Reply To: Adelaide

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Senate Legal and Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600

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Dear Senators,

re: Inquiry into the Native Title Amendment Bill 2006

I refer to my brief discussions of the 15th January with your Ms O'Connell and to my submission to the Parliamentary Joint Committee on Native Title & The Aboriginal& Torres Strait Islander Land Fund, Inquiry into Native Title Representative Bodies dated 31st May 2004.That submission forms the basis of this submission in relation to the Native Title Act Amendments being considered by your Committee.

I note that the Native Title Act Amendments being considered by your committee do not cover sections 203EA & EB of the Native Title Act. This submission will provide arguments that they should do so and that the legal and policy problems with the operation of those laws require the amendments, which are here recommended.

I note that part of this submission covers questions of incoherence between the *Native Title Act* 1993, the *CAC Act* 1997, the *CLERP* Act and the *Associations Incorporation Act SA* 1985.

It may be that references to the *Associations Incorporation Act SA*1985 will become irrelevant as NTRBs move progressively to the *Aboriginal Councils and Associations Act* and its amending Act of 2007. Nevertheless the points made about

- over regulation,
- inappropriateness of the kinds of regulation to be applied to Commonwealth Statutory Authorities being applied, unmediated to NTRBs
- incoherence between the *NTAct* and the *CAC Act* and the *Associations Incorporation Act SA 1985*

have been a problem for the Aboriginal Legal Rights Movement as an NTRB since July 2000, and they remain so.

I confine this submission to the operation of Sections 203EA and 203 EB of the *Native Title Act.(NTAct)*

s 203EA Native Title Act

Subject to this section and to section 203EB, Division 4 of Part 3 and Schedule 2 (other than clauses 8 and 12) of the *Commonwealth Authorities and Companies Act 1997* apply in relation to a representative body as if:

(a) each reference in that Division and in that Schedule to a Commonwealth authority were a reference to the representative body; and

(b) each reference in that Division to an officer of a Commonwealth authority were a reference to an executive officer of the representative body; and

(c) each reference in that Division to a former officer of a Commonwealth authority were a reference to a former executive officer of the representative body; and

(d) each reference in that Division and in that Schedule to a director of a Commonwealth authority were a reference to a director of the representative body; and

(e) each reference in that Division to the Board of a Commonwealth authority were a reference to the governing body of the representative body; and

(f) each reference in that Schedule to the Finance Minister were a reference to the Commonwealth Minister.

The Native Title Act as amended received the Royal assent on the 27 July 1998 and came into operation on the 30 September1998. The Schedule III amendments which includes Section 203EA &EB came into operation on the 1 July 2000. Section 203EA and EB refer to the *Commonwealth Authorities and Companies Act 1997*. By the 1st of July 2000 however, that Act had been amended and repealed by the *Corporate Law Economic Reform Package Act 1999[CLERPAct] or ' new' CACAct.*

The *Native Title Act* has never been amended to reflect the changes in the other legislation and attempts are made to rely on the transitional provisions of the new *CAC* Act.

Considerable doubt and uncertainty has arisen in the minds of Native Title Representative Bodies as to what is the applicable law in relation to the important question of regulation of the conduct of directors and other executive officers.

The Aboriginal Legal Rights Movement obtained a copy of a letter of advice from the Australian Government Solicitor, dated 3rd August 2000, on this question. AGS advice was that the transitional provisions in schedule 3 , para 2 of the new *CAC* Act provided for the operation of the new law in place of the old , except so far as a contrary intention appears. We have relied upon that advice to conclude that in relation to the operation of Section 203EA, the relevant parts of the new1999 *CAC Act* to be applied to representative bodies are as follows:

In relation to Section 203EA NTAct

Divisions 4 and 4A of Part 3 and Schedule II of the old *CAC Act* should be read as a reference to Divisions 4 &4A of Part 3 and

Schedule 2of the new *CAC Act* –that is sections 21 to 27E and schedule 2 – civil consequences . As well as 4A 27M to 27P. The reference in s.203EA to clauses 8&12 of schedule 2 should be read as a reference to s.27C That is to say section 27C should be read as the section which now does not apply to representative bodies.

