognition.
- At present the recognition process and withdrawal of recognition process require two step processes which could give the appearance that the Minister has pre-empted her final decision. This is considered to be undesirable as applicants and existing rep bodies should be able to present their case without any possibly prejudicial material being before the Minister. Removing some of the prerequisite steps will both streamline the process and reduce paperwork for rep bodies and will result in more timely and soundly based decisions. This along with other changes outlined below, will make Part 11 of the Native Title Act much easier to read and follow.
- Section 203BA sets out details of how a rep body is to perform its functions and what organisation structures and processes are to be in place. It is considered to be unnecessary to repeat these requirements in the body of s 203AI.
- The provisions relating to transitionally affected areas are detailed and scattered throughout the Part. These are distracting as a reader needs to determine whether they apply in a particular case. As there are now no longer any transitionally affected areas it is considered to be desirable to remove these for clarity and ease of reference.

*Changes in representative body areas*

The Native Title Act currently sets out separately and in great detail three very similar processes for the extension, reduction or variation of the area for which a body is the representative body in sections 203AE – AG. Possible amendments could consolidate these sections for the sake of clarity and simplicity. Other amendments could streamline the provisions currently governing the process for notifying intended changes to a representative body's area, which is unnecessarily complex, to make it more flexible. Amendments could also remove the public notification requirement as the NTRBs would undertake consultations with all relevant parties.

*Determinations*

An amendment could change the word 'determine' in Part 11 where appropriate to clarify when formal registration of a legislative instrument is required following a ministerial decision. For example, in section 203A the Minister must determine the form of applications when what is intended is that the Minister 'decide' how applications will be invited. This use of 'determine' can cause confusion and make the process more complicated.

*Question*

- Do you consider that the proposed amendments to the NTRB provisions would streamline NTRB processes under the Act?

## 5. Other changes to improve the conduct of native title litigation

The Government recently introduced legislation to assist judges to reduce the cost and length of trials for litigants. The *Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008* contains a range of reforms to improve the efficient operation of the federal courts and tribunals. One key measure gives the Federal Court the power to refer questions arising in proceedings to a referee for inquiry and report. The measure will allow Federal Court judges to refer all, or part, of a proceeding in the Court to an appropriately qualified person for inquiry. That person would then provide a report to the Court on the matter

This power will enable the Court to more effectively manage large litigation, including native title litigation.

*Questions*

(a) Do you consider that inquisitorial processes, such as the use of referees, can assist to progress native title issues?

(b) Are there particular aspects of native title where an inquisitorial process would be most useful?