



13<sup>th</sup> February 2009

Mr Iain Anderson  
The First Assistant Secretary  
Territories and Native Title Division  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
**Barton ACT 2600**

Dear Iain,

### **DISCUSSION PAPER – Proposed minor Native Title amendments**

On behalf of this Association's Native Title Committee, I am pleased to put forward these comments about the December 2008 Discussion Paper. The Pastoralists and Graziers Association instructs solicitors on behalf of approximately 450 pastoralist respondents to nearly 100 claims in Western Australia. The PGA anticipates that if the Federal Court becomes increasingly responsible for mediation, it will be able to address the factors that delay settlement of native title matters. This will assist pastoralists to continue to resolve their native title issues through mediation.

#### **1. Mediation powers to the Federal Court**

Pastoralists across Western Australia prefer to mediate rather than litigate native title claims. The Pastoralists and Graziers Association (PGA) actively advocates this position to the Federal Court and the National Native Title Tribunal ("*the Tribunal*") in matters where pastoralists are involved. In relation to the proposal to grant the Federal Court a role in mediation of native title claims, the PGA supports this proposal to the extent that it will provide pastoralists with early access to mediation of their issues with native title claimants.

Pastoralists want to see claims progressed and resolved quickly and efficiently so that there is no more uncertainty about managing their stations. The PGA supports the increasing involvement of the Federal Court both prior to and during active Court ordered mediation.

The main delays in resolving native title claims result from delays to the resolution of inter-indigenous issues and overlapping claims, the delays in the preparation of claimants' connection research and the procedural delays in the subsequent connection assessment process by the State of Western Australia. While these matters are being resolved, pastoralists usually do not actively participate in mediation. Generally, pastoralists seek to negotiate an Indigenous Land Use Agreement ("*ILUA*") with native title claimants where a consent determination is imminent. The timing of this is usually dictated by the position of the State and Applicants, neither of whom will typically interact with respondents before resolution of the question of connection; however, the Tribunal is actively seeking involvement of respondent parties at an early stage, an initiative that the Association fully supports.

The negotiation process in relation to an ILUA usually takes 6 months to a year and is conducted in parallel with multiparty negotiations of a form of consent determination

acceptable to all parties. The Tribunal has ably assisted the ILUA negotiation by mediation in past determinations. The Tribunal has successfully mediated all six of the native title settlements in Western Australia involving pastoral lessees. The negotiations between pastoralists and claimants through the NNTT have never delayed the progress of mediation or the finalisation of a consent determination.

The PGA has also been working towards making mediation and the consent determination process more efficient & cost-effective so that negotiation of an ILUA for pastoralists can proceed in parallel with the State's assessment of connection. In 2008, the Tribunal initiated scoping conferences in selected native title matters, which has significantly advanced the ability of pastoralists to resolve issues early by taking an interests-based mediation approach. There are now agreed timetables for negotiations of ILUAs that have been achieved from these scoping conferences which may result in pastoralist issues being resolved far in advance of consent determinations in those matters.

The PGA would expect that the changes resulting from the Court being given mediation powers will preserve the beneficial early outcomes realised by the scoping conference process that has been actively advanced by the Tribunal. This is necessary for long-term, durable native title settlements resulting from native title claims. The only concern of the PGA is one of resourcing. As the PGA apprehends things, there are more Tribunal Members available for mediation than there are presently Federal Court Registrars.

## **2. Agreed Statement of Facts for Consent Determinations**

The Discussion Paper proposes that an agreed statement of facts should be sufficient for a consent determination to be made under section 87. Existing practice in recent consent determinations in WA is for the State and the applicant to lodge affidavits and joint submissions with the Court detailing why a consent determination should be made. Those submissions are either made in conjunction with other respondents or supported by other respondents. It is unclear whether a joint statement of facts is preferable to the current practice in Western Australia, which seems to work well.

This proposed amendment foreshadows the exclusion of non-government respondents from participating in the consent determination process generally. The PGA strongly opposes the proposal. It is important that non-government respondents not be excluded from mediation towards a consent determination. The participation of pastoralists and other non-government respondents is necessary to ensure high quality and durable outcomes for claimants and pastoralists.

The aim of the PGA involvement in consent determination mediation is to seek to achieve pragmatic, interest-based co-existence solutions for future land management. Should pastoralist involvement not continue, it is unlikely that WA would continue to achieve mutually beneficial native title consent determinations (e.g. Ngarla, Eastern Guruama, and Thalanyji). If pastoralists are excluded, it could result in undesirable outcomes such as have resulted in several determinations in WA (e.g. Ngarluma Yinjibarndi, Wanjina, and Karajarri). In these determinations, relationships and practical co-existence arrangements have not been progressed, to the detriment of both pastoralists and native title holders. There are no ILUAs in these settlements to operationalise how the new native title rights are to be exercised and co-exist with the pastoralists' lease title rights so that practical outcomes are maximised and future conflicts prevented.

