The 2007 Amendments to the *Native Title Act 1993* (Cth): Technical Amendments or Disturbing the Balance of Rights?

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Abbreviations

ACA Act	*Aboriginal Councils and Associations Act 1976* (Cth)
ADJR Act	*Administrative Decisions (Judicial Review) Act 1977* (Cth)
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRM	Aboriginal Legal Rights Movement Inc.
Amendment Act	*Native Title Amendment Act 2007* (Cth)
Assistance Guidelines	*Guidelines on the Provision of Financial Assistance by the Attorney General under the Native Title Act 1993*. Commonwealth House of Representatives, Canberra, enacted 15 December 2006 by Attorney General, Philip Ruddock, effective 1 January 2007
CATSI Act	*Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)
Chapman	*Chapman v Minister for Land and Water Conservation* (NSW) [2000] FCA 1114 (28 July 2000)
CoAG	Council of Australian Governments
Court	Federal Court of Australia
Hiley Levy Report	Hiley QC, Graham and Levy, Ken, *Native Title Claims Resolution Review*, report for the Attorney General's Department, Canberra, 2006.
Joint Committee	Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account
ILUA	Indigenous Land Use Agreement
MCA	Minerals Council of Australia
NNTC	National Native Title Council: Peak Body for Native Title Representative Bodies
NNTT	National Native Title Tribunal
NTSCorp	New South Wales Native Title Services Ltd
NTA	*Native Title Act 1993* (Cth)
NTSP	Native Title Service Provider
NTSV	Native Title Services Victoria Ltd
OIPC	Office of Indigenous Policy Coordination
ORAC	Office of the Registrar of Aboriginal Corporations
ORIC	Office of the Registrar of Indigenous Corporations
PBC	Prescribed Body Corporate
PBC Regulations	*Native Title (Prescribed Body Corporate) Regulations*

	1999 (Cth)
PBC Report	Attorney General's Department, Commonwealth of Australia. *Structures and Processes of Prescribed Bodies Corporate* (January 2006)
QS NTS	Queensland South Native Title Services Ltd
Representative Body	Native Title Representative Body
Response to Hiley Levy Report	Commonwealth Government, *Government Response to the Report of the Native Title Claims Resolution Review*, Attorney General's Department, Canberra, 2006
Rubibi No.7	*Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459 (28 April 2006)
Sebastian	*Western Australia v Sebastian* [2008] FCAFC 65 (2 May 2008)
Senate Committee	Standing Senate Committee on Legal and Constitutional Affairs
Technical Amendments Act	*Native Title Amendment (Technical Amendments) Act 2007* (Cth)
Technical Amendments, First Discussion Paper	Commonwealth Government, *Technical Amendments to the Native Title Act 1993: Discussion Paper*, Attorney General's Department, Commonwealth Government, Canberra, 2005
Technical Amendments, Second Discussion Paper	Commonwealth Government, *Technical Amendments to the Native Title Act 1993: Second Discussion Paper*, Attorney General's Department, Commonwealth Government, Canberra, 2006
Webb	*Webb v State of Western Australia* [2007] FCA 1342 (28 August 2007)

Abstract

In 2005 the Attorney General announced an interconnected package of reforms to the native title system, focussing in particular on native title representative bodies, the claims resolution process in the National Native Title Tribunal and the Federal Court, prescribed bodies corporate, financial assistance for non-claimant groups, dialogue with the States and Territories, and technical amendments. Reviews in these areas informed the drafting of the *Native Title Amendment Act 2007* (Cth) and the *Native Title Amendment (Technical Amendments) Act 2007* (Cth), much of which came into force in April and September 2007.

This paper describes the reform process, and each Government, independent and parliamentary review of Government proposals, and the draft legislation. It focuses on the substantive changes to the *Native Title Act 1993* (Cth), and their effect on native title practice and outcomes. The paper addresses the implications of the reforms enacted, in particular the changes affecting native title representative bodies and prescribed bodies corporate, and the shifts in the functions of the National Native Title Tribunal and its relationship with the Federal Court. The amendments make substantive changes in relation to these areas, which go beyond making the system more efficient.

The amendments confer greater discretion concerning the choice and operation of native title representative bodies on the executive government, which in turn adds to the uncertainty of and pressure on their relationships with native title groups. Increased accountability demands on native title representative bodies come amidst calls for increases in their funding levels, which have remained static for many years.

The amendments also signal a major shift in the balance in the roles of the National Native Title Tribunal and the Court, especially in respect of mediation, but also, to an extent, in the Court's litigation role. The Court's role in working with the Tribunal and in scrutinising the exercise of Government powers is diminished. The Tribunal is to play a far greater role in mediation, with new powers to assist that function.

These trends may damage the enjoyment of procedural fairness by all parties, but in particular Indigenous Australians, who have historically suffered difficulties in achieving just recognition of their laws, customs and rights.

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1. Introduction

Since the High Court decision in *Mabo*[1] and the enactment of the *Native Title Act 1993* (Cth) (**NTA**), the legislative and policy framework of the native title system has matured. However, with only 21 applications finalised in 2005-2006 and over 600[2] native title applications filed and awaiting a final outcome, there is still much work to do and potential for improvement in the system. Despite the overwhelming nature of the task, there are now significant case studies and expertise in the native title system, which allows us to reflect on possibilities for streamlining the claims process to provide more efficient mechanisms for the recognition of native title.

The native title system poses a unique set of challenges for all participants, including:

- The requirement arising from the decision in *Mabo* for validating acts that affect native title rights and interests, due to the late recognition of the existence of native title under Australian law;
- The lengthy time-span (over many years and sometimes decades) of proceedings, from application to determination;
- The lengthy hearings in some matters once they get to trial, which require extensive evidence and submission;
- The large number of parties involved in a single matter;
- The range and amount of evidence required to establish connection, authorisation, and extinguishment;
- The management and evidencing of Indigenous decision-making processes;
- The resolution of intra-Indigenous disputes and overlapping claims;
- The use of the same initiating instrument (a native title determination application) to commence the substantive determination proceedings and the administrative procedure designed to protect native title from the effects of future acts;
- Difficulties in resolving proceedings by negotiated or mediated settlement; and
- A highly emotional connection of all parties and the general public to land management issues and the concepts of 'ownership rights' and 'responsibilities'.

A number of significant decisions in the last two years, particularly pertaining to metropolitan areas,[3] have again raised the profile of native title, perhaps at

[1] *Mabo and Ors v Queensland (No. 2)* 1992 175 CLR 1.

[2] Hiley QC, Graham and Levy, Ken, *Native Title Claims Resolution Review*, report for the Attorney General's Department, 2006 (**Hiley Levy Report**), p.16.

[3] For instance, *Bennell v State of Western Australia* (2006) 153 FCR 120, (19 September 2006), per Wilcox J, and the appeal decision in Bodney v Bennell [2008] FCAFC 63 (23 April 2008), which relate to metropolitan Perth; *Risk v Northern Territory* [2006] FCA 404 (29 August 2006), in relation to Darwin, which was appealed [2007] FCAFC 46 (5 April 2007);

the cost of reigniting emotive and sometimes ill-informed public commentary. This highlights the importance of transparency and collaboration by all parties, particularly Government, when seeking to improve the native title regime. At the same time, Parliament must be wary of simplifications of the process which inadvertently erode the effective recognition or enjoyment of rights of Indigenous parties.

Although the High Court in *Mabo* recognised rights arising from traditional laws and customs, the institutional design of the system places the onus of proving native title on the Indigenous claimants.[4] Native title representative bodies (**Representative Bodies**), pivotal to the operation of the NTA, are tasked with representing and assisting them. They operate in a demanding cross-vocational and cross-cultural environment which sees them juggle the day-to-day management of claimant rights (often procedural) whilst navigating claims through long term litigation and negotiation. The maintenance of Representative Bodies, their resources and their relationships with traditional owners is fundamental to the realisation of the *Mabo* promise of a fair and just recognition of native title.

There is also a growing group of native title holders facing the challenges of managing their land and continuing their traditional laws and customs, as envisioned in the NTA, as well as fulfilling the broader social and economic goals of their communities. Prescribed bodies corporate (**PBCs**), determined by the Federal Court (the **Court**) to hold or manage native title, face these challenges with little advice and support to allow them to organise, communicate and access resources in order to fulfil their demanding obligations.

On 7 September 2005, the then Commonwealth Attorney General, the Hon, Philip Ruddock MP, announced a package of coordinated measures aimed at improving the performance of the native title system. The Government stated its view that the existing native title regime – after the 1998 amendments to the NTA – provided a sound framework for the resolution of native title issues, but that the current processes remained expensive and slow. The proposed changes were described as being intended to ensure that existing processes in the native title system 'work more effectively and efficiently in securing outcomes.'[5] There was no intention to unhinge the delicate balance of rights between parties under the NTA.

Reform to the Representative Body and PBC systems would provide native title stakeholders with the opportunity to improve their approaches to lengthy and resource-intensive negotiation and litigation. A claims review process

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Rubibi Community v State of Western Australia (No 7) [2006] FCA 459 (28 April 2006) (***Rubibi No.7***), per Merkel J, appealed as *Western Australia v Sebastian* [2008] FCAFC 65 (2 May 2008) (***Sebastian***), which relates to Broome.

[4] Strelein, L '"Who's running this show?" The institutional dynamics of the native title process and the impact on claimants' ability to assert control in the process', Working Paper presented to the 'Effects of Native Title' Workshop, Centre for Aboriginal Economic Policy Research, Australian National University, 2005.

[5] P Ruddock (Attorney General), *Practical reforms to deliver better outcomes in native title*, media release, Canberra, 7 September 2005 (**Media release 7 September 2005**).

was directed to identifying and reducing any duplication of effort by the National Native Title Tribunal (**NNTT**) and the Court so as to encourage agreement-based outcomes. A number of so-called technical amendments were made to the NTA. In addition, changes were made to the process for granting funding to respondents in native title proceedings, and to achieve more transparency in Commonwealth dealings with the States and Territories. The amendments are assumed to be resource neutral as the terms of the reviews did not extend to the examination of federal budget allocation for native title, or the breakdown of funding between different parties in the system.

Many parties welcomed the Government's efforts to involve stakeholders in the various reviews and prevent a repeat of the politically hostile 1998 amendment process. Unfortunately, these efforts were marred at the end of the process, by allowing limited consultation on the findings of the expert and government reports, by not making exposure drafts of the amending Bills available before tabling in Parliament, and by limiting the time and opportunities for evidence to be given to the relevant Senate committee on its considerations of the Bills. Thus, the Government did not get feedback imperative to technical Bills of this kind. This attracted much criticism in submissions to the Senate Committee.

Whilst the timing and many themes of the review package were welcomed by many in the native title system, the character of the review may have strayed from its initial premise. Although some provisions add clarity and efficiency, others will impose operational difficulties. There are areas where purported technical change may affect Indigenous parties adversely. Perhaps the most significant concern with the scheme of the amendments as a whole is their impact on the nature and priorities of the work of Representative Bodies. The changes to the claims resolution system are also far reaching.

Questions arise whether these changes do alter the fundamentals of the system, and whether they ensure more effectiveness and efficiency. Some amendments may adversely affect the recognition and enjoyment of native title rights and interests or may impede the claims process through the misallocation of the scarce resources within the system.

This paper briefly outlines the nature of the review process, describes the amendments made by the *Native Title Amendment Act 2007* (Cth) (the **Amendment Act**) and the *Native Title Amendment (Technical Amendments) Act 2007* (Cth) (the **Technical Amendments Act**), and reflects on the potential impact of these changes on native title practice. It deals in this way with each of the areas subject to reform: native title Representative Bodies, the claims resolution process, prescribed bodies corporate, the respondents' financial assistance program, the dialogue between the Commonwealth and the States and Territories, and technical changes.

