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25 January 2006

Ms Jackie Morris
Acting Committee Secretary
Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms Morris

Re: Inquiry into the Native Title Amendment Bill 2006

I refer to your letter inviting a submission from the Federal Court of Australia to the inquiry by the Standing Committee on Legal and Constitutional Affairs into the Native Title Amendment Bill 2006. I am pleased to enclose a submission and thank you for agreeing to receive the submission outside the relevant time provided. As explained to you, the submission was intended to be sent to you by 19 January 2007, but that did not occur due to an administrative oversight.

The comments that follow reflect, in general, the views that were expressed by me and by other representatives of the Federal Court to the consultants engaged to conduct the Native Title Claims Resolution Review. As much of what follows was not ultimately highlighted in the consultants' final report to Government, I thought it appropriate to make the comments again.

Regrettably, as I am away from Australia next week, I will be unable to attend the Senate Committee's Public Hearing in relation to the Bill in Sydney on Tuesday 30 January

2007. Nevertheless, I would be happy to attend before the Committee at another time convenient to it to clarify or expand upon the matters I mention.

Yours sincerely,

Warwick Soden
Registrar and Chief Executive Officer
Federal Court of Australia

Submission - inquiry by the Standing Committee on Legal and Constitutional Affairs into the Native Title Amendment Bill 2006

1. Background

(a) The Claims Resolution Review (the Review)

In July 2005 the Commonwealth Attorney-General wrote to the Chief Justice of the Federal Court of Australia advising his Honour that the Attorney-General was initiating a Review of the role of the National Native Title Tribunal (NNTT) and the Federal Court (the Court) in the resolution of native title claims.

In his letter the Attorney-General acknowledged that the Court and the NNTT are the central institutions in the native title system and both play a pivotal role in the resolution of native title claims. The letter referred to the Attorney-General's desire to improve the speed and efficiency of claims resolution. He proposed to the Chief Justice that the Registrar of the Court be invited to participate on the Steering Committee which was to oversee the work of the Review.

The Attorney-General made a public announcement about the Review on 7 September 2005 and notified the Court and others of the appointment of the consultants engaged to undertake the Review on 17 October 2005.

The Steering Committee, chaired by Ian Govey of the Attorney-General's Department and comprising the Registrar of the Court, Warwick Soden, John Sosso, a member of the NNTT and Greg Roche from the Office of Indigenous Policy Coordination, was established to oversee the Review. The Steering Committee met a number of times and contributed to the Review through responses to the Consultants' draft reports as they were received.

(b) Consultation

The Consultants met with the judicial and staff members of the Court's Native Title Coordination Committee. In general, the view put by members of the Court was that the Court should be given greater flexibility in relation to case management of native title matters, allowing it to deal with them according to their particular circumstances. This view was based on the Court's experience of the beneficial results of active case management by the Court in some native title proceedings. Under the current Act the Court is able to employ flexible, and

responsive means of dealing with native title claims, including court-annexed mediation, management of expert evidence**,** early neutral evaluation, case conferences and other practical ADR procedures. There have been successful outcomes from some court-annexed mediation which has been used selectively where the court considered it would open a new path to resolution.

The Newcastle Waters matters (comprising 6 matters in the Barkly region of the Northern Territory) were identified by the Court as the (joint) lead case for a number of pastoral estate cases in the Northern Territory. Their progress was closely managed by the Court**.** That management included the convening of a conference of experts. The length and cost of the trial was greatly reduced**.** The entirety of the evidence, including on-country evidence, was heard within one week. That short trial is expected to allow for the mediated settlement of up to 80 other matters.

The following points touch on some other matters that were raised by representatives of the Court with the Consultants:

- The Court's case management strategies focus on assisting the parties to reach agreement wherever possible, however, the Court's constitutional and statutory functions are to ultimately hear and determine cases.
- Litigated determinations or partial determinations on a question of fact or law are beneficial when they produce answers to questions of principle (which affect the resolution of other applications) or have a factual flow-on effect in particular regions and may assist mediation.
- In native title matters, the Court's objectives are:
  - (i) Expedition of the mediation process consistent with available resources;
  - (ii) The identification and management of cases to go to trial; and
  - (iii) The resolution of a case either by mediation or litigation.
- The Court's flexible and innovative Rules and its approaches to native title practice are designed to promote expedited resolution of litigation in native title claims through:

(i) case management conferences and detailed timetabling of steps in the preparation of a case for trial;

(ii) Court annexed mediation specifically, and the application of alternative or assisted dispute resolution techniques more generally, including via compulsory conferencing of experts, identification of agreed facts to reduce areas of dispute at trial, and early neutral evaluations. (Such mediation is employed selectively having regard to the primary role of the NNTT in native title mediation); and

(iii) the taking of early or limited evidence where appropriate.

