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18 January 2018

Director
Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

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

Dear Sir or Madam,

Reforms to the *Native Title Act 1993* (Cth) – November 2017 Options Paper

At the request of the Chief Justice, I am writing to comment on a small number of issues raised in your Department's November 2017 Options Paper "Reforms to the *Native Title Act 1993* (Cth)". The Chief Justice asked me to clarify in this response that the comments and suggestions made follow full and careful consideration of the issues discussed in the options paper by the Chief Justice, the National Coordinating Judges of the Court's Native Title National Practice Area and the most senior and experienced of the Court's native title Registrars.

It would be inappropriate for the Court to make any comment on matters of policy regarding the Native Title Act and native title law more generally. Such matters are entirely for the government of the day and ultimately the Parliament. It is, however, hoped that the Court's comments on some procedural and other operational reforms which have been proposed that are directly related to the Court's role under the Native Title Act may be of assistance.

The Options Paper suggests (at page 20 and in proposal F11 on page 34) that one option available to improve post-determination dispute management would be to make the Federal Court's jurisdiction exclusive in relation to *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) matters that affect Prescribed Bodies Corporate (PBCs), where parties can currently also commence proceedings in a State or Territory court. It is also suggested (page 20) that this measure would "ensure consistency and coherency in jurisprudence and case management".

The Options Paper does not propose that all matters arising in relation to the CATSI Act be within the exclusive jurisdiction of the Federal Court; rather, only those matters "that affect PBCs". If this proposal was adopted, corporations established under the CATSI Act which do not operate as PBCs could continue to access both Federal and State/Territory jurisdictions.

The Court supports this proposal. CATSI Act matters that affect PBCs are invariably complex and their judicial determination is significantly aided by a deep understanding of the operation of native title law. The flexibility provided by the *Federal Court Rules 2011* for the case management and alternative dispute resolution of proceedings would be of considerable assistance in the management of these matters; particularly when combined with the mediation

and case management expertise of the Court's specialist native title Registrars. For the longer term, as the current mediation provisions of the Native Title Act were designed solely for applications under section 61 of that Act (i.e. native title and compensation applications), it would be desirable for those provisions to also be updated in line with contemporary mediation and case management practices for even greater efficiency in the management of such CATSI Act matters.

The Court, however, suggests that consideration be given to granting the Federal Court exclusive jurisdiction in all CATSI Act matters. CATSI Act matters which do not affect PBCs are also always complex, legally and factually, and their judicial determination aided by experience in resolution of commercial disputes and an understanding of indigenous communities. Despite not being a PBC, many of these CATSI Corporations will have been established and operate in the context of native title proceedings. The Judges of the Federal Court are ideally equipped to deal with these matters because of the specialist knowledge and expertise they have gained in their work in the Court's Commercial and Corporations and Native Title National Practice Areas. In addition, the flexibility provided by the Court's rules and the proficiency of its native title Registrars as noted above would also be of significant assistance in the management of non-PBC connected CATSI Act matters.

Included in the Options Paper (Attachment G) are a number of proposals raised by State and Territory governments. Proposal G22 (on page 38) calls for clarification of the appropriate use of section 87 (power of Federal Court if parties reach agreement) vis-a-vis section 87A (power of Federal Court to make determination for part of an area) of the Native Title Act.

The commentary in regard to this proposal notes that States and Territories have indicated that there is uncertainty around the appropriate use of section 87 and 87A. By way of example, it is noted that if a claim is split into parts "A" and "B", there is an argument that "A" should be determined by section 87A and "B" by section 87, as that is the whole of the remainder. It is suggested at proposal G22 that case law indicates that there is no practical difference other than in terms of what the Federal Court's Chief Executive Officer and Principal Registrar must do by way of pre-requisite steps for a consent determination and that this potentially affects timing and effective use of resources.

The Court agrees that it could be useful to clarify that where only part of the original application is being determined but that determination disposes of the entire matter (such as a Part B determination), this should properly proceed under section 87 of the Native Title Act rather than section 87A (recently confirmed in *Yaegl People #2 v AG New South Wales* [2017] FCA 993, at [18]). This is evident when considering the effect of subsection 64(1B), which provides that the application is taken to have been amended to reduce the area of the application by the area covered by a section 87A determination. If not clarified legislatively, the ongoing uncertainty is likely to lead to continuing, unnecessary and expensive judicial consideration of these provisions in differing circumstances. Additionally, such legislative clarification would eliminate the ongoing expense of notification to parties to proceedings required under subsection 87A(3), which would be unnecessary if section 87 applied.

Yours sincerely

John Mathieson
Deputy Principal Registrar