2. The Process of Reform

2.1 First Announcement of Proposed Reform

In its 7 September 2005 press release, the Government stated that the reforms to the NTA were aimed at achieving better outcomes for all stakeholders including native title claimants and holders, but also industry, land owners and governments. The Government did not propose wholesale changes to the system, and substantive rights currently provided under the NTA were not to be undermined.[6] The focus was not on achieving better native title outcomes, but better outcomes for all stakeholders through the native title system. This reflected the current focus on agreement making as the preferred means of resolving native title matters.[7]

The Government's 'coordinated and balanced series of reforms to key aspects of the system' had 'six key inter-related elements':

1. Measures to improve the effectiveness of **native title representative bodies;**
2. An independent **review of claims resolution processes** to consider how the NNTT and the Federal Court can work more effectively in managing and resolving native title claims;
3. An examination of current structures and processes of **Prescribed Bodies Corporate,** including targeted consultation with relevant stakeholders;
4. Amending the guidelines of the **native title respondents' financial assistance program** to encourage agreement-making rather than litigation;
5. Increased **dialogue and consultation with the State and Territory Governments** to promote and encourage more transparent practices in the resolution of native title issues; and
6. Preparation of exposure draft legislation for consultation on possible **technical** amendments to the NTA to improve existing processes for native title litigation and negotiation.[8]

[6] Attorney General's Department, Commonwealth of Australia. *Native Title Ministers' Meeting Communiqué* (16 September 2005), Canberra (**Ministers' meeting communiqué 16 September 2005**).

[7] See, for instance, P. Ruddock (Attorney General) and A Vanstone (Minister for Immigration, Multicultural and Indigenous Affairs), *Delivering better outcomes in native title – update on Government's plan for practical reform*, media release, Canberra, 23 November 2005 (**Media release 23 November 2005**).

[8] Media release 7 September 2005, above n 5.

2.2 The Process of Reform – an overview

Important elements of the review process after September 2005 included:

2.2.1 Native title representative bodies

Changes to the native title representative body regime announced on 23 November 2005.

2.2.2 Review of claims resolution processes

An independent review of the processes for resolving native title claims undertaken by Mr Graham Hiley QC and Dr Ken Levy. It took public submissions and reported on 31 March 2006.

2.2.3 Prescribed Bodies Corporate

A review conducted by the Native Title Unit of the Attorney General's Department, which led to the publication on 27 October 2006 of a report titled *Structures and Processes of Prescribed Bodies Corporate*.

2.2.4 Native title respondents' financial assistance program

A review conducted by the Native Title Unit of the Attorney General's Department, which led to amendments expanding the scope of the native title non-claimants (respondents) financial assistance program and publication of *Guidelines for financial assistance under section 183(3) NTA* on 15 December 2006.

2.2.5 Dialogue and consultation with the State and Territory Governments

Native Title Ministers' Meetings held on 16 September 2005 and 15 December 2006.

2.2.6 Technical amendments

Two discussion papers with proposals for technical amendments to the NTA released on 22 November 2005 and 22 November 2006.

2.2.7 Reviews of Bills

The referral of the Amendment Bill to the Senate Committee on Legal and Constitutional Affairs on 7 December 2006. Submissions were invited by 19 January 2007. Eighteen submissions were made. The Committee's Inquiry allowed for one day of public hearings in Sydney on 30 January 2007. The Committee reported on 23 February 2007.

The referral of the Technical Amendments Bill to the Senate Committee on Legal and Constitutional Affairs on 29 March 2007. Submissions were invited

by 20 April 2007. Twelve submissions were made. The Committee's Inquiry included a one day public hearing in Adelaide on 2 May 2007. The Committee reported on 8 May 2007.

2.3 Outcomes of the Reform Process

Major outcomes of the review process included:

- Communiqués of the Native Title Minister's Meetings on 16 September 2005 and 15 December 2006;
- *Guidelines for financial assistance under section 183(3) NTA* published on 15 December 2006;
- The Amendment Act, which received assent on 15 April 2007. The Schedules to this Act dealt with:
    - Schedule 1 – Amendments relating to representative Aboriginal/Torres Strait Islander bodies;
    - Schedule 2 – Claims Resolution Review;
    - Schedule 3 – Amendments relating to prescribed bodies corporate;
    - Schedule 4 – Funding under s.183 of the NTA.
- The Technical Amendments Act, which received assent on 20 July 2007. The Schedules to this Act dealt with:
    - Schedule 1 – Amendment of the NTA;
    - Schedule 2 – Amendments relating to representative bodies;
    - Schedule 3 – Amendments relating to prescribed bodies corporate;
    - Schedule 4 – Technical amendments relating to legislative instruments;
    - Schedule 5 – Applications not considered or reconsidered under items 98 and 90 of Schedule 2 to the Native Title Amendment Act 2007.

The amendments relating to PBCs contemplated the making of regulations to give effect to the proposed changes. No such regulations have yet been made.

2.4 The Role of Consultation in the Reform Process

A number of submissions to the Senate Committee express concern about the timing of the various Inquiries by the Senate and by the bureaucracy into the NTA amendments and the time allowed for submissions. For instance, the Minerals Council of Australia (**MCA**) considered that 'the Government adopted an appropriate consultation process in relation to the technical amendments', which allowed it to consult broadly and develop a common

position on issues of mutual interest.[9] That process involved submissions being made on a discussion paper, a second discussion paper being released that contained the Government's response to the submissions, and an opportunity for further submissions. The MCA lamented that similar consultation processes were not adopted for other aspects of the reforms. It also considered that the timeframe of the Committee's Inquiry process for the Amendment Bill was inadequate. It would have preferred that an exposure draft had been released.[10]

As the first Inquiry was held over the Christmas non-sitting period of Parliament, there was only a short period for written submissions and public hearings, which in turn limited opportunities for Committee members to tease out the practical effect of some amendments. The period of the second Inquiry was also short. Both Inquiries only had one day of hearings.

Hearings provide a unique opportunity to discuss emerging issues, question conclusions, clarify data, and elaborate on expert opinion. The Committee is also able to request witnesses appearing in person to 'peer review' and evaluate evidence given by other witnesses. The hearing days in Sydney and Adelaide were no exception: many issues were clarified and witnesses were able to demonstrate the relationships between different parts of the Bills. Amendments to the Technical Amendments Bill were made as a result of evidence heard in Adelaide.

The correlation between inadequate consultation and difficulties in implementation was demonstrated by the National Farmers Federation (**NFF**) in its evidence regarding changes to the Representative Body re-recognition cycle. In its written submission, the NFF concentrated on issues other than Representative Bodies.[11] When questioned on whether it was concerned that competently operating Representative Bodies may be recognised for a period less than the maximum allowed under the proposed s.203AD, NFF Chairman Mr John Stewart, replied:

> We would have to express some concern if it was said that the term for rep bodies was from one to six years. If you had shown that you were able to do the job properly and do what was required and you were given a six-year term, I think there would have to be some very good reason as to why that right was taken away from you during the process. If it was taken away I would expect that it would be for a damn good reason.[12]

[9] Submission of the Minerals Council of Australia to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006, Submission 4 *Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006* (2007) (**MCA Submission to Senate on Amendment Bill**).

[10] See above n.9.

[11] Submission of the National Farmers' Federation to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006, Submission 5 *Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006* (2007).

[12] Evidence of John Stewart to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006, Senate, Legal and Constitutional Affairs Committee, 30 January 2007, p.29.

Senator Crossin observed that there was nothing in the Amendment Bill to suggest that the six year period was presumptive.[13] Thus, through public hearings, it emerged that the operation of Ministerial discretion not to recognise Representative Bodies on a presumptive six-yearly basis would potentially disrupt the progress of court proceedings, but also destabilise relationships between pastoralists (and other stakeholder groups), Representative Bodies, and native title groups.

Consultation is not, of course, limited to the parliamentary stage of the reform process. The very nature of the native title system demands a collaborative and consensus-based approach to reform. For the most part, this reform process provided for feedback, particularly with regard to the technical amendments. The processes for reforming the native title system and PBCs provided some opportunities for external input into the proposals. However, a draft of regulations to give effect to the changes regarding PBCs has never been released; these regulations had still had not been made by September 2008.

The part of the reforms where the least consultation occurred attracted the most controversy in Committee. The reforms to Representative Bodies were introduced with little additional consultation beyond the Submission of the former Office of Indigenous Policy Coordination in the Department of Immigration and Multicultural Affairs (**OIPC**), and other submissions made, to the Joint Committee's Representative Body Inquiry, which took evidence in 2004 and 2005 and reported in March 2006.[14] No subsequent formal process involving all parties in the native title system was undertaken.

The methodology for this reform process was inadequate for sponsoring the collaborative, bipartisan introduction of Bills intended to create efficiencies and safeguard justice 'for all parties',[15] particularly where negotiation is the professed preferred method of resolving disputes. At best, the Bills received patchy scrutiny. Some of the more controversial provisions may be enacted only to suffer operational or legal difficulties as a result of the Government's hasty legislative agenda.

[13] See above n.12: Senator Crossin.

[14] Submission of the Office of Indigenous Policy Coordination, Department of Immigration and Multicultural Affairs to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, submission 1A, *Inquiry into the capacity of Representative Bodies to discharge their duties under the NTA* (2005)(**OIPC Submission to Joint Committee on Representative Bodies**).

[15] Media Release 7 September 2005, above n.5.

3. Reform of Native Title Representative Bodies

3.1 The old Native Title Representative Body system

One of the major benefits for Aboriginal peoples and Torres Strait Islanders in the structures arising out of the NTA has been the establishment of Native Title Representative Bodies. The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (**Joint Committee**), when inquiring into the capacity of Representative Bodies to discharge their duties under the NTA, found that they are a 'fundamental component of the native title system',[16] providing services to native title claim groups making applications for determinations of native title and negotiating agreements. They are the principal means through which non-indigenous parties engage with native title groups.[17] In addition, they are vital in resolving issues such as identifying the right people to speak for country.

Representative Bodies have also been more general advocates for Aboriginal and Torres Strait Islander land interests and their political aspirations. The tasks they have taken on include land rights, native title, cultural heritage, and community and economic development. They have been 'seen as expressions of self-determination.'[18] Therefore, they must be accountable to the communities they represent, by informing and reporting to them about their activities. This broad responsibility has not been explicitly recognised in their statutory functions under the NTA.

There was considerable diversity in the origins of the Representative Bodies first recognised in 1994. Some were statutory land councils, some were Aboriginal Legal Services, some had been originally set up by Aboriginal peoples to advocate for land rights, and some were expressly established as Representative Bodies.[19]

Originally, in effect, a one size fits all model was applied to Representative Bodies.[20] New Representative Bodies had to be incorporated under the former *Aboriginal Councils and Associations Act 1976* (Cth)(**ACA Act**),[21] which

[16] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Inquiry into the capacity of Representative Bodies to discharge their duties under the NTA*, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Canberra, 2006 (**Joint Committee Representative Body Report**), [2.23], citing both the Minerals Council of Australia and the National Native Title Tribunal.

[17] Aboriginal and Torres Strait Islander Social Justice Commissioner of the Human Rights and Equal Opportunity Commission Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, submission 15, *Inquiry into the capacity of Representative Bodies to discharge their duties under the NTA* (2005) (**Calma Submission to Joint Committee on Representative Bodies**), p 3.

[18] OIPC Submission to Joint Committee on Representative Bodies, above n.14, p 13.

