Human Rights and Equal Opportunity Commission

Aboriginal Torres Strait Islander Social Justice Commissioner

22 December 2006

By email: native.title@ag.gov.au

The First Assistant Secretary
Legal Services and Native Title Division
Attorney-General's Department
National Circuit
BARTON ACT 2600

Dear Mr Anderson,

Second Discussion Paper: Technical Amendments to the *Native Title Act 1993*

I am responding on behalf of the Human Rights and Equal Opportunity Commission to your invitation for submissions on the Government's Second Discussion Paper: Technical Amendments to the *Native Title Act 1993*, ('the Second Discussion Paper').

I commend the Government for its earlier decision to consider only those amendments which are 'not designed to wind back native title'. Given the hostilities and mistrust which enveloped Australia in the course of the public debates leading up to the passage of the 1998 amendments, I strongly believe it is in the wider public interest that no further legislative erosion of the position of native title holders occurs.

Consultation process

Before commenting on any of the specific proposals contained in the Second Discussion Paper, I should also commend the Government on its consultative approach to these amendments. Understandably, there has been considerable anxiety, especially amongst Aboriginal peoples and Torres Strait Islanders as to what the amendments might involve. The circulation of the discussion papers has gone some way to relieving this anxiety.

I did not respond to the First Discussion Paper because at that time the Government expected to publish an exposure draft of the Bill in early 2006 before the Bill was introduced into the Parliament. It is now no longer envisaged that an exposure draft will be released before the technical amendments Bill is introduced in the 2007 Autumn session. This is unfortunate, given the very complex nature of the principal legislation. As the Government well appreciates, native title is an area of law where the drafting can produce far reaching and unintended consequences.

Although the Second Discussion Paper contains reasonable detail in respect of most of the proposed changes, I consider that it is important to assess the proposals by reference to the drafted words of the legislation. For some of the proposals, particularly those concerning the future act regime and the changes to alternative State provisions, the actual wording is likely to be significant. Accordingly, my comments in this submission are qualified to the extent that I have not yet had that opportunity.

General comments on the proposed amendments

Apart from a few important exceptions, I believe that many of the proposals set out in the Second Discussion Paper are sound and will improve the operation of the *Native Title Act 1993* ('the Act') without unduly affecting the existing rights of any party.

Many of the proposals are directed at reducing the cost of future act notification without compromising the substantive purpose of the existing provisions. To the extent that modifying the formal requirements for notification releases resources into the system, these resources are likely to be well used in supporting the new claims resolution processes and in other parts of the reform package.

Other amendments are addressed at clarifying the existing law without seeking to change it. Such amendments serve a valuable purpose in reducing uncertainty over how the legislation is intended to operate and in thereby reducing the scope for disputes arising.

The amendments which narrow the circumstances in which the registration test must be applied to an amended claim will encourage the timely amendment of applications and this, in turn, may aid the resolution of claims or help to narrow the substantive issues in dispute. Similarly, giving respondents the opportunity to withdraw from proceedings as of right at any time prior to the hearing of the evidence may assist in reducing the number of parties to an application.

Other amendments are aimed at introducing greater flexibility into existing procedures. These changes are sensible and likely to result in a native title system that can more readily adjust to the wide range of cases and circumstances with which it presently contends.

Proposals of concern

Despite the comments above, the Second Discussion Paper contains several proposals which cause me some considerable concern. The basis of this concern arises from the potential of these proposals to adversely affect native title holders, including by placing them in a more disadvantageous position than holders of ordinary title to land.

With one exception, these proposals all appear to have arisen from suggestions made in response to the First Discussion Paper. Also with one exception, they all relate to proposed changes to the future act regime in Division 3 of Part 2 of the Act.

The proposals of concern which I address in this submission are as follows.

1. Section 24MD(6B): Allowing non-native title parties to request an independent hearing in relation to objections over certain acts

I do not object to the proposed amendments to this provision.