The PGA assumes that the proposed change seeks to address delay. As set out above, non-government respondents have not delayed any consent determination in WA. If non-government

respondents are excluded from mediation, the PGA considers that this will encourage pastoralists to disengage and to consider alternative options in some cases. It will also jeopardize the successful resolution of pastoralist issues that has resulted from participation in mediation previously.

### 3. Other amendments

You called for input as to other areas in which legislative change could facilitate agreement making.

The PGA submits that coextensive rights (eg native title rights and the rights of a pastoralist) are best governed by an express agreement between the respective rights holders. This is certainly the experience of pastoralists with other coextensive rights holders, such as where mining tenure is granted over pastoral tenure. It is true that the interaction of coextensive rights is governed in general terms by the Native Title Act and by the terms of native title determinations. It is also true that specific disputes as to that interaction can be resolved by a court of competent jurisdiction. Nevertheless, it is infinitely preferable from the perspectives of certainty, comity, relationship building and/or relationship maintenance that (a) there not be litigation at all and (b) the interrelationship of rights is the subject of clearly understood and mutually acceptable principles.

In practice, the PGA has advised members to enter ILUAs to deal with these matters. As set out above, that is part of the PGA's negotiation strategy and thus far ILUAs have been negotiated or are being negotiated in the Pilbara and in the Gascoyne region in parallel to consent determinations.

However there are two situations that the PGA has encountered in which agreement as to interaction of rights has not been the subject of agreement.

First, there is one instance in which an applicant group committed to negotiating relevant land access and interaction principles as part of a consent determination (ie pastoralists entered into the consent determination to facilitate and accelerate the making of that determination on the express basis that there would be negotiations after the consent determination was delivered). That was the determination on native title in the Karajarri Part B consent determination. Subsequently, the PGA has stood ready to enter into negotiations and has importuned the Kimberly Land Council on behalf of the Karajarri people persistently and consistently to commence the promised negotiations. Those requests have been unflinching declined for various reasons, the key one of which is funding.

Second, there have been two determinations of native title in Western Australia that were determined after litigation in which pastoral leases coexist with native title rights. Those matters are the Wanjinna Willingurr native title determination and the Ngarluma Yinjibarndi native title determination. It ought to be noted that in each of those claims the State did not engage in negotiations for a consent determination and there were (at the stage at which the claims were made) novel or important issues of law to decide. In each of those cases the PGA has approached the relevant legal advisors to engage in negotiations as to relevant land access issues. Once again, those approached have been rebuffed.

Also, some native title representative bodies are more inclined to engage on land access agreements than others to facilitate the reaching of a consent determination. Yamatji Land and Sea Council and Pilbara Native Title Service ought to be applauded for their conduct in this area. Also, the PGA and Goldfields Land and Sea Council have formulated "pastoral access principles" that are intended to form the basis of ILUAs in due course and are an interim guide

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for claimants and pastoralists in an area of significant uncertainty in a native title context (particularly given the dismissals of a number of claims and foreshadowed further claims in the area of the former "Wongatha claim" and the former "North West Cluster"). However, unrepresented claimants and the Kimberley Land Council have largely flagged a disinclination to engage in negotiations on ILUAs in parallel with, prior to the making of a consent determination, or indeed not at all.

The PGA's primary position is that an amendment to the Act is warranted for the signing of an ILUA with any affected respondent to be mandatory prior to the conclusion of a determination in the Federal Court, except in circumstances where the parties elect not to deal with the question of interaction in that way. At the very least, negotiation in good faith by interested parties ought to be compulsory. In this regard, it is submitted that, in the same way that a future act under the Right to Negotiate (Subdivision P of Divisions 3 of Part 2 of the Act) must be the subject of negotiations in good faith before it can be determined, it would be appropriate to mandate legislatively that respondents and applicants with coextensive rights must negotiate in good faith with a view to reaching agreement as to the principles of interaction of rights before a consent determination can be made.

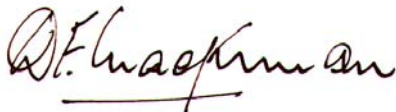
Moreover, the Native Title Act ought to mandate negotiations in good faith between registered Native Title Claimants or Registered Native Title Holders and any other co-extensive right holders if either party wishes to seek to agree a position on the interaction of rights (whether before or after determination). That would facilitate consent determinations by resolving interaction issues at an early stage and it would also foster relationship building by entrenching the need for discussions between "neighbours" with a view to establishing a structure of relationship building.

On a different but related point, the jurisdiction of the Tribunal to mediate relationships terminates upon the making of a consent or other determination. Accordingly, if an ILUA is entered into as part of a consent determination process or otherwise and a dispute arises under it, the parties are "on their own" and are unable to use the existing mediation facilities of the tribunal. The mediation jurisdiction of the Tribunal ought to be extended to all disputes or matters arising under a determination, ILUA or other native title related matter, whether occurring before or after the making of a determination.

## Conclusion

Thank you for the opportunity to comment on the Attorney-General's discussion paper. The PGA would welcome the opportunity to further clarify these issues, should the Attorney-General wish to engage directly.

Yours sincerely,



Dan MacKinnon  
Chairman, Native Title Committee