[19] OIPC Submission to Joint Committee on Representative Bodies, above n.14, p 9.

[20] OIPC Submission to Joint Committee on Representative Bodies, above n.14, p 11.

[21] See ss.203AD(1) and 201B NTA definition of 'eligible body'.

required that all members of the Representative Body be Aboriginal people or Torres Strait Islanders, and that the elected Board be accountable to the members.[22] The Australian Government has achieved more flexibility in the system by providing funding to corporations limited by guarantee under the *Corporations Act 2001* (Cth) (**Corporations Act**) to perform some of the functions of Representative Bodies.[23] These corporations can have members who are not Aboriginal people or Torres Strait Islanders, and are not accountable to their members in the same way as Representative Bodies. They are called native title service providers (**NTSPs**).

As this indicates, the Australian Government has increasingly moved to a service provision model for funding non-government organisations such as Representative Bodies, thereby reducing their capacity to engage broadly in advocacy. Representative Bodies have basically become providers of native title litigation and negotiation services to native title groups;[24] they represent or assist 70 to 90 per cent of the native title applications before the Court.[25]

Some people believe that the role and functions of Representative Bodies should be expanded. The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Tom Calma, has argued that the role of Representative Bodies should be extended to include addressing native title groups' economic and social development goals. This would enable them to negotiate more comprehensive agreements directed to these goals.[26] He bases these arguments on human rights standards, including the rights to equality, effective participation, enjoy and maintain culture, and self-determination.[27] In addition, Representative Bodies' contribution to Indigenous capacity and community development enables native title groups to more effectively participate in native title processes.[28] Others would like Representative Bodies given statutory land management functions in addition to their native title facilitation and assistance functions.[29] The Joint Committee implicitly rejected these calls.[30]

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[22] *Aboriginal Councils and Associations Act 1976* (Cth) (**ACA Act**), s.49 and see OIPC Submission to Joint Committee on Representative Bodies, above n.14, p 18-19.

[23] NSW Native Title Services Ltd, Native Title Services Victoria Ltd, and Queensland South Native Title Services Ltd; see OIPC Submission to Joint Committee on Representative Bodies, above n.14, pp 15-19, and Joint Committee Representative Body Report, above n.16, [2.33].

[24] OIPC Submission to Joint Committee on Representative Bodies, above n.14, p 14.

[25] Senate Legal and Constitutional Affairs Committee, *Inquiry into Native Title Amendment Bill 2006*, Senate Legal and Constitutional Affairs Committee, Canberra, 2007 (**Senate Committee Report on Amendment Bill**), [2.22].

[26] Calma Submission to Joint Committee on Representative Bodies, above n.17, p.15.

[27] Calma Submission to Joint Committee on Representative Bodies, above n.17, pp.1-3.

[28] Submission from the Australian Institute for Aboriginal and Torres Strait Islander Studies to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, submission 40, *Inquiry into the capacity of Representative Bodies to discharge their duties under the NTA* (2004), pp.11-13.

[29] Joint Committee Representative Body Report, above n.16, [2.27]-[2.28].

[30] Joint Committee Representative Body Report, above n.16, [2.29].

The 1998 amendments to the NTA imposed mandatory functions and higher standards of performance and accountability on Representative Bodies. Representative Bodies also obtained a virtual monopoly on government funding for native title service provision to native title claimants in their areas.[31] These changes meant that as service providers, Representative Bodies had to have a high level of professional and administrative competence and a clear focus on native title objectives.[32] The new amendments are likely to bring about only marginal improvements in this regard.

The adequacy of funding is an important issue in determining the efficacy of Representative Bodies. Representative Bodies, some governments, and some in the mining and development industries feel that they are inadequately funded to fulfil their statutory functions,[33] Such that they are simply unable to engage traditional owners on matters that affect their native title rights.[34] Others feel that they attempt to spread themselves too thinly by seeking to address all the land needs of their constituents, rather then primarily their statutory functions.[35] Other factors affecting the efficacy of Representative Bodies may include whether they are statutory bodies, and the size of the area covered.[36]

The former OIPC, which was charged with administering the Representative Body system, argued in 2004 that it would be appropriate to address the efficiency and effective use of existing Representative Body resources before increasing funding.[37] On the other hand, Representative Bodies claim that 'OIPC is more interested in eliminating their advocacy role and micro-managing their work than promoting efficiency'.[38] This claim and counterclaim occur in the context of a more and more inequitable distribution of funding between Representative Bodies and other institutions and parties in the native title system.[39]

These amendments to the NTA appear to be based on a policy paradigm that accepts OIPC's vision for the Representative Body system. There was no opportunity given for any stakeholder to address this vision and the proposed measures to give effect to it in a formal consultative process. The reforms to the Representative Body system do not address the level of funding for Representative Bodies.

[31] Joint Committee Representative Body Report, above n.16, [2.5].

[32] OIPC Submission to Joint Committee on Representative Bodies, above n.14, p 14.

[33] Joint Committee Representative Body Report, above n.16, [2.48].

[34] Calma Submission to Joint Committee on Representative Bodies, above n.17, p,7.

[35] The Indigenous Land Corporation: see Joint Committee Representative Body Report, above n.16, [2.46].

[36] Joint Committee Representative Body Report, above n.16, [2.52].

[37] OIPC Submission to Joint Committee on Representative Bodies, above n.14, p 23.

[38] Joint Committee Representative Body Report, above n.16, Minority Report, p.83.

[39] Calma Submission to Joint Committee on Representative Bodies, above n.17, pp.9-10.

3.2 Process of Reform

3.2.1 Changes to the NTRB system announced

One of the six key inter-related elements of the reform package announced by the Government on 7 September 2005 was measures to improve the effectiveness of Representative Bodies. Senator Vanstone later announced specific changes to the Representative Body regime aimed at improving accountability for the expenditure of public funds, and allowing the Government to act quickly where there are problems in service delivery, with minimal disruption to the claims process or inconvenience to claimants.[40]

The Minister said that these goals were to be achieved by broadening the range of organisations that could undertake activities on behalf of claimants, and providing multi-year funding to allow better planning. There was no mention of additional funding. The changes were also likely to reduce the prospects of a Representative Body retaining that status in the long term, by making withdrawal of recognition as a Representative Body easier and putting a time limit on recognition, with re-recognition subject to periodic assessment of performance. There was to be consultation with Representative Bodies, and other stakeholders, about these changes before they were to be introduced into Parliament.[41] An inquiry into the needs, resources and performance of Representative Bodies did become part of the wider reviews and consultations conducted privately by the Attorney General's Native Title Unit, but there was no new public inquiry into these matters, apart from the already commenced inquiry by the Joint Committee.

3.2.2 Consultation: Inquiry by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

On 15 September 2003, the Joint Committee had adopted a term of reference requiring it to inquire into and report on the capacity of Representative Bodies to discharge their responsibilities under the NTA, with particular reference to, among other things, their structure and role, and the resources available to them. The Joint Committee reported on 21 March 2006, after the announcement of the changes to the Representative Body regime on 23 November 2005. Several submissions were made to it after that announcement.

In August 2004, the OIPC gave evidence to the Joint Committee.[42] It stated its belief that some Representative Bodies 'fail to provide a consistently professional level of service delivery.' It argued that greater flexibility and diversity of organisational arrangements is necessary in order to achieve better service delivery, and, implicitly, better native title outcomes.[43]

[40] Media Release 23 November 2005, above n.7.

[41] Media Release 23 November 2005, above n.7.

[42] OIPC Submission to Joint Committee on Representative Bodies, above n.14.

[43] OIPC Submission to Joint Committee on Representative Bodies, above n.14, pp 2-3, 11.

This expression of a need for increased flexibility seemed to be directed to achieving a situation where there are fewer but larger Representative Bodies, and where some, if not all, Representative Bodies are incorporated under the Corporations Act. This would have benefits in allowing for pooling resources, creating economies of scale, providing a critical mass of core staff and management, and attracting and retaining high calibre staff.[44] It would also mean that Representative Bodies are likely to be less accountable to their native title constituency since, potentially, native title holding members would no longer control the organisations.[45]

Other changes contemplated by OIPC in 2004 included regular re-recognition of Representative Bodies through a periodic tender and re-accreditation process, and making it easier for the Minister to withdraw recognition of Representative Bodies that are providing inadequate services to their clients.[46]

3.2.3 Native Title Amendment Bill 2006

The *Native Title Amendment Bill 2006* (**Amendment Bill**) was introduced into the House of Representatives on 7 December 2006. This led to the next public step in the consultation process. In the Second Reading Speech, the Attorney General said that the aim of the amendments was to ensure Representative Bodies operate with greater effectiveness and accountability. The flexibility of the Representative Body system was to be enhanced by replacing the current indefinite recognition of Representative Bodies with fixed terms.[47]

The Bill was transmitted to the Senate and immediately referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 27 February 2007.[48] It was passed on 28 March 2007, and came into force on Royal Assent on 15 April 2007.

3.2.4 Native Title Amendment (Technical Amendments) Bill 2007

The *Native Title Amendment (Technical Amendments) Bill 2007* was introduced into Parliament on 29 March 2007 and passed on 20 June 2007. Amendments in Schedule 2 to the Bill dealt with Representative Bodies. Most of these provisions came into force on 21 July 2007.

[44] See OIPC Submission to Joint Committee on Representative Bodies, above n.14, pp 26-28.

[45] See OIPC Submission to Joint Committee on Representative Bodies, above n.14, pp 18-19.

[46] OIPC Submission to Joint Committee on Representative Bodies, above n.14, pp 19-20.

[47] Phillip Ruddock, Attorney General, 'Second Reading speech: *Native Title Amendment Bill 2006*', House of Representatives, Debates, 7 December 2006 (**Amendment Bill, Second Reading Speech**).

[48] Senate Committee Report on Amendment Bill, above n.25.

3.3 General description of Changes

The Explanatory Memorandum to the *Native Title Amendment Bill 2006* states that it introduces a new regime for representative bodies. The proposed measures are designed to:

1. Put a time limit on the recognised status of Representative Bodies to ensure a focus on outcomes (while ensuring that all existing Representative Bodies are initially invited to be recognised for between one and six years). Representative Bodies will be recognised for fixed terms of between one and six years, rather than for an indefinite period as previously;
2. Streamline the process and criteria for withdrawing recognition from poorly performing Representative Bodies and appointing a replacement body. The criteria governing extension, variation and reduction of Representative Body areas have also been simplified;
3. Enhance the quality of services provided by Representative Bodies by broadening the range of organisations that can undertake activities on behalf of claimants. Thus, bodies incorporated under the Corporations Act can be recognised as Representative Bodies;
4. Reduce red-tape by removing the requirement for Representative Bodies to prepare strategic plans and table their annual reports in Parliament; and
5. Ensure that entities funded to perform Representative Body functions (native title service providers) for an area for which there is no Representative Body are able to operate in the same way as Representative Bodies to the extent that this is appropriate.[49]

The *Native Title Amendment (Technical Amendments) Act 2007* also amended provisions relating to representative bodies to:

1. Remove corporate governance obligations that are already imposed on Representative Bodies under their incorporation statutes;
2. Improve the process for reviewing decisions by Representative Bodies not to assist native title claimants and holders; and
3. Simplify and clarify the process for transferring documents from a former Representative Body to its replacement.[50]

None of these measures address the need for adequate funding of Representative Bodies 'to perform their extremely difficult and important role in the recognition and protection of native title'.[51] The Aboriginal and Torres

[49] House of Representatives, *Native Title Amendment Bill 2006, Explanatory Memorandum*, Commonwealth Government, Canberra, 2006 (**Amendment Bill Explanatory Memorandum**), p.5.