- Connection evidence is viewed by the Court as an element of the mediation process, not a pre-condition. Flexibility about the ways in which connection can be demonstrated have been encouraged by the Court: see for example *Frazer v State of Western Australia* [2003] FCA 351 and *Gunditjmara #1* (VID6004/98). The parties' financial and human resources are a key factor in the imposition of intensive management regimes with respect to mediation or litigation.
- There are some fundamental constraints imposed by the capacities of the parties to engage with the process of resolution of native title claims through mediation. Nonetheless, wherever possible and appropriate, having regard to the proper role of the NNTT, the Court actively seeks the non-litigious resolution of native title claims in a timely and economic manner.

(c) Drafting Instructions

The Court was provided with an opportunity to comment on several versions of the proposed "Native Title Claims Resolution Review – Drafting Instructions"**.**

The Judges of the Court comprising the National Native Title Co-ordinating Committee declined the invitation on the basis that it is not appropriate that judges have detailed input into the legislative drafting instructions, the outcomes of which the Court may be called upon to construe and apply. However, their Honours noted that the implementation of the recommendations potentially raised two questions of fundamental principle:

1. A confusion of the mediation role of the NNTT with other functions of a determinative nature, particularly the power to make coercive directions.

2. Whether the implementation of a number of the proposals would involve an impermissible intrusion of executive power into the judicial power of the Commonwealth. This question applies particularly to those recommendations which would mandate dismissal of applications based upon their failure to meet an administrative registration test even though the Court would be given discretion to depart from that mandate**.**

2. Native Title Amendment Bill 2006 (the Bill)

In providing comments on the Bill reference is made to the underlying principle that native title determination applications are proceedings in the Court and that mediation (and/or any other ADR process) is an adjunct to those proceedings and directed to their prompt resolution. The challenge is to ensure that the roles of the NNTT and the Court are complementary and integrated in dealing with the jurisdiction. These observations are offered in support of the common objective of endeavouring to make the resolution of native title claims more expeditious and economical.

The Bill would not affect the Court's powers to conduct litigation, including directions hearings, most case management conferences, preservation of evidence hearings**,** limited evidence hearings, and other forms of ADR: see Explanatory Memorandum [2.33] and proposed subsection 86B(6)(b). However the changes may unnecessarily limit the capacity of the Court to manage applications pending before it. Native title applications are filed in the Court and are, until a determination is made, a proceeding in the Court and therefore subject to its control in the exercise of the judicial power of the Commonwealth. An incident of this power is the power to supervise progress of the proceeding. The Bill proposes to prevent the Court from doing so as it appears to limit the Court's capacity to use the full range of case management options normally available to it, including conferences of experts, to assist in the resolution of issues as between the parties while a matter is in the course of NNTT mediation. Such an approach has been successful in Gunditjmara (VID6004/98 and VID655/06), Yankunytjatjara/Antakirinja (SAD 6022/98), Blue Mud Bay (NTD6043/98) and Newcastle Waters (NTD6008/01, NTD6024/00, NTD6033/02, NTD6013/02, NTD6017/02 and NTD3/04) and should continue to be an option available to the Court in the interests of assisting the parties to reach agreement.

(a) The conferring upon the NNTT of powers to make coercive directions.

As noted above some Judges of the Court have previously indicated concern with the constitutionality of the coercive powers of the NNTT. These remain a concern in relation to proposed sections 136B(1A) and 136CA which are proposed to empower the presiding member of the NNTT to direct parties to attend mediation conferences and produce documents for those conferences. If a party fails to comply the President can report the non-compliance to the Court. Under proposed subsection 86D(3) the Court will have a power to make an order 'in similar terms to the direction given by the NNTT.'

There are four issues about the proposed scheme which are of sufficient concern that they should be brought to your attention. Two are contextual concerns which affect the other two.

The first concern is that statutory directive powers conferred upon the NNTT in the context of mediation are likely to be exercised by a range of people, namely NNTT members, who have been appointed on the basis that their primary function is mediation. If any such members have the necessary experience and qualifications to formulate such orders in ways that will make them readily enforceable, that will be a matter of accident rather than design.