The effect of these provisions is to apply to the Native Title Representative Body , its executive officers and directors , those sections of the new *CACAct* which apply the business judgement rule, and civil and criminally sanctioned obligations of good faith and obligations as to use of information and position in the Native Title Representative Body (sections 21-25)They also deal with the indemnification of such officers (sections 27M to P)

The Australian Government Solicitor has some doubts about the applicability of s.27A of the new *CACAct* to officers of Native Title Representative Bodies. That section deals with the interaction of provisions of Div 4 of Part 3 with other provisions of the new *CAC Act*. For example the exception in s.27A(2) will not apply to Native Title Representative Bodies for which the officers of the Association are NOT public servants – presumably the vast majority of cases! The Australian Government Solicitor recommended a modification to cover the duties to be imposed on officers of NTRBs.

I point out that the direct transposition of Commonwealth Authority to Native Title Representative Body under s.203EA(a)and (b) results, in the case of South Australia in the direct transposition of "Commonwealth Authority " to a South Australian Incorporated Association- the Aboriginal Legal Rights Movement Inc.

The definition of "officer" in s.5 of the *new CAC Act* , is not quite coherent with and is indeed narrower than the definition of an "officer"under s.3 of the *Associations Incorporation Act* of South Australia.

Section 5 *CACAct 1999*
Officer in relation to a Commonwealth Authority (read NTRB) , means a :
(a) A director of the authority
(b) Any other person who is concerned in, or takes part in the management of the Authority

As can be seen, the South Australian definition also picks up in s. 3 paras (b) and (c) persons to whom s.203EA(b) ,(c) or (d) probably does not apply.

s.3 Associations Incorporation Act
"**officer**" of an incorporated association means-
(a) any person who-
(i) occupies or acts in a position of-

(A) a member of the committee of the association; or

(B) the secretary, treasurer or public officer of the association; or

(ii) is concerned, or takes part, in the management of the affairs of the association,

by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; or

(b) the holder of any other office established by the rules of the association (except a patron or the holder of some other honorary office that confers no right to participate in the management of the affairs of the association); or

(c) any person in accordance with whose directions or instructions the committee of the association is accustomed to act;

This situation is not aided by the fact that s.203EA (b)&(c) create an equivalence between an officer of a Commonwealth Authority (for which we must read the Native Title Representative Body) and an Executive Officer of the Native Title Representative Body- when “Executive Officer”.as such is defined neither by the *CACAct*, nor the *NTAct* nor the *Associations Incorporation Act* of South Australia.

It seems doubtful that the persons mentioned as Officers under s3 of the *Associations Incorporations Act* paras (b) and (c) would fit any definition of ‘director’, either. Directors are however covered under the definition of committee members in section 3(a)(i).

Officers of South Australian Incorporated Associations are already subject to a rigorous regime of regulation , including civil and criminal penalties under the *Associations Incorporations Act* itself.

Associations Incorporations Act Part 4 Div 1 covers eligibility for membership of the management committee, disclosure of interest and voting,
Div 2 covers accounts and audit and the lodgement of returns
Div3A creates criminal offences and a civil liability to account for profit in relation to abuse of information and office,
Part 5 Div 2 creates further offences , including frauds by officers.

Many of these provisions, which have their equivalents in the *Aboriginal Councils and Associations Act* are duplicated or amplified by s203EA *NTAct* and the new *CACAct.*

The provisions in relation to indemnification and insurance are however unique to the *CAC Act* ad not otherwise provided for .

The structural rigidity and formal requirements for procedural rigour which applies to Commonwealth Authorities is not necessarily appropriate to representative bodies, such as ALRM . An example may be found in Section 27E of the new *CACAct*. Section 27E (1) states:

> If the Directors of a Commonwealth Authority delegate a power under its enabling legislation, a director is responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves.