[50] House of Representatives, *Native Title Amendment (Technical Amendments) Bill 2007, Explanatory Memorandum*, Commonwealth Government, Canberra, 2007 (**Technical Amendments Bill Explanatory Memorandum**), p.3.

[51] Submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006, Submission 10, *Senate Legal and Constitutional Affairs Committee Inquiry into the*

Strait Islander Commissioner was of the view that the changes in the Amendment Bill had 'to be considered in light of the likelihood that Representative Bodies will continue to be under resourced'.[52]

Native Title Amendment Bill 2006 (2007) (**Calma Submission to Senate on Amendment Bill**), [8].

[52] Calma Submission to Senate on Amendment Bill, above n.51, [12].

3.4 Specific Amendments

3.4.1 Fixed term recognition and transitional arrangements

3.4.1.1 Situation under the old NTA

Under the old NTA, Representative Bodies were recognised indefinitely, subject to withdrawal of recognition pursuant to the Act.

Representative Bodies were originally recognised from 1 January 1994. A process for re-recognition took place after the commencement of the 1998 Amendments to the NTA, which considerably disrupted the operations and planning of Representative Bodies. It was submitted to the Senate Legal and Constitutional Affairs Committee inquiry into the *Corporations (Aboriginal and Torres Strait Islander) Bill 2005* that this process brought the system almost to a standstill for two years while Representative Bodies struggled to adjust.[53]

3.4.1.2 The Amendments

The transition period

The Amendment Act repeals the existing transition period provisions, which applied to the recognition of Representative Bodies after the 1998 Amendments, and replaces them with a new definition of 'transition period', which effectively ran from 15 April to 30 June 2007.[54] The new transition period is now spent.

During that period, the Minister had to invite all existing Representative Bodies (but not the NTSPs) to apply for recognition for a period between one and six years, as determined by the Minister, subject to certain pre-conditions if the period was to be less than two years.[55] If an existing Representative Body applied for recognition, the Minister had to recognise it.[56] All recognitions took effect from 1 July 2007 in respect of the same areas for which Representative Bodies had previously been recognised.[57]

The periods in respect of which Representative Bodies were recognised varied from one to six years. In summary:

- Kimberley Land Council, Northern Land Council, Central Land Council, North Queensland Land Council and Torres Strait Regional Authority were recognised for six years to 30 June 2013;

[53] Joint Committee Representative Body Report, above n.16, Minority Report, p 83.

[54] See definitions of 'transitional commencing day' and 'transition period' in s.201A NTA.

[55] New s.203AA NTA.

[56] New s.203AC(1A)(b) NTA.

[57] New s.203AD(s)(a); also see M Brough (Minister for Families, Community Services and Indigenous Affairs), *Reforms to Representative Bodies to benefit Indigenous Australians*, media release, Canberra, 7 June 2007 (**Media Release 7 June 2007**).

- Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, Goldfields Land and Sea Council, and Cape York Land Council were recognised for three or four years (on the basis that in the past they had been affected by poor performance or governance issues) to 30 June 2010 or 2011;
- South West Aboriginal Land and Sea Council, the Aboriginal Legal Rights Movement (**ALRM**), Carpentaria Land Council, Gurang Land Council, and Central Queensland Land Council were recognised for one year to 30 June 2008. ALRM is in an agreed transition process under which it will only continue to operate until 30 June 2008, so only required recognition for one year. The three Queensland Land Councils that were recognised for only one year and Queensland South Native Title Services Ltd (**QS NTS**)[58] and merged into QS NTA from 1 July 2008.
- The Victoria, NSW and Queensland South areas were not subject to the recognition process since those areas were, and are, serviced by NTSPs.
- Ngaanyatjarra Council was not recognised as a Representative Body and was replaced by a native title service provider from 1 July 2007.

Rolling re-recognition

From 1 July 2007, Representative Bodies will be subject to rolling cycles of re-recognition for periods between one and six years.[59] The Amendment Bill was amended during the Parliamentary debate to increase the minimum period of recognition for a Representative Body from one to two years in most circumstances. The Act does not prescribe any criteria by which the Minister is to make decisions about the length of time for which each Representative Body is to be recognised.

3.4.1.3 Analysis of the Changes

The effect of these changes is that all Representative Bodies will be recognised for at most six years from 1 July 2007, and some for a considerably shorter period. These transitional changes will usher in a new period of rolling cycles of recognition and application for re-recognition for all Representative Bodies (including current NTSPs which are recognised as Representative Bodies).[60] The amendments introduce a strong cyclical element to Representative Body operations. The only purpose of the transitional provisions, by which Representative Bodies had to apply for recognition after the commencement of the Amendment Act, seems to be to start these rolling cycles.

The justification given by the Government for these changes is that they will ensure greater flexibility in the Representative Body system, which will mean that greater effectiveness and accountability will be achieved.[61] The

[58] Media Release 7 June 2007, above n.57.

[59] See s.203AD NTA.

[60] See s.203AA NTA, and see below.

[61] Amendment Bill, Second Reading Speech, above n.47.

Government will have more oversight of Representative Bodies, and will be able to ensure they focus to an even greater extent on their statutory functions. The prospect of not re-recognising Representative Bodies is an additional method of regulating Representative Body operations, on top of withdrawal of recognition, review of funding decisions, periodic funding, via grant conditions, and internal accountability to native title groups. The National Native Title Council is of the view that these mechanisms are already sufficient to ensure their effective operation.[62]

The effect of these amendments, taken with the other changes to the Representative Body regime is that a competition model is being applied to Representative Bodies. If a Representative Body is not perceived to be effective or accountable, it will be replaced. Presumably, the prospect of being replaced will lead to Representative Bodies performing better.

This flexibility comes at a cost to the Representative Bodies subjected to it. These costs can be summarised as:

- Erosion of Representative Body independence from the Commonwealth Executive;
- Diversion of Representative Bodies from their core functions; and
- Reduction of Representative Bodies' capacity to plan for the medium to long term.

Erosion of independence from the Commonwealth Executive

The independence of Representative Bodies is eroded by increasing the discretion of the Minister to make recognition decisions including:

- The decision to invite applications for recognition as a Representative Body beyond the transition period.[63] There is no requirement in the NTA for the Minister to invite any applications at all. Therefore, the situation could turn out to be one where the Minister may end up funding NTSPs rather than recognising Representative Bodies. This prospect 'further erodes Representative Bodies' independence from the Commonwealth government'.[64]
- The decision to determine the period for which Representative Bodies will be recognised. There are no criteria in the NTA for decisions about the length of recognition periods, except if the period is to be between one and two years.

In each case, the fact that there are no statutory criteria for the decision to be made means that there is no transparency in decision-making. In addition, the

[62] National Native Title Council, Submissions to the Senate Legal and Constitutional Affairs Committee, submission 9, *Inquiry into the Native Title Amendment Bill 2006* (2007)(**NNTC Submission to Senate on Amendment Bill**), p.4.

[63] Section 203A(1) NTA.

[64] See Calma Submission to Senate on Amendment Bill, above n.51, [24]-[27].

criteria by which the Minister makes the decision to recognise a Representative Body have been reduced. This is discussed further below.

An additional matter that tends to increase Ministerial discretion is the fact that recognition decisions are to be made by legislative instrument, rather than by written instrument. This has the effect that these decisions will no longer be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)(**ADJR Act**), but by prerogative writ, which is likely to be more complex and expensive, and provide more limited remedies.[65]

Diversion from core functions

Current momentum towards the resolution of native title matters may be interrupted by the periodic need to seek re-recognition (as was seen following the 1998 re-recognition process).[66] Representative Bodies will spend time and resources at various points in these cycles preparing applications and lobbying for re-recognition. This may well distract them from the performance of their statutory functions.

Periodic recognition is likely to foster behaviours and create incentives based on an 'election' cycle that may be counter-productive to the resolution of native title matters. There may be a tendency to seek to maximise reportable native title outcomes towards the end of the period. This would not be sustainable or necessarily in the best interest of native title groups. In addition, awareness of this constraint on Representative Bodies may change the behaviour of other parties in native title matters, potentially leading to less favourable outcomes for native title groups.

Instability in the system may also lead to uncertainty for other parties in native title matters as to who they are dealing with beyond the end of each cycle. Changes may lead to a loss of trust and goodwill by those parties towards the representatives of native title groups, and the groups themselves.

Potential recognition for only one year is inadequate. It exacerbates all these problems of instability. [67]

Reduced capacity to plan for the long term

The fact that there are no criteria in the NTA for decisions about the length of recognition periods means that Representative Bodies cannot predict the standards they will have to meet in order to gain the benefit of a longer recognition period.

Risks for the effectiveness of Representative Bodies include:

[65] Calma Submission to Senate on Amendment Bill, above n.51, p.18.

[66] NNTC Submission to Senate on Amendment Bill, above n.62, p.4.

[67] The MCA, for instance, recommends a minimum of three to six years. See MCA Submission to Senate on the Amendment Bill, above n.9, p.2.

- The cyclical nature of the recognition process will discourage new managers from taking risks (for example in restructuring), which may otherwise be in the long term interests of a Representative Body;
- Instability in the status of Representative Bodies may lead to difficulties in attracting strong managers and professional staff, if employment cannot be guaranteed beyond a limited period. This will compound existing problems;[68]
- Difficulties for Representative Bodies entering long term contracts, such as leases of office space; and
- Corporate knowledge of the native title groups and their native title aspirations and matters may be lost if there is wholesale turnover of staff when a Representative Body is not re-recognised.

More importantly, the uncertainty of having to seek re-recognition from time to time means that Representative Bodies will be disassociated from the inter-generational nature of native title. There will be less incentive for Representative Bodies to plan for future generations, by addressing long term disputes or building capacity over the decades.

As a partial redress for this inherent instability, the Aboriginal and Torres Strait Islander Social Justice Commissioner recommended that 'a formal legal link be established between recognition and funding, so that the periods are the same'.[69] Thus, there would be no need for two decision making processes. The Carpentaria Land Council recommended that 'if recognition is to be decided periodically, then funding should also follow from that decision'.[70]

3.4.2 Criteria for recognising and withdrawing recognition, and extending, varying and reducing representative body areas

3.4.2.1 Situation under the old NTA

Previously, before recognising or withdrawing recognition from a Representative Body, or extending, varying, or reducing its area, the Minister had to take account of criteria including whether it did or would:

[68] For an insight into existing difficulties for professional development and staff retention due to remoteness, insufficient resources and under-development see Potok, R 'A report into the professional development needs of Native Title Representative Body Lawyers', Castan Centre for Human Rights Law, Monash University, 2005. The report resulted in the establishment of *The Aurora Project* in the Castan Centre for Human Rights Law to train and retain professionals and promote legal and anthropological careers in native title practice.

[69] Calma Submission to Senate on Amendment Bill, above n.51, [31].

[70] Submission of the Carpentaria Land Council Aboriginal Corporation to the Senate Legal and Constitutional Affairs Committee *Inquiry into the Native Title Amendment Bill 2006*, submission 13, Senate Legal and Constitutional Affairs Committee *Inquiry into the Native Title Amendment Bill 2006* (2007) (**Carpentaria Submission to Senate on Amendment Bill)**, [15].

- satisfactorily represent native title holders and persons who may hold native title in its area;
- consult effectively with Aboriginal peoples and Torres Strait Islanders living in its area; and
- satisfactorily perform the functions of a Representative Body.[71]

In addition, Representative Bodies were required to perform their functions in a manner that maintained organisational structures and administrative processes that promote the satisfactory representation of native title holders and persons who might hold native title in its area and effective consultation with Aboriginal peoples and Torres Strait Islanders living in its area.[72] These were two of the measures against which satisfactory performance of functions would be measured.

