National Native Title Tribunal

Supplementary Submissions of the National Native Title Tribunal:

Native Title Legislation Amendment Bill 2019

The Hon John Dowsett AM, QC President

29 November 2019

Introduction

1. On 17 October 2019 the Senate referred the *Native Title Legislation Amendment Bill 2019* (**the Bill**) to the Senate Legal and Constitutional Affairs Committee.

2. The National Native Title Tribunal (**the Tribunal**) has previously made submissions[1] in response to the Options Paper - Proposed Reforms to the *Native Title Act 1993* (Cth) (Options Paper) and the exposure draft Native Title Amendment Bill 2018 & Registered Native title Bodies Corporate Legislation Amendment Regulations 2018 Public Consultation Paper October 2018 which submissions drew on earlier submissions made in relation to the following:

    - *Native Title Amendment Bill 2012*;
    - Inquiry into the *Native Title Amendment Bill 2012*[2]*;* and
    - ALRC, *Connection to Country: Review of the* Native Title Act 1993 (Cth), Report No 126 (2015)

3. The Tribunal now seeks to supplement those earlier submissions.

Schedule 6 – Other Procedural Changes – Right to Negotiate Process

4. The Tribunal has identified issues arising with respect to the right to negotiate process set out in Subdivision P of part 2, division 3 of the NTA, including the expedited procedure and use of the term, "native title party".

5. Subdivision P applies only to some future acts, such as the grant of rights to mine (see s 25(1)). Section 29 prescribes a process by which notice is given by the State of its intention to do such a future act. Notice must be given to (inter alia) "native title parties". The term is initially defined in that section. In effect, for the purposes of s 29, a "native title party" is a registered native title body corporate (**RNTBC**) in relation to any land and waters which will be affected by the proposed future act, **and** any registered native title claimant in relation to any land or waters which will be so affected. Some future acts may involve multiple RNTBCs and/or multiple registered claimants as parties under ss 29 and 30.

[1] National Native Title Tribunal (PDF 3.06MB) and National Native Title Tribunal (PDF 250KB)

[2] National Native Title Tribunal (PDF 540KB) and 17.1 Supplementary Submission - National Native Title Tribunal (PDF 157KB)

6. Registered claimants and RNTBCs who become registered following notification are also "native title parties" under s 30 of the *Native Title Act 1993* (Cth) (**NTA**). This may arise, for example, where:

   (a) a new native title claim is lodged and registered within the specified period in response to the s 29 notice; or
   (b) an existing native title claim is determined by the Federal Court, in which case the existing claimant ceases to be a native title party and the RNTBC becomes a native title party.

7. The right to negotiate process in subdivision P includes an "expedited procedure", which is often applied to exploration tenements. Pursuant to s 29(7) the State may insert in the notice a statement that it (the State) considers that the proposed future act attracts "the expedited procedure" (see s 237). In effect, a proposed future act will attract the expedited procedure if it is not likely to have identified adverse effects. If the State's expedited procedure assertion is not challenged by a native title party pursuant to s 32, any native title party will lose the right to negotiate in good faith concerning the proposed future act pursuant to s 31. If any native title party objects to the inclusion of the expedited procedure assertion, the Tribunal must determine the question pursuant to s 32. The Tribunal's determination relates to the whole of the area of the proposed future act, regardless of whether only one, or all, native title parties lodged an objection. See *Hale on behalf of the Bunuba#2 Native Title Claim Group v State of Western Australia* [2015] FCA 560. Any objection must be filed within four months of the notification date (s 32(3)).

8. All native title parties, whether they received notice under s 29 or became a native title party at a later time under s 30, are entitled to participate in any negotiations under s 31 or lodge an objection under the expedited procedure process. However, native title parties who become parties under ss 30(1) (a) or (b) only achieve that status on the expiration of the dates specified in those sections, namely three or four months from the notification day.

9. In that respect, the provisions of s 30 seem to be unduly complicated. It has on occasions caused problems, leading to loss by native title parties of their rights to object to expedited procedure notices. This issue arose in the recent decision of *Josephine Forrest and Ors on behalf of the Yi-Martuwarra Ngurrara Native Title Claimants v State of Western Australia* [2019] NNTTA 43 (25 June 2019). The time at which a person becomes a native title party under s 30 would also affect their participation in negotiations under s 31.

10. The Tribunal suggests that consideration be given to appropriate amendment of s 30.

Implications of the Proposed Amendment to s 141(2)

11. Where an inquiry is conducted under s 139 in relation to expedited procedure objection application under s 75, s 141(2) provides that all native title parties are parties to the application. This would include native title parties at the time the s 29 notice is issued as well as any persons who subsequently become native title parties under s 30.

12. The proposed amendment to s 141(2) would have the effect of limiting participation in the objection proceedings to the native title party which filed the objection.

13. This proposed change would have significant adverse consequences in cases where a native title determination is made during the course of an inquiry, which event is not uncommon. In such a case, the registered native title claimant which lodged the objection would cease to be a native title party under s 30(2). However, while the RNTBC for that claim would become a native title party to the right to negotiate process under s 30(1)(c), it would not be a party to the objection application, pursuant to s 141(2) in its amended form.

14. Aside from this particular consequence, there appear to be some inconsistencies in terminology between the operation of Subdivision P, s 75 and the inquiry provisions from s 139 onwards. The Tribunal considers these provisions would benefit from a more holistic review, possibly in the context of the presently proposed amendments.

Schedule 7 – National Native Title Tribunal

15. The Tribunal strongly supports the proposed amendments in this schedule but suggests that consideration be given to conferring upon it an arbitral power to complement the mediation function.

16. The addition of s 60AAA to the Act will allow the Tribunal to offer assistance to a wider range of native title stakeholders. However, where there has been an unsuccessful mediation, or where the parties do not agree to mediation, the only present alternative, if the dispute is to be resolved, is litigation, probably in the Federal Court. The Tribunal suggests that at least in some cases, it may be more efficient, and less expensive to provide, in the NTA, for some form of non-judicial arbitration. The Tribunal already has a mediation role in connection with expedited procedure matters and future act applications. In each case, the Tribunal also has an arbitral role. Of course, the Tribunal keeps the two processes separate. The Tribunal suggests that any arbitral role relate at least to:

(a) disputes as to any failure by the Board of an RNTBC to admit a traditional owner to membership; and

(b) disputes between members of an RNTBC and/or relevant traditional owners, on the one hand, and the Board of the RNTBC on the other, concerning the validity of any decision, or proposed decision, by the Board, which decision has had, or is likely to have any effect upon land or waters, subject to a relevant native title determination.

The Hon John Dowsett AM QC
President
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