



NATIVE TITLE OFFICE

16 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 – submission by the Native Title Office of the Torres Strait Regional Authority

The Native Title Office of the Torres Strait Regional Authority (TSRA) makes this submission on behalf of the Prescribed Bodies Corporate in the Torres Strait, and further to the submission made on 20 February 2009 signed by David Saylor, 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).

TSRA refers to the initial submissions that it made in its letter of 20 February 2009 to the Commonwealth Attorney-General's Department on the discussion paper that had been released on proposed amendments to the *Native Title Act 1993* (Cth) (NTA).

This submission relates mainly to Schedule 5 of the Bill, that is 'Amendments relating to representative bodies'.

1. Introduction

The TSRA is the native title representative body (NTRB) for the Torres Strait representative body area (**Torres Strait Region**). From a native title perspective, the two main features of the Torres Strait Region are:

- (a) there are approved determinations of native title over all of the community islands (excluding Thursday Island and Hammond Island) and the vast majority of uninhabited islands in the region (26 separate determinations); and
- (b) there is a native title determination application over nearly all of the seas in the Torres Strait Region, this application is brought on behalf of all Torres Strait Islanders, with closing submissions due in the week commencing 20 July 2009 (**Torres Strait Regional Sea Claim**).

So while there are many approved determinations of native title over the Torres Strait islands, each with a Prescribed Body Corporate (PBC) made up of the relevant native title holders for each determination area, there is also a determination application over the sea on behalf of all Torres Strait island people, the external boundaries of which incorporate all of the existing determination areas. If native title is determined to exist over the area covered by the Torres Strait Regional Sea Claim then members of that PBC will most likely include all of the people who have been determined to hold native title over the various community and uninhabited islands. That is, its members would include members from all of the PBCs that have already been incorporated in the Torres Strait Region excluding the Kaurareg as they have filed a separate and overlapping sea claim. In effect the PBC for the Torres Strait Regional Sea Claim would be regional in character and everyone that is eligible to be a member of that PBC would be people who, through that PBC or their PBCs from their existing determination of native title over land, may seek assistance in relation to matters that might affect their determined native title rights and interests.

So the Torres Strait is moving into a post-determination stage and there will be, potentially, a PBC whose membership is open to all of the people who are entitled to be members of the existing PBCs in the Torres Strait Region. In our view it is likely that if a PBC is established for the Torres Strait Regional Sea Claim then there might be considerable support for it to be the NTRB for the Torres Strait Region also. The NTA presently does not allow this and the Bill does not propose to amend the NTA to allow it but in our view there are good reasons why it should. This is our first submission. Our second submission is that there needs to be increased support for PBCs and NTRBs.

Before moving to the substance of our submissions we will provide an overview of the Torres Strait Region.

1. Overview of the Torres Strait Region

TSRA is a statutory authority. It was established in 1994 under 1989 Commonwealth legislation that is now known as the *Aboriginal and Torres Strait Islanders Act 2005* (Cth). TSRA has been the NTRB since 1994. It has assisted Torres Strait island people to obtain 20 of the 26 determinations of native title that have been made to date over land and waters in the Torres Strait Region, most of these have been by consent.¹

Of the remaining seven active claimant applications that cover land and waters in the Torres Strait Region², TSRA is providing assistance in four of them. Three of which cover a number of uninhabited islands, and includes the significant Torres Strait Regional Sea Claim. Part A of the Torres Strait Regional Sea Claim is currently being heard before Justice Finn in the Federal Court.³

¹ The other six determinations of native title include *Billy Wasaga and others on behalf of the Kaurareg People –v State of Queensland* [2001] FCA 657 (23 May 2001), which involved the making of five consent determinations of native title in favour of the Kaurareg People over Horn, Prince of Wales, Entrance and Dumaralag and other islands and who were represented by Cape York Land Council ("CYLC"), and the decision of the High Court in *Mabo –v State of Queensland (No 2)* (1992) 175 CLR 1, which, although litigated before the commencement of the NTA, is an approved determination of native title pursuant to section 13(7) of the NTA.

² The Gudang Yadhaykenu claimant application (QC08/8), which is being conducted by CYLC, covers certain land and waters in both TSRA's and CYLC's representative body areas and overlaps part of the claim area of the Torres Strait Regional Sea Claim.