The combined effect of these requirements was that Representative Bodies had to focus, in the performance of their functions, including their facilitation and assistance function, on the appropriate representation of people who might hold native title and also on proper consultation with non-native title holding Aboriginal or Torres Strait Islander people in their area. They had to be aware of the politics within the native title group and also in the broader Indigenous community. To that extent, their statutory functions required them to be more than a provider of native title services, but active participants in the lives of their communities.

3.4.2.2 The Amendments

Criteria for decisions affecting the recognition of Representative Bodies

The Amendments remove two of the criteria the Minister is to take into account in making decisions whether to recognise or withdraw recognition from a Representative Body, or extend, vary, or reduce its area. The Minister will no longer have to take account of whether the Representative Body satisfactorily represents native title holders or effectively consults local Indigenous people.

Instead, the Minister will only have to take account of whether the Representative Body does or will satisfactorily perform the functions of a Representative Body.[73] In each case, apart from where decisions to withdraw recognition are made, this is the only criterion that the Minister must take into account.

While there is now no explicit reference to requirements that Representative Bodies satisfactorily represent native title groups or consult with the local community, the manner in which a Representative Body performs its functions is still relevant. The manner in which a Representative Body maintains

[71] Former ss.203AD(1)(a)-(d) [recognition], 203AH(2)(a)(i)-(iii) [withdrawal], 203AE(c)-(e) [extension], 203AF(4)(a)-(c) [variation], and 203AG(2)(a)-(c) [reduction] NTA.

[72] Former ss.203BA(2)(a) and (b) NTA.

[73] Sections 203AD(1)(c) and (d) [recognition], 203AH(2)(a) [withdrawal], 203AE(2) [extension], 203AF(2) [variation], and 203AG(1) [reduction] NTA.

organisational structures and administrative processes that promote the satisfactory representation of native title groups, and effective consultation with Aboriginal peoples and Torres Strait Islanders living in its area is relevant to an assessment of the manner in which it performs its functions.[74] However, the importance of effective consultation and satisfactory representation as criteria for making these decisions is reduced.

For withdrawal of recognition, there is an alternative criterion for the exercise of the Minister's discretion: whether there are serious or repeated irregularities in the financial affairs of the body.[75] The Minister will no longer need to be satisfied that a Representative Body that would otherwise meet the criteria for withdrawal of recognition is unlikely to take steps to remedy this situation within a reasonable period.[76]

Procedure for making decisions

In addition, the procedures by which the Minister is to consult with a Representative Body before making a decision to extend its area, vary adjoining Representative Body areas, or reduce a Representative Body's area have also changed. The Minister will have far more control of these processes and native title holders or claimants will have less input.

A Representative Body will now be able to apply to extend its area into an area for which there is no Representative Body.[77] The Minister may extend the area or vary the boundary between areas on the application of a Representative Body (or Representative Bodies), or on the Minister's own initiative.[78] If done on the Minister's initiative, there is no need for the agreement of the relevant Representative Bodies.[79]

There will now be no need for Representative Bodies seeking to vary their common boundary to consult with Aboriginal peoples or Torres Strait Islanders who might be affected or to be satisfied that there is broad support for the variation among the native title groups for the area in respect of which the Representative Body will change.[80]

If the Minister is considering changing a Representative Body's area she or he must give 60 days (reduced from 90 days) notice of the proposal and the reasons for it to the Representative Body and to the public, and invite submissions from them.[81] In making the decision, the Minister must consider any submissions made, and may consider reports concerning audits,

[74] Section 203BA(2)(a) and (b) NTA.

[75] Section 203AH(2)(b) NTA.

[76] Section 203AH(2) NTA.

[77] Section 203AE(3)(a) NTA.

[78] Sections 203AH(2)(a) [withdrawal], 203AE(3) [extension], 203AF(2) [variation] NTA.

[79] Former s.203AE(f) has been repealed and s.203AF now allows for the Minister to act on his or her own initiative.

[80] Former s.203AF(2) NTA has been repealed.

[81] Sections 203AG(3) [reduction] and 203AH(3) [withdrawal] NTA.

evaluations of funding provided, the performance of its functions, and any irregularities in its financial affairs.[82]

The procedures by which the Minister is to consult with a Representative Body before making a decision to reduce its area or withdraw recognition match those for extending or varying an area on the Minister's own initiative, apart from the requirement to notify the public of the proposal.[83]

All decisions to recognise or withdraw recognition, or extend, vary, or reduce a Representative Body area are now to be made by legislative instrument. Therefore, the decisions are no longer subject to review under the ADJR Act.

3.4.2.3 Analysis of the Changes

Changes to criteria for recognition of decisions

The changes mean that the only criterion for decisions about these recognition decisions is that the Minister is satisfied that after the change the Representative Body will satisfactorily perform its functions in relation to the changed area. This further increases the Minister's discretion to make these decisions, and decreases certainty for Representative Bodies and those relying on or dealing with them.

The criteria removed include the requirement that the Minister be satisfied that the Representative Body satisfactorily represents native title holders and claimants and effectively consults with Aboriginal and Torres Strait Islander peoples. Representative Bodies will only have to maintain organisational structures and administrative procedures that promote these outcomes. The removal of this requirement implicitly downplays the importance of representation and effective consultation.[84] Another criterion removed is the requirement that, in some instances, the Representative Body affected by the decision must consent to the change.

These changes mean that Representative Bodies may increasingly be disconnected from their constituencies. This is part of the increased focus of Representative Bodies on service delivery rather than being representative of and representing their communities.

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Tom Calma was concerned about limiting the criteria for recognition decisions:

> '[L]eaving recognition decisions to be decided solely on the basis of a broadly defined criterion susceptible to differing interpretations, exposes representative bodies to an actual or at least perceived danger that decision making will be influenced by political considerations.'[85]

[82] Sections 203AE(4)-(9) [extension] and 203AF(4)-(9) [variation of adjoining areas] NTA.

[83] Sections 203AG(3)-(6) [reduction] and 203AH(3)-(6) [withdrawal] NTA.

[84] See NNTC Submission to Senate on Amendment Bill, above n.62, p.5.

[85] Calma Submission to Senate on Amendment Bill, above n.51, p.18.

Under the changes, Representative Bodies have less say over the extent of the area for which they are responsible. A Representative Body may have its area changed without its consent if the Minister feels that it will satisfactorily perform its functions in respect of the changed area. The Minister's view is privileged above that of the Representative Body, which is likely to have better idea of its own capacity and of local political considerations than the Minister.

Representative Body boundaries have been set after considerable consultation. Many reflect cultural groupings, as well as Representative Body membership.[86] In some cases, changes to a Representative Body's boundaries may not necessarily align with current cultural groupings as well as constitutional and governance arrangements.

Representative Body procedural rights and notification

The notice a Representative Body is to be given of proposals to change its area is reduced from 90 to 60 days. It may be difficult for the Representative Body to consult its members and constituents, and to prepare a submission to the Minister in such a limited time.

In addition, notice now has to be given to the public. It is not clear that the public has any interest at all in what Representative Body should be responsible for a particular area. Potentially, decisions about the extent of Representative Body areas will be exposed to public pressure and political considerations.[87]

Since review must now be by way of prerogative writ, rather than judicial review under the ADJR Act, the review process will become more difficult and expensive, which means that Ministerial decisions are less likely to be challenged, and the Minister's discretion is effectively broadened.

Withdrawal of recognition is easier

The Minister can withdraw recognition if the Representative Body is not satisfactorily performing its functions or there are serious or repeated financial irregularities. Before deciding to withdraw recognition the Minister no longer needs to be satisfied that the Representative Body is unlikely to remedy the relevant deficiencies.[88] This means that withdrawal of recognition can occur in a summary manner, without giving a Representative Body the opportunity to address its shortcomings. This appears disproportionate given that financial dysfunction should not be the only indicator of the lack of 'success' of a particular Representative Body.

This change also increases the Minister's discretion about recognition decisions. There may be more reluctance to help a Representative Body with identified deficiencies, if it can be replaced in short order.

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[86] NNTC Submission to Senate on Amendment Bill, above n.62, p.7.

[87] Calma Submission to Senate on Amendment Bill, above n.51, [52].

[88] Former s.203AH(2)(b).

3.4.3 Allowing bodies incorporated under the Corporations Act to be recognised as representative bodies

3.4.3.1 Situation under the old NTA

At the time these amendments were made, on 15 April 2007, most Representative Bodies were incorporated under the ACA Act, which was replaced from 1 July 2007 by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**). These Representative Bodies are now incorporated under the CATSI Act. Apart from Representative Bodies recognised as at 30 October 1998, only bodies incorporated under the former ACA Act could seek recognition as a Representative Body.[89] Recognition means that a body can perform certain statutory requirements including entering Indigenous land use agreements as a Representative Body, and receiving future act notices under the NTA.

In April 2007, there were no Representative Bodies recognised with responsibility for NSW, the ACT, Victoria, and Queensland South. In each of these areas, the Australian Government supported NTSPs performing Representative Body functions, to the extent allowed by law. These were NSW Native Title Services Ltd (now known as **NTSCorp**), Native Title Services Victoria Ltd (**NTSV**), and QSNTS, which are companies limited by guarantee, incorporated under the Corporations Act.[90] In addition there is and was no Representative Body for Tasmania.

These companies have some advantages over Representative Bodies, because their structures and the Corporations Act allow them 'to recruit expert directors and to minimise governance problems such as conflicts of interests and inadequate separation of powers.'[91] For instance, NTSCORP has a small maximum membership that is not directly representative of on native title holders in its area. Three of the ten directors need not be members of the corporation. These factors mean that the members and directors can be at arms length from their clientele, and that the organisation can recruit external directors with particular expertise.[92]

However, since these companies were not Representative Bodies, their role was limited in that, while they could provide services to native title parties, they could not perform all the statutory functions of Representative Bodies.

[89] See s.203AD and s.201B(1) NTA, and OIPC Submission to Joint Committee on Representative Bodies, above n.14, p 17. The ACA Act was repealed from 1 July 2007 and replaced by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**).

[90] Joint Committee Representative Body Report, above n.16, [2.32]-[2.33].

[91] OIPC Submission to Joint Committee on Representative Bodies, above n.14, p 17.

[92] Joint Committee Representative Body Report, above n.16, [2.42].

3.4.3.2 The Amendments

The amendments attempt to bring the functions of service providers in line with these of Representative Bodies. The changes address this situation in part by broadening the range of bodies that can be recognised as Representative Bodies to include companies incorporated under the Corporations Act.[93] Thus, potentially, each of NTSCORP, NTSV and QSNTS can be recognised as a Representative Body and have the same functions and be subject to the same regulation as other Representative Bodies. Further, Representative Bodies that were formerly incorporated under the ACA Act are now incorporated under the CATSI Act, which gives them more flexibility in their operations.

In addition, the amendments give greater powers and impose more regulation on NTSPs (see below), which also brings companies incorporated under the Corporations Act into the regulatory system of the NTA.

3.4.3.3 Analysis of Changes

Corporations Act Representative Bodies have advantages over ACA Act Representative Bodies, including being able to recruit expert directors and minimise conflicts of interests.[94] The structures that give rise to these advantages also mean that Corporations Act Representative Bodies are more truly service providers rather than either representative of or advocates for their constituents. This change is consistent with the previous Government's apparent view that the effective and client-focussed provision of services is fundamental to the operation of Representative Bodies

However, with the almost simultaneous changes to the ACA, it is likely that the advantages that Corporations Act Representative Bodies had over ACA Act Representative Bodies in this regard are less than those they might have over CATSI Act Representative Bodies. The CATSI Act addresses many of the internal governance issues identified by the Joint Committee as problems for Indigenous corporations.[95] In addition, Representative Bodies can minimise conflicts of interest and any inadequate separation of powers through the development and implementation of policy.[96] Thus, there may be limited advantages for a Corporations Act Representative Body over a CATSI Act Representative Body.

