FEDERAL COURT OF AUSTRALIA RESPONSE TO AUSTRALIAN LAW REFORM COMMISSION DISCUSSION PAPER

The Court's Native Title Practice Committee has considered the Discussion Paper released on 23 October 2014.

As the Committee previously indicated, it does not make any comments on matters of policy.

However, it wishes to make some observations on the questions raised in Chapter 9 "Promoting Claims Resolution" so far as they involve practical issues.

The Committee refers to the information previously provided to the ALRC concerning the way in which, it is anticipated that, the majority of outstanding claims will be resolved in the reasonably proximate future. That information was supported by the refined processes of case management adopted by the Judges of the Court, the fact that most claims are now likely to resolve by agreement (mainly by consent determinations) so that there is not a significant number of claims likely to proceed to a contested hearing, and to the experience of the Court in conducting contested hearings, including through concurrent evidence.

The following comments relate to the Questions posed in Chapter 9, in the sequence they are asked:

(1) The Committee does not consider that there is a need for specific legislatively supported changes to effect improvements in the procedures available to the Court to identify and assemble evidence;

(2) the Committee does not consider that legislative change is needed to ensure archival material is assembled and properly archived/

(3) the Committee notes that present procedures adopted by Judges of the Court accommodate the concurrent collation of evidence to establish connection and where appropriate the collation of tenure material, so no further powers to do so are required;

(4)-(5) the Committee considers that practices adopted both by representative bodies and by State and Territory governments are now guided by, and benefit from, the experience of past consent determinations in which the process towards determination is managed by Registrars of the Court in a nationally consistent way. Consequently, it does not consider that there is a need for the Commonwealth itself to develop a "connection policy", as it can address and protect its interests in particular areas under claim at present, and there is no need for any further "best practice" principles;

(6) the Committee's view is that the legal professionals acting in native title matters are largely appropriately experienced, and that there is no need to develop a more refined system of training and certification of legal professionals to act in such matters;

(7)-(9) the use of native title application inquiries has been available for many years. It has been used only on a few occasions. Judges are aware of its availability and have used that procedure as they consider beneficial and appropriate. The Committee does not consider that any action is necessary or appropriate to either encourage or require increased use of such inquiries. They are part of the menu of options used by Judges in case management to encourage resolution of claims by agreement. Statistics over the last few years indicate the significant resolution of many claims. Consequently, the Committee does not consider that it is desirable or appropriate to take any steps to increase the use of the native title application inquiry process;

(10)-(11) this response is also related to the same topic as questions (7)-(9). It is not clear how a potential claimant who chooses neither to be a party to an application for the determination of native title, nor a party resisting such an application, should be entitled to make such a request to the Court. If anything, that may well lead to the slowing of the process of agreement and disposition of claims. Such persons, if they are members of the claim group and are permitted to separately be parties on a proper basis, or are opponents of the claim, may make such a request in any event. Consequently, it does not consider that there is any benefit, in terms of the claims disposition responsibility of the Court in making any changes as the questions raise. There are occasions when a member or members of a claim group, as a minority of the claim group, disagree with the way the applicant for the claim

> group is managing the progress of the claim. It is the invariable practice of native title representative bodies that, before a consent determination, a further full meeting of the claim group is held to decide whether to support the proposed determination. At that time, the minority members of the claim group have their opportunity in an appropriate forum to put their point of view. There are also occasions when there is a dispute about whether certain persons are members of the claim group. Such persons are generally made parties to the claim, and resolution of their status is necessary (by the processes available to the Court, including an inquiry by the Tribunal) before a determination of native title can be made.

The Committee would be happy to provide you with further information in relation to the above matters if required.