³ See *Akila on behalf of the Torres Strait Regional Sea Claim People –v State of Queensland* [2008] FCA 1446 (23 September 2008).

To date 19 PBCs have been incorporated and registered on the National Native Title Register following the making of approved determinations of native title in the Torres Strait Region. TSRA has assisted with the incorporation and registration of the majority of these PBCs and continues to provide ongoing assistance, legal advice and representation for these PBCs in relation to consultations, mediations and negotiations concerning matters relating to their respective approved determinations of native title. Each of these PBCs is now deemed to have been incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ('the CATSI Act') and they will need ongoing assistance and support to ensure that they meet their regulatory compliance obligations under the CATSI Act.

In the event that a determination that native title exists is made in relation to the land and waters covered by the Torres Strait Regional Sea Claim and the uninhabited islands in respect of which there are active claimant applications, there will only remain limited offshore areas, such as Thursday Island, Hammond Island and a small number of uninhabited islands in respect of which determinations of native title will not have been made. As such, unlike every other representative body area in Australia, the Torres Strait Region will hopefully very soon be entering a post-native title claim environment where the roles of the PBCs, in maintaining and protecting the determined native title, will be the sole focus of future activity and assistance.

It is against this overview and the unique situation that exists in the Torres Strait that TSRA makes its submissions on the Bill.

2. Submissions

The Native Title Office of the TSRA makes two submissions. Firstly, the *Native Title Act 1993* (Cth) (NTA) should be amended so that in certain limited and special circumstances PBCs can be recognised as NTRBs. Secondly, there needs to be more support, financial and otherwise, for NTRBs and PBCs.

Recognition of PBCs as NTRBs

The Bill does not propose to amend section 201B NTA but this is the section to which we address our first submission. The section defines what is an eligible body, that is, what entities are eligible to be recognised as NTRBs. Section 201B(1) provides that a registered native title body corporate (this includes a PBC) cannot be an eligible body. In our submission the NTA should be amended to allow PBCs, in some instances and special circumstances, to be recognised as NTRBs also.

In our submission this would benefit the Torres Strait Region having regard to its unique and special circumstances. Broadly, the reasons for this are that the region is entering a post-determination claim environment and it is possible that there will be a PBC (for the Torres Strait Regional Sea Claim) whose membership would be open to all of the people who are entitled to be members of the existing PBCs (with one possible exception of the Kaurareg PBC) in the Torres Strait Region, making it broadly representative of all Torres Strait Islander native title holders.

In a post-determination claim environment the functions the NTRB will carry out under Part 11, Division 3 of the NTA will differ to the ones carried out by the NTRB when claims were being lodged, mediated and determined, either through litigation or by consent. The functions as they relate to making native title determination applications will become irrelevant. Increasingly, the functions and organisational structure of the NTRB for the Torres Strait Region will need to

properly reflect the need to assist and support PBCs and native title holders in the region in relation to future acts, ILUAs, rights of access and other matters relating to native title or the operation of the NTA. It will also need to ensure that PBCs build capacity to manage their own affairs and meet their regulatory compliance obligations under the CATSI Act.

If a PBC is established for the Torres Strait Regional Sea Claim then, in TSRA's submission, stakeholders might consider that it could carry out these functions in the Torres Strait Region.

Of course TSRA could seek re-recognition as the NTRB in three years time but there are good reasons that it should not. Firstly, there is discussion between the relevant stakeholders and growing support in the Torres Strait Region for the next NTRB to be an entity other than TSRA as it has many other important statutory functions and activities which it needs to perform and undertake. We feel it is important to record that the Torres Strait community, which comprises native title holders of the Torres Strait Region, has expressed a desire and are currently considering for a body other than TSRA to become the NTRB for the Torres Strait Region at the end of its recognition period, should it be appropriate for this to occur and there being a suitably established body capable of taking on the role.

Secondly, TSRA's other statutory functions that it performs has the potential to raise conflicts with the functions that it might be required to undertake as a NTRB. For example, in a post-native title claim environment, it is likely that activities that TSRA may be required to undertake on determined native title land will require separate representation and advice to be provided to affected native title holders. At the moment, these potential conflicts are managed through TSRA's Native Title Office. The ability for another body to be recognised as the NTRB for the Torres Strait Region, possibly the PBC for the Torres Strait Regional Sea Claim, would avoid these potential conflicts.