The second concern is that the issue of directions by the NNTT is likely to impact upon State and Territory governments in the exercise of their governmental functions. A government participating in mediation in a manner informed by its own policies and practices, if subject to directions by the NNTT, could characterise such directions as raising legal, and perhaps even constitutional issues, by compromising its ability to act in accordance with its policies. Such directions may lead to the mediation process being burdened with second order litigation by governments seeking to protect their own prerogatives.

The third concern raises a legal issue. Administrative directions given by an NNTT member in the context of a mediation will have no credibility unless there is an effective enforcement mechanism. Such directions can only be enforced in the exercise of the judicial power of the Commonwealth. That is to say, if an NNTT member gives directions relating to the conduct of a mediation which are then breached, enforcement action will have to take place in some court, presumably the court which has the conduct of the relevant proceeding. The result of this is that coercive powers conferred on the NNTT as an administrative body are likely to generate additional elements of costs and delay in contentious matters. This is more likely where orders

formulated by persons who are not necessarily qualified to do so raise difficulties about their interpretation and therefore about their enforcement.

The fourth concern arises out of the same separation of powers principle. Once the power to give directions in a mediation is conferred upon the NNTT and is not a power exercised by the Court, it becomes administrative in character. This makes it amenable to judicial review under either s 39B of the *Judiciary Act 1903* or the provisions of the *Administrative Decisions (Judicial Review) Act 1977*.

Ultimately, under our constitutional arrangements, it is simply not possible to set up a system under which an administrator may give binding statutory directions which do not attract a need for judicial enforcement and which are exempt from judicial review.

The vesting of coercive power in the NNTT sets the scene for additional cost and delay in the mediation process. On the other hand, the Court, properly informed by reports from the NNTT and the submissions of the parties, can and should be able to fix timetables for the steps to be undertaken in mediation, supported by its own institutional mechanisms for enforcement and without attracting a separate layer of judicial review processes**.**

(b) Simultaneous mediation by the Court and the Tribunal

An objective of the Bill is to prohibit simultaneous mediation by the Court and the NNTT. It is unclear from proposed section 86B(6), and from the comment in paragraph 2.34 of the Explanatory Memorandum, whether conferences of experts remain an ADR option available to the Court while a matter is in NNTT mediation. As stated above, such an option has proven useful in a number of matters and should remain available as one of the suite of alternative dispute resolution options available to progress claims. One view is that it is only true mediations attracting the protections of section 53B of the Federal Court Act, which were the subject of the Claims Resolution Review recommendations, and that only such mediations should be precluded during the course of NNTT mediation.

(c) Removal of discretion as to whether to refer a matter to NNTT mediation

The proposal to repeal section 86B(2), and thereby remove the Court's discretion in relation to whether to refer a matter to NNTT mediation, may adversely impact on the efficient and flexible management of litigation in the interests of prompt and effective resolution of native

title proceedings. Currently, some matters are filed in a form designed for a particular litigation or settlement path and a presumption in favour of automatic referral for mediation would be counterproductive in these cases. Examples include Blue Mud Bay #2 (NTD6035/02) which was a new claim excised from Blue Mud Bay #1 (NTD6043/98) for the express purpose of comprising a small and manageable litigation test case. Had the Court been required to refer that case for mediation and been unable to use the range of Court ordered steps including case management conferences and a conference of experts, the matter would not have proceeded as quickly or efficiently as it did. Other examples are Gunditjmara #2 (VID655/06) and Tennant Creek #2 (NTD8/06), each filed to reflect an agreement already well advanced in another mediation process.

Generally speaking, an overly rigid referral provision would unreasonably limit the ability for the Court to make referrals in an orderly and (where appropriate) staggered manner and for parties to work together to target matters as efficiently as possible. For example, parties might support deferring referral of a particular matter to mediation pending a Court decision or other independent process of negotiation. In the meantime, a different process such as a case conference, conference of experts or other method could be productive.

(d) Dismissal of matters brought in response to future act notifications

In relation to the proposal for summary dismissal of matters brought in response to future acts, I do not see that the NNTT could assist in identifying the matters "filed purely in response to a future act" as they propose. Such identification would be difficult as many matters would have been filed for dual purposes – to gain procedural rights but also as a genuine expression of a claim for the recognition of native title. Where relevant, the issues would be the subject of evidence in the course of the dismissal hearing and could not be predetermined by advice from the NNTT.