Sub-section 2 provides exceptions to that rule.

Most Native Title Representative Bodies are set up as incorporated associations under the laws of the States and Territories, or under the *Aboriginal Councils and Associations Act(CW).*As noted ALRM is a South Australian Incorporated Association.

As such, its Board members and executive officers are bound by the constitution of the body, as well as the regulatory regime that applies under the *Associations Incorporations Act.* Now it is usual for State or Territory legislation to require that board members and officers act in accordance with their constitutional rules which bind them, by virtue of their membership of the association concerned (see for example section 23 and 23A of the *Associations Incorporations Act* 1985 SA.

DIVISION 3-RULES

Rules binding on association and its members

23. (1) The rules of an incorporated association bind the association and all members of the association.

(2) The reference in this section to the rules of an association extends to rules, by-laws or ordinances of the association relating to any matter.

Contents of rules of an incorporated association

23A. (1) The rules of an incorporated association-

(a) must state the name of the association and set out its objects; and

(b) must not contain any provision that is contrary to or inconsistent with this Act; and

(c) must contain provisions that, in the opinion of the Commission, deal with the following matters with sufficient particularity and certainty having regard to the nature and objects of the association:

(i) membership in the case of an association that has members;

(ii) the powers, duties and manner of appointment of the committee of the association;

(iii) the appointment of an auditor in the case of an association that is a prescribed association;

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(v) the calling of and procedure at general meetings;

(vi) who has the management and control of the funds and other property of the association;

(vii) the powers of the association and by whom and in what manner they may be exercised;

(viii) the manner in which the rules of the association may be altered;

(ix) any other matter prescribed by regulation.

(2) This section applies only to rules, or an alteration to rules, submitted to the Commission for registration after the commencement of this section.

Delegations for ALRM as an Association arise from the constitution and rules, rather than from the legislation itself. Some constitutions provide for delegations but it is not necessary that they should do so.
Section 23A does not *mandate* delegations.

In the case of ALRM , it should be pointed out that the constitution does allow for delegations, but a question arises as to the coherence of operation of the new *CAC Act* to Native Title Representative Bodies that are incorporated state and territory bodies, whose constitutions do not allow for delegations.

Section 203EB *NativeTitle Act*

203EB Application of section 21 of the Commonwealth Authorities and Companies Act

Section 21 of the *Commonwealth Authorities and Companies Act 1997* applies in relation to a representative body as if subsections (3), (4) and (5) were omitted and the following subsection substituted:

(3) The director:

(a) must not be present during any deliberation by the governing body on the matter; and

(b) must not take part in any decision of the governing body on the matter.

203EC Sections 203EA and 203EB not to affect certain obligations

To avoid doubt, sections 203EA and 203EB do not affect the obligations imposed by the *Commonwealth Authorities and Companies Act 1997* upon a representative body that is a Commonwealth authority within the meaning of section 7 of that Act.

In relation to Section 203EB, there are difficulties in applying relevant sections of the new *CACAct 1999* in place of the old provisions of the. *Commonwealth Authorities & Corporations Act of 1997*[old *CACAc*t]

The substitution , by operation of clauses 1&2 of Schedule 3 of the *CLERPAct ,* [the transitional provisions]is, according to the Australian Government Solicitor, as follows;

The reference to s21 of *old CACAct* in s203EB should be read as reference to ss.27F to 27K; and
The reference to s21(3),(4) and (5) *old CACAct* should be read as a reference to ss27J(1)-(3)and s27K

The difficulty in this transposition relates to the description of a *director* under the new and old laws and a perceived incoherence in the operation of a test of a 'matter' which requires the director to stand down under s203EB(3).