Many Representative Bodies emphasise the need to be directly accountable to their constituency, both for decisions about funding particular native title matters, and so that service delivery can lead to culturally and socially

[93] Section 201B(1)(ba) NTA adds these corporations to the definition of eligible bodies, which can be recognised as Representative Bodies under s.203AD(1) NTA.

[94] OIPC Submission to Joint Committee on Representative Bodies, above n.14, p 17.

[95] Joint Committee Representative Body Report, above n.51, [2.42]. See Calma Submission to Senate on Amendment Bill, above n.51, [61].

[96] For example, see Carpentaria Submission to Senate on Amendment Bill, above n.70, p 12.

appropriate native title outcomes.[97] Accountability through Representative Bodies' internal mechanisms is an important aspect of this. This is particularly so for CATSI Act Representative Bodies because they can choose to limit their membership to Aboriginal people or Torres Strait Islanders.[98] Corporations Act Representative Bodies cannot have their membership limited in this way.

However, these changes need to be considered in light of the new CATSI Act. Under the CATSI Act corporations need not have their membership only open to Aboriginal people or Torres Strait Islanders.[99] The Minority report of the Senate Committee *Inquiry into the Native Title Amendment Bill* expressed concern that the CATSI Act relaxes minimum standards for Indigenous membership, redefining the role of Representative Bodies as 'representational' rather than 'representative':

> Labor and the Greens believe that mainstreaming the provision of native title services may result in service providers who do not have strong relationships with Traditional Owners or the capacity to effectively represent them. This will undermine the role of Representative Bodies as representative organisations.[100]

Government does recognise that issues of accountability to constituents and Indigenous participation in decision-making must be taken into account,[101] but the amendments broadening the functions of NTSPs have the potential to reduce the role of traditional law and custom in Representative Body decision making. Despite the CATSI Act changes, Corporations Act Representative Bodies remain less accountable to their members for the way they operate. This reduction in the representativeness of Representative Bodies coincides with the removal of the criteria for recognition of a Representative Body that it will satisfactorily represent native title groups and will be able to consult effectively with Aboriginal people and Torres Strait Islanders living in its area.

3.4.4 Strategic plans and annual reports

3.4.4.1 Situation under the old NTA

Under the old NTA, Representative Bodies were required to prepare strategic plans relating to their functions for periods of at least three years.[102] These

[97] See Joint Committee Representative Body Report, above n.16, [2.63].

[98] Section 141-10 CATSI Act, above n.89.

[99] See s.29-5 CATSI Act, above n.89, which provides that a minimum indigeneity requirement for CATSI corporations can be set by regulation.

[100] Senate Legal and Constitutional Affairs Committee, *Inquiry into the Native Title Amendment Bill 2006: Minority report by the Australian Labor Party and the Australian Greens*, Senate Legal and Constitutional Affairs Committee, Canberra 2007, at [1.25].

[101] See Joint Committee Representative Body Report, above n.16, [2.69] and [2.66].

[102] Section 203D(1) NTA.

had to be given to the Minister for approval.[103] They also had to prepare annual financial reports in respect of their Representative Body functions, which had to be audited and laid before each House of Parliament.[104]

The Miller 'Review of the Representative Body System' in 2002 found that these strategic plans and annual reports did not help Representative Bodies plan their workloads or provide appropriate information to the Government for it to make its funding decisions. In addition, the Minister had failed to table these annual reports as required.[105] By 2004, OIPC was already requiring better information from Representative Bodies to address these deficiencies, including operational plans and performance reports based on an output and outcomes reporting framework.[106] It was also assisting Representative Bodies to prepare more valuable strategic plans.[107]

3.4.4.2 The Amendments

Representative Bodies will no longer be required to prepare strategic plans or annual reports, which include financial statements.[108] However, financial statements will be required as a condition of funding.[109]

3.4.4.3 Analysis of changes

Representative Bodies do need to be able to plan their future activities, so some sort of strategic plan is necessary. They also need to be accountable for their expenditure of public funds.

Another important matter is to maintain the confidence of their constituency by making resource allocation decisions that are 'transparent, fair and objective.[110] The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Tom Calma, argues that:

> … the long-term nature of native title litigation and projects, the paucity of representative body resources to progress them, and the necessity for fair allocation of resources, make transparent planning processes essential to the effective operation [of] representative bodies. Statutory plans provide a sound basis on which to base decisions about resource allocation. Such plans are also useful for engagement with the Court and NNTT in relation to, for example, case management.[111]

[103] Section 203D(5) NTA.

[104] Section 203DC NTA.

[105] Joint Committee Representative Body Report, above n.16, [1.10].

[106] OIPC Submission to Joint Committee on Representative Bodies, above n.14, pp 23-24.

[107] OIPC Submission to Joint Committee on Representative Bodies, above n.14, pp 30-32.

[108] Repeal of ss.203D and 203DC.

[109] Section 203CA(1)(d) NTA.

[110] Calma Submission to Senate on Amendment Bill, above n.51, [40].

[111] Calma Submission to Senate on Amendment Bill, above n.51, [41].

While it appears likely that strategic planning and financial accountability will still be imposed on Representative Bodies through funding conditions, the changes make the process much less transparent. Thus, for instance, Representative Bodies will no longer have publicly available strategic plans to justify planning and resource allocation decisions to their constituents and to the Court and NNTT. It will become more difficult for a Representative Body to 'adhere to its medium to long term goals in the face of pressures from within and outside of its constituent client base'.[112]

Removal of the requirement for Representative Bodies to make strategic plans that must be approved by the Minister reflects the general shift in these amendments to a system where the regulation of Representative Bodies is much more within the Minister's discretion.

3.4.5 Native title service providers

3.4.5.1 Situation under the old NTA

Previously, the Secretary of the relevant Department[113] could make funding available to a person or body under s.203FE(1) to perform Representative Body functions for an area for which there was no Representative Body. NTSCORP, NTSV and QSNTS, were funded as native title service providers.[114] However, since they were not Representative Bodies, they could not perform all the statutory functions of Representative Bodies. They could not certify or enter agreements as Representative Bodies, nor did they have the right to receive notices under the NTA.

The Secretary could also make funding available to a person or body under s.203FE(2) to perform specified facilitation and assistance functions in relation to a particular matter for which a Representative Body had refused to provide assistance.

3.4.5.2 The Amendments

New ss.203FEA-203FED provide that, where appropriate, the NTA applies to persons or bodies funded under s.203FE in the same way as it applies to Representative Bodies.

This is achieved by explicitly providing that a NTSP has the same obligations and powers in relation to the performance of its functions as a Representative Body.[115] Further, third parties have the same obligations and powers in

[112] Carpentaria Submission to Senate on Amendment Bill, above n.70, [19].

[113] Currently, the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs (**FaHCSIA**).

[114] Joint Committee Representative Body Report, above n.16, [2.32]-[2.33].

[115] Sections 203FEA(1) and 203FEB(1). Note that s.203FE(2) NTSPs can only have facilitation and assistance functions in respect of a particular matter.

relation to a NTSP as they have in relation to a Representative Body.[116] In addition, certain provisions in the NTA which might not be construed as giving a function to Representative Bodies, are explicitly applied to NTSPs.[117] Other provisions of the NTA may be applied to NTSPs by regulation.[118] No regulations have yet been made. Further, the immunities of persons involved in managing Representative Bodies are extended to persons involved in the managing NTSPs.[119] The result is that a NTSP will have Representative Body functions, if it is funded to perform them.

In addition, several provisions in the NTA that apply to Representative Bodies are explicitly not applied to NTSPs. They cannot apply for funding under s.203C, and are not subject to the provisions concerning the recognition and withdrawal of recognition of Representative Bodies.[120]

3.4.5.3 Analysis of changes

These provisions effectively supply a suite of functions for NTSPs, from which the Secretary can pick and choose by granting funding. If a NTSP is funded to perform particular functions, the extent of its powers and obligations will be set by these new provisions. This adds to the flexibility of the Representative Body system and to the discretion of the Commonwealth Executive.

Unlike Representative Bodies, the operation of NTSPs is regulated by the Secretary through the grant or withdrawal of funding, and the terms on which, and the time for which, funding is granted. Therefore the procedural rights concerning variation of areas and withdrawal of recognition do not apply to them. This potentially means that NTSPs will have much less independence in their operations, since they will not have the benefit of the statutory withdrawal of recognition process. The scope, nature and timing of the operations of NTSPs within the Representative Body system are completely at the discretion of the Secretary.

In addition, there is still a duality in the administration of the Representative Body system, despite these changes. Representative Bodies and NTSPs still have different processes governing their operations.

3.4.6 Removal of corporate governance obligations already imposed under incorporation statutes

These amendments were made by the Technical Amendments Act.

[116] Sections 203FEA(2) and 203FEB(2).

[117] Sections 203FEA(3)-(4) and 203FEB(5)-(6).

[118] Sections 203FEA(5) and 203FEB(7).

[119] Section 203FED.

[120] Section 203FEC NTA.

3.4.6.1 Situation under the old NTA

The 1998 Amendments inserted Division 6 into Part 11 of the NTA, which deals with the conduct of directors and other executive officers. As it stood, it applied provisions of the *Commonwealth Authorities and Companies Act 1997* (Cth) to Representative Bodies dealing with:

- The conduct of officers;
- Indemnity and insurance;
- Civil consequences of contravening civil penalties; and
- Directors' material personal interests.

Similar provisions already applied to Corporations Act NTSPs. From 1 July 2007, provisions dealing with the conduct of officers and civil penalties in the new CATSI Act applied to Representative Bodies incorporated under that Act. The CATSI Act does not deal with indemnity and insurance. Therefore, CATSI Act Representative Bodies were potentially subject to provisions duplicated in both the *Commonwealth Authorities and Companies Act 1997* (Cth) and in the CATSI Act.

3.4.6.2 The Amendments

The purpose of the amendments is to address the situation where a Representative Body would be subject to two sets of similar provisions covering the same subject matter.[121] This is done by repealing Division 6, and replacing it with new provisions that deal explicitly with the application of the relevant provisions to:

- Representative Bodies that are neither Corporations Act nor CATSI Act Representative Bodies;[122] and
- CATSI Act Representative Bodies.[123]

These provisions commenced on 1 July 2007, the date the CATSI Act commenced.

There is no need to apply these provisions to Corporations Act Representative Bodies, because similar provisions already apply to them under the Corporations Act.

3.4.6.3 Analysis of changes

These changes are effectively consequential on allowing Corporations Act companies to be Representative Bodies, and on the replacement of the ACA Act by the CATSI Act.

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[121] Technical Amendments Bill Explanatory Memorandum, above n.50, at [2.11].

[122] Section 203EA NTA.

[123] Section 203EB NTA.

3.4.7 Process for reviewing decisions not to assist native title claimants and holders

These amendments were made by the Technical Amendments Act.

3.4.7.1 Situation under the old NTA

An Aboriginal or Torres Strait Islander person affected by a Representative Body's decision not to assist him or her in the performance of its facilitation and assistance function could apply to the Secretary for a review of the decision, under s.203FB.