Thirdly, having regard to that potential PBC's functions as a registered native title body corporate under the NTA and *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) (the PBC Regulations), they would complement the NTRB functions that it might be requested to perform under the NTA in providing assistance and advice to the other existing PBCs, all of whose native title holders would be entitled to be members of the regional PBC.

Although there are likely to be a range of circumstances in other parts of Australia where it might be inappropriate for a PBC to be recognised as an NTRB, in the post-native title claim environment of the Torres Strait Region it would be appropriate for the NTA to be amended to permit such recognition to occur in such special and unique circumstances as exist in the Torres Strait Region. That way, it would ultimately be up to the relevant eligible body to satisfy the Minister that it would be able to perform satisfactorily the functions of a NTRB to attain recognition.⁴

As to whether the removal of the exclusion of PBCs from being eligible bodies will require the relaxation of other requirements that eligible bodies need to satisfy to be recognised as NTRBs, also warrants further consideration.

Funding of PBCs and NTRBs

The capacity of both NTRBs and the PBCs, particularly the significant number in the Torres Strait Region, to adequately perform their statutory functions and meet their regulatory

⁴ NTA, section 203AD(1).

compliance obligations are heavily dependent on financial and other resources received from the Commonwealth Government and, to a lesser extent, State and Territory Governments (and their various departments and agencies).

The 19 PBCs in the Torres Strait Region currently receive limited Commonwealth Government funding to perform their statutory functions under the NTA and PBC Regulations and meet their regulatory compliance obligations under the CATSI Act. All of these PBCs are heavily reliant on TSRA, as the NTRB, to provide the necessary support and assistance, which often occurs in circumstances where TSRA does not have the adequate financial or other resources to do so. The current funding regime for PBCs that the Commonwealth Government has put in place provides only very limited assistance to existing PBCs.

Part of the uniqueness of the Torres Strait Region is that there are unlikely to be significant native title agreements or ILUAs negotiated by native title holders in relation to major mining, resource or infrastructure projects, with the vast majority of proponents in the Torres Strait Region being government departments and agencies to whom the provision of essential services and infrastructure to communities is usually linked to the giving of native title consents under agreements and ILUAs.

As a consequence, existing PBCs in the Torres Strait Region (and, we would surmise, elsewhere in Australia) are, for the most part, essentially dysfunctional, have no infrastructure or office, have limited access to governance training for directors and officers and are unlikely to be meeting existing regulatory compliance requirements under the CATSI Act.

The Native Title Office of the TSRA would submit that there is unlikely to be available evidence which would support the proposition that PBCs (particularly those in the Torres Strait Region) have built capacity to effectively manage their own affairs. The recent appointment of administrators to two PBCs in mainland Queensland would appear to support such a conclusion. They are accordingly vulnerable to failure and being placed in administration or wound up. The possible failure of PBCs obviously puts at risk both the protection and management of native title, and the certainty required by land and resources stakeholders in terms of their negotiations with PBCs and native title holders.

In order for PBCs to build the necessary foundation to take up their position in a post-native title claim environment, greater financial resources, administrative support, infrastructure and governance training is required to ensure that they can fulfil perform their statutory functions and meet their regulatory compliance obligations into the future.

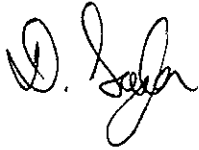
We submit that, having regard to the amendments to the NTA currently being considered, consideration should also be given to ensuring that there are appropriate and effective programs in place so that PBCs are given greater financial resources, administrative support and governance training to ensure that they are capable of performing their important statutory functions, meet their regulatory compliance obligations and build capacity so that they can manage their own affairs.

3. Conclusion

Due to the limited timeframes within which we were required to provide a submission, we wish to seek leave from the Committee to provide an addendum to this submission, addressing further areas of concern, by 21 April 2009 and will make every effort to provide it earlier.

We hope that you find our submission useful and advise that we are happy to expand on any of the points we have raised.

Yours faithfully

A handwritten signature in black ink, appearing to read 'D. Saylor', with a stylized flourish at the end.

David Saylor
Principal Legal Officer
Native Title Office