NATIVE TITLE OFFICE

24 April 2009

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dears Sir

Inquiry into the Native Title Amendment Bill 2009 – addendum to the submission by the Native Title Office of the Torres Strait Regional Authority

We apologise for the late delivery of this further submission. The Native Title Office of the Torres Strait Regional Authority (**TSRA**) makes this further submission on behalf of the Prescribed Bodies Corporate in the Torres Strait, by way of an addendum to the submission made by David Saylor on 16 April 2009 and in response to the Senate Standing Committee on Legal and Constitutional Affairs' invitation for submissions in relation to its inquiry into the Native Title Amendment Bill 2009 (**Bill**).

This addendum relates to Schedules 1, 2 and 3 of the Bill, that is 'Amendments relating to mediation', 'Powers of the Court' and 'Rules of Evidence', but is also related more generally to the purpose of the Bill, which in the outline of the Explanatory Memorandum to the Bill is suggested as being 'to improve the operation of the native title system by encouraging more negotiated settlements of native title claims, and encouraging the Court and parties to find new ways to resolve claims'[1].

Submissions

The Native Title Office of the TSRA makes two further submissions. Firstly, any amendments to the *Native Title Act* 1993 (Cth) (**NTA**) made with the intention of 'encouraging more negotiated settlements of native title claims' should be reflected in a similarly changed attitude of the Queensland and Commonwealth as respondent parties to native title claims. Secondly, the NTA should be amended so that the elements of the burden of proof are lifted from the Applicants and extinguishment is disregarded with the agreement of the relevant government parties[2].

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[1] Outline, p.1, Explanatory Memorandum, *Native Title Amendment Bill* 2009, House of Representatives
[2] See paper of French CJ "Lifting the burden of native Title: Some proposals for improvement". Australian Law Reform Commission: April (2009).

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1. Reflecting changes to the NTA in government approaches to native title claims

The TSRA represents the Applicant in the Torres Strait Regional Sea Claim (the 'Sea Claim'), a significant native title claim to which the Queensland Government and the Commonwealth Government are each a respondent party. The claim is currently in litigation and the Government parties have made only a few minor technical concessions thereby putting the Applicant to proof of all elements of claim. The TSRA notes that the position taken by the Queensland and Commonwealth Governments as respondents in the Sea Claim is inconsistent with recent public statements made by the Commonwealth Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs (FAHCSIA) regarding making changes to the native title system to 'make native title work better'[3] and with their commitment to act as model litigants. The Queensland and Commonwealth Governments' attitude has been disappointing in that on the one hand the Commonwealth Attorney-General and Minister Macklin have made public speeches on making native title work while on the other hand the Government lawyers continue to oppose the claim putting the Applicant to proof of its case. In the case of the Sea Claim the government parties' position is captured by, among other things:

- a failure to make any significant concessions;
- technical arguments regarding the nature and content of the native title rights and interests;
- challenging the exercise, existence and extent of native title rights and interests in the whole of the claim area; and
- pressing technical legal arguments that relate to questions of society and authorisation of the claim.

The position taken by the Queensland and Commonwealth Governments' are disappointingly inconsistent with a commitment to 'improve the operation of the native title system by encouraging more negotiated settlements of native title claims'. The position taken has caused TSRA to commit significant financial resources, time and other resources to prosecute the claim. Furthermore, it should also be noted that the respondent parties too incur significant costs. With most of the claims over land in the Torres Strait finalised, the TSRA has with its limited native title resources, struggled to perform its NTRB functions in relation to protection and management of native title on land largely due to its commitment to progress the Sea Claim through the mediation and court process. Many important matters involving the negotiation of native title agreements and provision of support and representation to PBCs have had to be deferred until the completion of the Sea Claim. Had the Queensland and Commonwealth governments demonstrated a genuine commitment to resolve the claim by way of a settlement consistent with those statements made by the Attorney General and Minister Macklin, the costs of progressing the claim would have been significantly reduced.

2. Lifting the burden of proof from the Applicants and disregarding of extinguishment

The TSRA emphatically supports recent comments made by Chief Justice French regarding proposals for improvement of the native title system. The Chief Justice suggests that the burden of proof could be lifted if a presumption was applied in favour of the Applicants bringing the claim namely; a presumption of continuity of the relevant society and the acknowledgement of

[3] Attorney-General's Address, given at the Third Negotiating Native Title Forum, 20 February 2009, Melbourne.

laws and customs from sovereignty to the present time. If these presumptions were available to be relied on by the Applicant during the prosecution of the Sea Claim we would be confident that only a limited number of issues would be brought before the Court for rulings and the claim settled some time ago. In this regard the Sea Claim Applicant has now called 26 witnesses, filed seven expert reports, tendered some eight volumes of documentary evidence and has filed countless legal documents.

Furthermore, any agreement between the parties that disregards extinguishment would also save all parties considerable expense, time and effort. In responding to extinguishment evidence in the Sea Claim the TSRA will incur considerable costs on analysing and responding to extinguishment evidence produced by the State and the Commonwealth which at the end of the day will have little or no consequence on any final determination of native title.

The Native Title Office of the TSRA considers that any changes to the NTA should go further than those contemplated by the Native Title Bill 2009, and amongst other changes, should address the matters raised in this further submission.

Conclusion

With a heavy legal burden resting with the Applicant in native title matters, Native Title Representative Bodies will continue to struggle to prosecute claims at their highest and to assist their clients with proof and determination of native title. We respectfully ask the Committee to take into account not only the economic benefits in the changes suggested by the Chief Justice but also the human element that is also involved namely Traditional Owners, some of who are elders, giving evidence and being put through the process of a court hearing and the rigors of giving evidence. In this regard, Justice Sackville [4]has also noted that:

> "Claimants in native title litigation suffer from a disadvantage that, in the absence of a written tradition, there are no indigenous documentary records that enable the Court to ascertain the laws and customs followed by Aboriginal people at sovereignty. While Aboriginal witnesses may be able to recount the content of laws and customs acknowledged and observed in the past, the collective memory of living people will not extend back for 170 or 180 years".

We trust that the Committee will consider this submission and we are happy to expand on any of the points we have raised.

Yours faithfully

David Saylor
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[4] *Jango v Northern Territory* (2006) 152 FCR 150, para [462].