The Secretary had to appoint an external expert to conduct the review,[124] who had to report whether the decision should be affirmed or whether the Secretary should make a grant of money under s.203FE to a person or body for the purpose of performing specified facilitation and assistance functions in relation to the particular matter.[125]

3.4.7.2 The Amendments

Section 203FB is replaced by ss.203FB, 203FBA and 203FBB. Now the Secretary can review the decision himself or herself, or appoint an external expert to do so.[126] Section 203FBA deals with external review, and s.203FBB with review by the Secretary.

Under s.203FBA, the external expert must take account of matters, including the Representative Body's priorities, the efficient performance of its functions, its funding conditions, and its efforts to minimise the number of native title applications in respect of particular land or waters.[127] These matters were already taken into account by external experts, but were not specified in the NTA. An applicant for review should now be aware that these matters will be taken into account on the review.[128] Otherwise, the process is the same, except that:

- The expert must refuse to review the decision if internal review by the Representative Body has not occurred;[129] and
- The expert must report within 60 days or such other period as directed, instead of three months as before.[130]

[124] Former s.203FB(2) NTA.

[125] Former s.203FB(3) NTA.

[126] Section 203FB(2) NTA.

[127] Section 203FBA(3) NTA.

[128] Technical Amendments Bill Explanatory Memorandum, above n.50, at [2.25].

[129] Section 203FBA(4) NTA.

[130] Section 203FBA(6) and (5) NTA.

The process for review by the Secretary under s.203BB is the same, save that the Secretary must make a decision within 60 days after the review application is made.[131] In addition, the review can be performed by an officer of the Secretary's Department.[132]

3.4.7.3 Analysis of changes

The Government's aim with these changes is to make the process of reviewing assistance decisions more transparent, efficient and timely.[133] The substantive change is the reduction of the period within which the review decision has to be made from 90 to 60 days.

3.4.8 Transfer of documents

These amendments were made by the Technical Amendments Act.

3.4.8.1 Situation under the old NTA

The Minister could direct a former Representative Body to transfer documents and records to a replacement Representative Body that needs them to perform its functions. However, it could not do so where the materials relate to a claimant or a compensation application or to determined native title rights and interests, unless the native title claimants or holders have asked the new Representative Body to assist them in relation to that claim or those rights and interests.[134] Since there was nothing saying otherwise, it was for the Minister to assess whether the new Representative Body had been asked for assistance in respect of these matters.

3.4.8.2 The Amendments

The changes address this situation by limiting the Minister's power to give directions in this regard to matters where the new Representative Body has given the Minister notice in writing that it has been asked to perform a Representative Body function in relation to the claim or to the native title rights and interests.[135]

These changes would apply to NTSPs as well as to Representative Bodies.[136]

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[131] Section 203FBB(6) NTA.

[132] Section 203FI NTA.

[133] Technical Amendments Bill Explanatory Memorandum, above n.50, at [2.20].

[134] Former s.203FB(1) and (2) NTA.

[135] Sections 203FC(2) and (2A) NTA.

[136] See ss.203FEA(1), (2) and (3)(c) NTA.

3.4.8.3 Analysis of changes

Therefore, a new Representative Body, rather than the Minister, is to judge whether it has been properly asked for assistance by the native title group and should have documents and records transferred to it. Presumably, the new Representative Body is in a better position to make that assessment than is the Minister.

3.5 Analysis of the Representative Body Amendments

These amendments themselves do not address funding for Representative Bodies. Nor have they been accompanied by any additional funding despite static or declining levels of Representative Bodies allocations since the 1998 reforms.[137] This is despite several increases in funding for the facilitators of outcomes, such as the NNTT and the Court. Increased capacity of these facilitators puts more pressure on Representative Bodies, which are directly responsible for achieving native title outcomes.[138] This observation was repeatedly made in submissions to the Senate Committee Inquiry into the Amendment Bill, with many stakeholders citing the inadequacy of resources as a significant obstacle to the efficient and professional progression of native title matters.[139]

These changes push Representative Bodies further down the track to becoming solely service providers rather than representative of and advocates for their constituents and communities. Their role is increasingly one of providing representation for clients rather than being representative of their communities and constituents. These changes drive this process by:

- Giving the Executive arm of Government more control over decisions about whether a particular body should be a Representative Body and its area of responsibility;
- Removing the requirement that in order to be recognised, a Representative Body must show that it can represent and consult with native title groups as well as other Aboriginal people and Torres Strait Islanders in their areas;
- Fixing the periods for which they are recognised;

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[137] Calma Submission to Joint Committee on Representative Bodies, above n.17.

[138] Submission from the Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunities Commission to the Hiley Levy Claims Resolution Review, *Hiley Levy Claims Resolution Review* (2006). <http://www.hreoc.gov.au/Social_Justice/submissions/claims_resolution_review_process.html >

[139] Calma Submission to Senate on Amendment Bill, above n.51, p.8. See also: NNTC Submission to Senate on Amendment Bill, above n.62; Submission of the Northern Land Council to the Senate Committee on Legal and Constitutional Affairs, submission 14, *Inquiry into the Native Title Amendment Bill 2006* (2007) (**NLC Submission to the Senate on the Amendment Bill**); MCA Submission to Senate on the Amendment Bill, above n.9.

- Allowing for summary withdrawal of recognition; and
- Allowing a range of entities to become Representative Bodies, including some that can have non-Indigenous members.[140]

These changes reflect a desire to control Representative Bodies as envisaged by requirements of accountability, rather than better service delivery. Carpentaria Land Council argues that it is not just a native title service delivery organisation, but can be an advocate for its constituency, representing native title community interests.[141]

For the National Native Title Council,

> Community participation through self-managed native title representee bodies is a corner stone of the native title system. The trust required to achieve viable outcomes, especially in terms of enduring agreement making, simply cannot be replicated by a firm of solicitors or other entity based far away both geographically and culturally, from claimants.[142]

In addition, the amendments erode Representative Body independence of the Commonwealth Minister and the Department, who gain far more discretion about many aspects of the regulation of Representative Bodies. This erosion may have some impact on Representative Bodies' capacity to represent their constituents without fear or favour.

The proposed changes to de-recognition, the introduction of periodic re-recognition and the relaxation of the distinction between Representative Bodies and NTSPs all address a single identified problem: under performing Representative Bodies. This attempt to kill one bird with three stones represents an overreaction to the problem that will require significant administrative resources from Government and Representative Bodies. Where no new resources are intended to be allocated to these amended processes, the risk is that there will be fewer resources available for achieving native title outcomes.

This view was put by the Western Australian Government, which sought justification from the Federal Government for such an unfettered discretion to recognise Representative Bodies in light of the seemingly smooth process of withdrawing the recognition of under performing Representative Bodies to date.[143]

Over and above these issues, the central concern must be the increased uncertainty in the long term stability of Representative Bodies and the impact of this uncertainty on relationships with their constituent communities and

[140] See NNTC Submission to Senate on Amendment Bill, above n.62, p.2.

[141] Carpentaria Land Council Aboriginal Corporation submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land, submission 38, *Inquiry into the capacity of Representative Bodies to discharge their duties under the NTA* (2005), [41].

[142] See NNTC Submission to Senate on Amendment Bill, above n.62, p.2.

[143] Submission of the Office of Native Title, Government of Western Australia to the Senate Committee on Legal and Constitutional Affairs, submission 3, *Inquiry into the Native Title Amendment Bill 2006* (2007) (**ONT(WA) Submission to the Senate on the Amendment Bill**), [1].

other parties and institutions. Representative Bodies are the pivotal institutional structures in the native title system. Their relationship with their constituents is an important aspect of that role. Their decisions that address issues among and between groups, such as which is the right group to speak for country or at which level a native title groups should be recognised, are difficult and require rigorous and transparent decision-making and dispute management. Successful decision making requires knowledge of the community and a substantial investment of time and resources by Representative Bodies.

Indeed, the resolution of issues between native title groups, such as 'registration' and 'authorisation' disagreements, which are best addressed by Representative Bodies, may be adversely affected by these changes.

Additionally, the reforms create a disincentive to invest in the intergenerational capacity building of native title groups. PBCs are likely to be required to act as agent or on trust for native title holders for many generations. Therefore, it is vital that they have the capacity to continue to represent them appropriately. Representative Bodies are required to play a role in developing and maintaining that capacity over the long term.

Representative Bodies also have a greater role in supporting the establishment of PBCs and the discharge of their statutory obligations (see below). The identification of potential PBC membership must be progressed well before it is determined, and also be undertaken periodically when the PBC is to act on behalf of the native title holders in respect of their native title. The uncertainty surrounding the future of Representative Bodies places this role at risk.

4. Reform of the Native Title Claims Resolution Processes

4.1 The old Native Title Claims Resolution Processes

A thread running through the terms of reference for the Hiley Levy Review related to the efficiency and effectiveness of the native title system, which required a focus on systemic issues. The presumption of the Government and of the Review was that efficiency and effectiveness would be best promoted by maximising agreement making.[144]

Previously, the Court had exclusive jurisdiction and thus ultimate control over native title matters brought under the NTA. The NNTT was a specialist provider of mediation services to parties in native title proceedings, but could only exercise that function in respect of matters, or parts of matters, referred to it by the Court. The Court retained ultimate control over whether a matter or issue was referred to mediation by the NNTT, and the progress of that mediation. In addition, it could use its own alternative dispute resolution mechanisms, such as mediation by a registrar, limited evidence hearings, determining separate questions, and conferences of experts, notwithstanding that the matter was still being mediated by the NNTT. The authors of the Hiley Levy Report considered that this led to duplication of functions, inappropriate competition and inefficiency.[145]

Other elements of the system that affected efficiency and effectiveness might have included the Tribunal's lack of coercive power to manage mediation and the recalcitrant behaviour of parties.[146]

4.2 Process of Reform

4.2.1 The changes announced

One part of the package of coordinated measures aimed at improving the performance of the native title system announced on 7 September 2005 was an independent review of native title claims resolution processes to consider how the NNTT and the Court may work together more effectively in managing and resolving native title claims.[147]

4.2.2 The Hiley Levy Report

On 17 October 2005, Mr Graham Hiley QC, a Barrister specialising in native title work, and Dr Ken Levy, a part time member of the Administrative Appeal Tribunal and former Director-General of the Queensland Department of Justice, were appointed to undertake an independent review of the processes for resolving native title claims. The review was overseen by a high-level steering committee, including representatives of the Court, the NNTT, the

[144] Hiley Levy Report, above n.2, [6.45], per Dr Levy.

[145] Hiley Levy Report, see above at n.2, [4.28]-[4.32].

[146] Hiley Levy Report, see above at n.2, [6.48].

[147] Media release 7 September 2005, above n.5.

Attorney General's Department, and OIPC. Relevant bodies and individuals were to be consulted and invited to provide submissions.[148]

The report timeframe was relatively short for a comprehensive review: it commenced with the announcement on 17 October 2005, there was a meeting between the Attorney General and Mr Hiley and Dr Levy on 22 November 2005, submissions were sought by 1 December 2005, and they were to report by 31 March 2006.

The Attorney General released the *Native Title Claims Resolution Review*, report for the Attorney General's Department (the **Hiley Levy Report**), together with the Government's Response (the **Response to Hiley Levy Report**) on 21 August 2006.[149]

4.2.3 Legislative process

No further submissions in response to the Report and the Response were invited, but stakeholders were able to make submissions to the Senate Committee's inquiries into the amendment Bills.

Most of the recommendations of the Hiley Levy Report were dealt with in Schedule 2 of the Amendment Bill, which commenced on 15 April 2007.

The Senate Committee recommended that the NTA be further amended to address some of the concerns raised in submissions. Some of these recommendations were dealt with in the Technical Amendments Act.