I suggest that the need for the amendment proposed in the First Discussion Paper probably derives from a genuine drafting error. The words 'and so requests' should **not** have been included in section 24MD(6B)(f), unless the legislation also provided for what would occur if no independent hearing was sought. I would therefore suggest that the proposed amendment could be simply effected by the deletion of those words.

The further proposed amendment in the Second Discussion Paper appears to be designed to afford native title holders greater protection. I encourage the Government to further develop this proposed amendment to cure the potentially discriminatory operation of subsection 24MD(6B). I suggest that a further amendment should make clear that the rights

afforded native title holders under section 24MD(6B) are in addition to, rather than in substitution of, any other rights that they may enjoy.

Section 24MD is a complex and poorly drafted provision. It is fundamental to the protection of native title but has been the subject of very little judicial consideration. There is no settled view as to how the section should be construed.

Section 24MD(2)(ba) and section 24MD(6A) purport to guarantee the rights of native title holders to at least the equivalent of the rights of ordinary title holders. However, the relationship between subsections 24MD(6A) and (6B) is not clear.

Where a State or Commonwealth law provides ordinary title holders with the right to an independent hearing about whether an act affecting the land subject to their title should occur and that hearing is binding, section 24MD(6A) would operate to give that same right to native title holders. On the other hand, if ordinary title holders were not entitled to an independent hearing of their objections, section 24MD(6B) provides native title holders with procedural rights, including a right to an independent hearing, in addition to any available to ordinary title holders.

Section 24MD(6B) also appears to provide that the procedural rights of native title holders under section 24MB(6A) are to be read down and qualified by the provisions of section 24MD(6B). While this may not have been the government's intention, the problem clearly arises if the rights afforded to ordinary title holders are greater than those provided under section 24MD(6B). To that extent, section 24MD(6B) may have an unintended but severely discriminatory operation. This needs to be remedied by a clear statement in the legislation that the rights under section 24MD(6B) are in addition to, and not in substitution of, any rights which native title holders might otherwise have because of section 24MD(6A).

Given the importance of section 24MD to the protection of native title rights and interests, I would consider such change to be essential.

2. Section 24KA: Clarify application to 'mixed purpose' infrastructure

I strongly encourage the Government to abandon this proposal.

The commentary on this proposal in the Second Discussion Paper does not appear to be an accurate statement of the law. In any event, the proposal would have the effect of widening the scope of the existing provision adverse to the interests of native title holders.

Section 24KA already allows for the construction of many facilities on or across land which could not be done if the land were held by persons other than native title holders, at least without formal interests, such as the freehold or an easement being acquired. The provision does contain a requirement to afford native title holders equivalent 'procedural rights' as other title holders but this apparently does not include the right of veto, even where it exists for such other title holders. To that extent, the subdivision is already discriminatory.

I can see no reason why the Government should now enlarge the scope of an already discriminatory provision. Where facilities are genuinely for the benefit of the public, a non-discriminatory means of ensuring their provision can already be found in Part 2 Division 3 Subdivision M.

3. Section 24LA: Allow government bodies to continue to carry out certain acts for community benefit or public safety following a determination of native title

I strongly encourage the Government to abandon this proposal.

Section 24LA is also already discriminatory in character and effect. It was originally justified on the basis that the future acts it allowed would not continue after native title was determined to exist. The Government now proposes to remove that restriction so that certain 'low impact' future acts can be carried out without the need for notice or consent even after a determination that native title exists has been made.

This is not a technical or minor amendment. It allows governments to continue to ignore recognised native title interests; treating them as though they did not exist. It considerably widens the scope under which acts, albeit 'low impact', might be done without native title holder consent or notice, even though such acts could not be done to land held under ordinary title.