The Government solicitor presents a solution, which I discuss below but notes that if his argument is incorrect, then ss203EA& EB evince a contrary intention for the purposes of clause 2(1) of schedule 3 of the new *CLERP Act* [transitional provisions] and also by virtue of the *Acts Interpretation Act* , section10(a), sections 203EA&EB would continue to apply the old *CAC Act 1997* and not the new *CACAct !*

This uncertainty about the operation of the laws on the corporate governance of Native Title Representative Bodies has existed since at least the year 2000 and is unsatisfactory both for the Representative Bodies, their constituents and for government. It is unsatisfactory because these issues are very important to the Board members of a Native Title representative body, and those who have to advise them. If the Australian Government Solicitor has a doubt as to the applicable law, what is to be done by a Native Title representative body? An amendment is needed.

The Government Solicitor's recommendation, contained in the letter of 3rd August 2000 is that "it would be desirable to amend sections 203EA and 203EB at an appropriate time to reflect the scheme of the new *CAC Act* provisions".

ALRM endorses this suggestion, *upon the assumption* that it should be the intention of the Parliament that the rigorous requirements of this legislation be applied to the Executive Officers and Board Directors of Native Title Representative Bodies.

That assumption is not entirely justified in relation to Representative Bodies that are not Commonwealth Authorities and caught by s203EC.

The structural rigidity and formal requirements for procedural rigour which applies to Commonwealth Authorities is not necessarily appropriate to representative bodies. In practicable terms, there is a huge difference

between the operation of a statutory authority and an incorporated association. The former are often staffed by public servants or statutory office holders and their level of resourcing and bureaucratic rationality is bounded in detail by the enabling legislation. The Authority is responsible to Parliament, to which it reports.

A Native Title Representative Body is responsible primarily to it's constituents as an Aboriginal community organisation and the *NTAct* requires this (See s203BA(2) *NTAct*)., and it is also responsible to Parliament by Part 11 Div 5—Accountability.

By imposing the rigours of the regime for statutory Authorities upon Representative bodies, but without resourcing them in the same way the Parliament may be imposing unrealistic and inappropriate expectations upon representative bodies. This imposition may also have the effect of stifling indigenous community control, by the very rigour of the operation of the laws themselves.

The legal problem
It is noted that the advice of the Australian Government Solicitor, referred to above, expresses doubt about the operation of the new *CAC Act* provisions in place of section 21 of the old *CACAct*. According to the Australian Government Solicitor there are problems with applying the replacement section203EB(3) in the context of the new *CACAct, sections 27F to K .,* and it is that uncertainty which gives rise to the need for amendment and clarification.

Briefly section 203EB(3) ,the actual disqualification rule in the replacement provision was written so as to fit with the old section 21 *CAC Act* . However the replacement provisions, for section 21(1) and (2) in the new Act sections 27F, G&H , do not fit so well with the substitute provision 203EB(3), since they were intended to apply to the new disqualification provision section 27 J&K. The substitution of the new for the old requires a coherence between the new laws and section 203EB(3) , which is not , in the opinion of the AGS clear.

Firstly the Director to which section 203EB(3) applies, is the Director to which the old section 21 applied , that is a *director of an NTRB who has a material personal interest in a matter that is being considered , or is about to be considered, by the governing body of the NTRB* .However when the replacement is read alone, as a replacement for the new section 27J , that extended description must be implied.

Similarly in relation to the 'matter' in section 203EB(3) Is it a matter in which the Director has a 'material personal interest' OR is it a 'matter' in relation to which the Director has such an interest in respect of which disclosure to the other Directors is required pursuant to Section 27F(1) *CACAct 1999*?

Further issues from the new CAC Act

The exceptions to the disclosure rule in section 27F(1) found in 27F(2)of the new *CACAct* , as they relate to directors remuneration and to the operation of subsidiaries will seldom be relevant to a Native Title representative body. NTRB Directors are not paid sitting fees of other remuneration, NTRBs do not have subsidiary companies.