Native title holders should enjoy no lesser rights of protection than ordinary titleholders. If governments are concerned about facilitating such activities on private land, they can readily legislate to ensure that they can be done on all private land. Such acts could then be approved, without burden or delay, under Part 2 Division 3 Subdivision M in exactly the same way as for other title holders (see subsections 24MB and 24MD(6A)). For matters of genuine public safety, such as the construction of emergency fire breaks, such legislation is already in place.

The proposed amendment is therefore both unnecessary and discriminatory.

4. Section 29: Enabling government notices to cover more than one act

I recommend that this proposal be modified to ensure that it is not open to abuse.

If the notices themselves are clear, there should generally not be a problem with notices covering more than one act being given to claimants and NTRBs.

However, I am concerned about the potential inherent in the proposal for claimants and NTRB's to be inundated with large numbers of irrelevant notices, such as when a State:

(a) posts a generic, State wide notice to every claimant and NTRB to ensure that each notice, although referring to more than one future act, is properly relevant to the addressee, or

(b) issues notices in respect of hundreds of licences at once (ie cluster and 'class' notices).

This significantly hampers the ability of claimants and NTRBs to identify particular future acts of concern and to make focused submissions in response to them.

The proposal would be less problematic if it were modified to ensure that a notice could only contain more than one proposed future act if each of the proposed future acts included in the notice:

(a) affected the land claimed by the addressee claimant, or

(b) concerned the addressee NTRB's area.

5. Section 43: Clarify scope of alternative regimes

I strongly encourage the Government to abandon this proposal.

This is not a technical or minor amendment. It is clear that:

(a) the expedited procedure and

(b) conjunctive agreements

may not be used where State alternative provisions have been enacted. Where State alternative provisions purport to do so, they should not be validated. If validation is required for some other reason, that reason should be identified and considered.

As a matter of principle, the Commonwealth should not be seeking to legislatively validate any act that unlawfully affects native title. Native title holders have already experienced two very significant rounds of validation against their interests and they must be given confidence that such discriminatory expediency will not continue.

To the extent that any State is concerned about the validity of an existing alternative regime, it should be invited to consider an alternative procedure ILUA.

States and Territories have the option of using either the alternative provisions or the Commonwealth regime. They have differing advantages and disadvantages. This proposal only operates to extend the disadvantages to native title holders of the alternative regime.

6. Sections 36C(5)(b), 42(3)(b), 42(5)(b) and 52: A more flexible scheme for payments held under the right to negotiate process

I strongly encourage the Government to abandon this proposal.

This is not a technical or minor amendment. If this proposal is adopted, the value of compensation paid to native title holders pursuant to it would be eroded over time.

Monies paid into trust are not in the nature of a bond. Rather, they are likely to constitute the realisable compensation of the native title holders, albeit contingent upon those persons establishing that they hold native title. Unlike cash invested or held under trust in a bank account, a bank guarantee will not accrue interest. The advantage of an early payment, being the realisation of interest payable on the compensation from the date when the relevant act is done, will be lost. As such, the adoption of the proposal would be in the nature of an interest free loan from the native title holders to the developer.

The longer the delay in the final determination of native title, the greater the erosion of the compensation amount. Given the current delays in resolving native title matters, the impact on native title holders' interests could be very significant.

I strongly urge the Government, in keeping with its commitment to avoid changes that have the effect of winding back native title, to give serious consideration to abandoning or amending the proposals identified above as recommended. The proposals are likely to adversely affect the already curtailed rights of native title holders and, in some cases, have the potential to again take Australia outside its obligations to avoid and prevent discrimination on the grounds of race.

I would be pleased to comment further on these submissions if you felt it might assist.

Yours sincerely,

Tom Calma
Aboriginal and Torres Strait Islander Social Justice Commissioner
on behalf of the Human Rights and Equal Opportunity Commission

Post Script

After preparing this submission, I have had the benefit of reading the draft submission of the National Native Title Council. I would like to express my support for the Council's submission in relation to the proposed amendments to section 32 of the NTA.