The rules in relation to standing disclosures under section 27G , could be useful to directors of NTRBs in some circumstances.

"Material Personal Interest"

When one considers the obligations of the board of a Native Title representative body, to make decisions in relation to allocation of resources for the facilitation and assistance of native title claims and related matters , one may also ask the rhetorical question, in what circumstances does an Aboriginal Director of an NTRB not have a material personal interest in a native title question for the area over which the representative body operates?

The response may be made that a particular director only has an interest in respect of the claim of which he or she is a claimant. That may be so, however does not the director also have a "material personal interest" in respect of other claims which may be in conflict with his or her claim or over which there is an overlap? How wide should that net be spread?

If the limitation of "material personal interest" is not restricted to the personal interest of a director who is a claimant or a member of a claim group, where can that boundary properly be drawn? When do the kinship obligations of a director affect his or her performance of functions so as to make a generalised interest in native title, a material personal interest? What is the position of a Director who has spiritual responsibilities for sites well beyond his or her group's claim area, but within the area for which the representative body is responsible?

How is the Act to recognise the varying motivations of Board Members whose varying interests may or may not affect their judgements? Further, and more important , how is the law to regulate a "personal interest", which is held by a Director , as a spiritual interest , held in company with other members of a claim group?

It is this distinction between a personal interest based solely in material gain and a spiritual interest which has the potential to give rise to a material gain and to kin obligations to others, which forms the nub of the issue in relation to material personal interest, which, it is submitted, this Committee should consider and concern itself with.

The point we make is a simple one, notions of material personal interest and conflict of interest that apply to commercial interests of board members of Statutory Authorities are not readily or easily transferable to Aboriginal community organisations that operate as representative bodies.

In a sense all Aboriginal people who are constituents of representative body have a "material personal interest" in relation to all native title claims and actions in respect of the area for which the Native Title representative body operates.

But this is also a practical question, that needs to be considered in the context of the Board members of an NTRB setting policies in the carrying out of the NTRB functions in Div 3 of Part 11 of the NTAct . In many cases these decisions will be about prioritising the use of scarce resources and applying them rationally to the areas of greatest need.

It should not be assumed that there is an automatic fit between the governance requirements of a Native Title representative body and a Commonwealth statutory authority. A less rigorous approach is needed than the automatic disqualification provided by s203EB(3)

The Minister's power to make class orders under Section 27K(3) of the new
CAC Act may partially resolve the issue. Under that subsection the Minister may make an order in writing allowing directors with a 'material personal interest' to be present at meetings, take part in deliberations and vote. More importantly , orders may be made in respect of a specified class of Commonwealth Authorities, directors, resolutions or interests. Accommodations could be made for kinds of interests and kinds of resolutions about the operation of representative bodies, which did not leave the directors or the board hamstrung.

Class orders should be made so as to recognise the practicalities of Aboriginal persons' interest in native title claims, and that they should not necessarily be regarded as disqualifying interests.

However, even subject to the doubts expressed by the Australian Government Solicitor, about whether the new or old *CAC Act* applies the present form of the *NT Act*, s 203EB(3) prohibits such a dispensation, since section27K is excluded by the substitution of section 203EB.

It is submitted that this Committee should recommend amendments which would allow s27K to apply and be used by the Minister to give dispensations to the Directors of Native Title Representative Bodies from time to time and in relation to specific kinds of interests and, resolutions.

It is further submitted that this Committee should review the operation of sections 203EA&EB *NTAct* and the *CAC Act* to Native Title Representative Bodies, with a view to relaxing their strict and inappropriate operation to state and territory bodies that are not statutory authorities and which may be adequately regulated under existing laws. In the alternative , an apprpopriate degree of regulation for NTRBS ,that are not Commonwealth statutory authorities may be created under the *Aboriginal Councils and Associations Act(CW*), and that

would , to that extent, render the operation of section203EA and EB redundant .

Yours faithfully

Christopher.J Charles
General Counsel