4.3 The Hiley Levy Report

4.3.1 Methodology

4.3.1.1 Terms of Reference

The Terms of Reference for the Review stated that its purpose was to:

> … focus on the process by which native title applications are resolved. It will examine the role of the … NNTT and the Federal Court … and inquire into and advise the Government on measures for the more efficient management of native title claims within the existing framework of the NTA [and] … consider how native title claims can be most efficiently and effectively resolved …, primarily through mediation and agreement-making, and where appropriate with a greater degree of consistency in the manner in which claims are handled.[150]

[148] P. Ruddock (Attorney General), *Review to improve the resolution of native title claims*, media release, Canberra, 17 October 2005 (**Media Release 17 October 2005**).

[149] P. Ruddock (Attorney General), *Improving resolution of native title claims*, media release, Canberra, 21 August 2006 (**Media Release 21 August 2006**).

[150] Media Release 17 October 2005, above n.148.

The independent reviewers understood that the focus of the review was to be on the current roles and practices of the Court and the NNTT with a view to identifying ways of improving their efficiency and effectiveness. This aim was subject to several limitations, including that:

- Efficiency and effectiveness was to be addressed through an emphasis on agreement making rather than litigation. Thus, mediation roles and processes were to be an important part of the review;
- Substantive rights were not to be reduced;
- Improvements should be achieved within the existing NTA framework as far as possible. Therefore, the existing system was to be streamlined, and the duplication of functions avoided; and
- Accountability and objective measures were important.[151]

At the time, both the NNTT and the Court were mediating native title matters. The Report was to examine and report on the way each body operated, the relationship between them, and consider, among other things, the extent to which their functions were duplicated. It was to consider whether there should be greater flexibility in the roles of the two bodies or whether their functions should be reassigned. It appears that the Report was to address the question whether one or other of them should in future play the major role in mediating native title matters, in order to achieve greater effectiveness and efficiency in resolving them.

Another matter the Report was to address was the gathering of evidence, and whether the NNTT should be able to use its inquiry power in this regard to enable the more effective disposition of claims.[152]

4.3.1.2 Consultation

The review considered 36 written submissions, most of which were relatively brief because of the short timeframe allowed. In addition, the reviewers orally consulted 52 stakeholders: representatives of governments, legal practitioners, Representative Bodies, industry groups, the Court and the NNTT. Due to the nature of the Report's methodology the majority of submissions were kept confidential. Time constraints imposed limits on the number of and time spent in such meetings.[153]

The Review also considered pre-existing material such as the Thurtell Report on on-country hearings[154] together with the Court's response, and the Joint Committee's Report on the effectiveness of the NNTT,[155] and the

[151] Hiley Levy Report, above n.2, [2.3].

[152] Hiley Levy Report, above n.2, [2.1].

[153] Hiley Levy Report, above n.2, [3.4].

[154] Thurtell, J, *Review of Practice and Procedure in the Conduct of On Country Hearings in Native Title Cases for the Federal Court of Australia*, report to the Federal Court, 2004, referred to at Hiley Levy Report, above n.2,[3.7].

[155] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land, *Report into the Effectiveness of the National Native Title Tribunal*,

Government's response to its findings,[156] both of which allowed longer periods for consultation and addressed some points either outside the Review's terms of reference, or in more detail.

4.3.1.3 The Approach of the Hiley Levy Review

The Review considered possible improvements to the existing system, including adjusting the relationship between the Court and the NNTT, and made 24 recommendations.[157] These recommendations could be adopted in a piecemeal manner.

In addition, the Review formed the opinion that there is a need for some institutional reform.[158] The Report puts forward five options addressing, clarifying or re-assigning functions between the Court and the NNTT.[159] Mr Hiley and Dr Levy made different recommendations as to which of these options the Government should follow.[160]

4.3.2 Hiley Levy Report Recommendations

Hiley and Levy pointed out that despite the Commonwealth funding Representative Bodies, respondents, its own lawyers, the Court and the NNTT, there had only been 81 determinations of native title to 17 January 2006 and over 600 claims remained. There was clearly a substantial volume of work to be done, which would place further demands on the native title system.[161] Implicit in its overview of funding and general outcomes to date is the conclusion that the existing processes and procedures were inefficient and ineffective.[162]

The two major approaches to resolving native title matters are litigation and mediation. The authors of the Report prefer mediation to lengthy and expensive litigation.[163] However:

> Native title mediation is fundamentally different from mediation conducted in other areas. In other types of mediation, the parties almost invariably have a

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Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land, Canberra, 2003 (**Joint Committee Report into the NNTT**).

[156] Commonwealth Government, *Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: Effectiveness of The National Native Title Tribunal: Government Response*, Attorney General's Department, Commonwealth Government, Canberra, 2005.

[157] Hiley Levy Report, above n.2, chapter 4.

[158] Hiley Levy Report, above n.2, [5.1].

[159] Hiley Levy Report, above n.2, chapter 5.

[160] Hiley Levy Report, above n.2, chapter 6.

[161] See Hiley Levy Report, above n.2, [4.6]-[4.17] for a statistical overview of the state of the native title system as at 17 January 2006.

[162] Hiley Levy Report, above n.2, [4.6]-[4.17].

[163] See Hiley Levy Report, above n.2, [4.22].

> prior relationship and the facts and history of the dispute will be well known to them. In native title mediation, there is usually no pre-existing relationship and the history and facts to be mediated are often not clear to the parties for a considerable time. Other factors that can complicate native title mediations are overlapping claims, vague or poorly drawn claims, a shortage of resources and a lack of will to progress a claim.[164]

4.3.3 Options for Institutional Reform

The Report starts from the premise that NNTT mediation can be positive and effective to resolve how native title rights and interests are exercised in practice. It notes that the Court has also been exercising its mediation power,[165] leading to confusion, competition between institutions and forum shopping. The Report's first recommendation was that mediation should not be carried out by more that one body at a time in order to avoid duplication of functions.[166]

Hiley and Levy seem to assume that the NNTT and Court were exercising their mediation powers in similar ways.[167] Rather, the Court and the NNTT often used their mediation powers to different ends and at different points in the litigation. The Court tended to rely on alternative dispute-resolution processes as a circuit breaker for particular issues blocking the resolution of proceedings, whereas the NNTT focused on mediation as the main way to resolve native title proceedings as a whole. Generally, the NNTT was concerned with both factual and legal disputes, while the Court had become adept at identifying and addressing a legal dispute and referring the factual aspects to the NNTT for negotiation.

Hiley and Levy disagreed about which body should be responsible for mediation.[168] Ultimately, the Government determined it should be the NNTT.[169]

The five options for institutional reform put forward by the Report were, in summary:

1. Provide the NNTT with an exclusive mediation jurisdiction for a period of three years. All applications would have to be referred to the NNTT for mediation as at present. All aspects of claims would be mediated by the NNTT for three years. The Court would be precluded from conducting concurrent mediation.
2. Provide the NNTT with an exclusive mediation role with no time limitation on Federal Court intervention. This option would retain the

[164] Hiley Levy Report, above n.2, [4.23].

[165] Under s.53A of the *Federal Court of Australia Act 1976* (Cth).

[166] Hiley Levy Report, above n.2, [4.24]-[4.32].

[167] See for instance, Hiley Levy Report, above n.2, [4.23]-[4.31].

[168] Hiley Levy Report, above n.2, chapter 6.

[169] Commonwealth Government, *Government Response to the Report of the Native Title Claims Resolution Review*, Attorney General's Department, Canberra, 2006 (**Response to Hiley Levy Report**), p.2.

status quo. The NNTT would be the only body entitled to mediate until the Court removed the matter from NNTT mediation;

3. Provide the Federal Court with greater flexibility in relation to alternative dispute resolution. The Court would no longer be obliged to refer an application to the NNTT for mediation, but would have to unless it believed that the matter or issue would benefit from being handled differently. It would be free to refer different issues to different forms of dispute resolution, and would have greater freedom to order that mediation cease or to remove a matter or issue from NNTT mediation and refer it elsewhere.
4. Introduce a modified pre-1998 model for resolving native title claims. All applications would be lodged with the NNTT, which would notify them and settle the party list for mediation. Questions regarding parties and questions of law or fact would be referred to the Court. Ultimately, the matter would be referred to the Court for a consent determination or for trial; and
5. Create a new native title court.[170]

An additional proposal was the creation of a native title panel or division within the Court.

Options one to three are focussed on mediation and dispute resolution within the existing framework of the NTA, while options four and five would involve more substantial changes to the institutional framework.

Mr Hiley and Dr Levy had different attitudes to these options.[171] Mr Hiley preferred *Option three*, allowing the Court to have complete control over all native title claims, and the NNTT to fulfil its role as a specialist tribunal, including its mediation function. He considered that native title claims should only be mediated by the NNTT, and that the Court should be able to use the other dispute resolution mechanisms available to it.[172]

Dr Levy preferred *Option two*, with mediation by one institution at a time, including control and co-ordination of mediation.[173] Therefore, since the NNTT is the best placed to advance agreement making, it should have exclusive control of the mediation process, and the Court should be explicitly restricted from intervening in matters in mediation by the NNTT.

4.3.4 Specific Recommendations

The Report's 24 specific recommendations addressing the current system were grouped under particular headings, including:

[170] Hiley Levy Report, above n.2, chapter 5.

[171] Hiley Levy Report, above n.2, chapter 6.

[172] Hiley Levy Report, above n.2, [6.4], [6.5] and [6.8].

[173] Hiley Levy Report, above n.2, [6.48]-[6.51].

- The effectiveness of NNTT mediation. Recommendations included giving the NNTT powers to compel participation, review connection material, conduct inquiries, and require parties to mediate in good faith;[174]
- Communication between the NNTT and the Court. Recommendations involved user group meetings, NNTT participation in Court proceedings, and reports to the Court;[175]
- The overlapping nature of claims and inter-Indigenous and intra-Indigenous disputes.[176]
- Uncertainty about the claim and uncertainty about the law. Recommendations involved better particularisation of claims at an earlier stage, and referring particular issues of law and fact to the Court;[177]
- Connection evidence and tenure research. Recommendations involved use of the NNTT's research facilities, and an NNTT database of tenure material;[178]
- Reducing the backlog of native title claims. Recommendations involved the dismissal of unregistered applications and those made in response to future act notices;[179]
- Limiting the role and participation of third party respondents;[180]
- Giving greater priority to holding limited evidence and preservation hearings coupled with dispute resolution;[181] and
- Inquiries by the NNTT directed at resolving particular issues, including inter-Indigenous or intra-Indigenous disputes.[182]

Most of these recommendations were accepted by the Government and enacted in the Amendment Bill. In addition, several recommendations were dealt with in the Technical Amendments Act, including:

- Avoiding the application of the registration test in some circumstances after the amendment of the application;[183]
- Amending the authorisation provisions to remove ambiguities;[184] and
- Giving the Court greater flexibility in relation to notification of applications.[185]

[174] Hiley Levy Report, above n.2, recommendations 2-4.

[175] Hiley Levy Report, above n.2, recommendations 5-8.

[176] Hiley Levy Report, above n.2, [4.63].

[177] Hiley Levy Report, above n.2, recommendations 9 and 17.

[178] Hiley Levy Report, above n.2, recommendations 10-11.

[179] Hiley Levy Report, above n.2, recommendations 15-16.

[180] Hiley Levy Report, above n.2, recommendations 18-20.

[181] Hiley Levy Report, above n.2, recommendations 21.

[182] Hiley Levy Report, above n.2, recommendations 22-23.

[183] Hiley Levy Report, above n.2, recommendations 12.

[184] Hiley Levy Report, above n.2, recommendations 13.

The Report also made several observations that might be useful for practitioners:

- It is essential that Representative Bodies are properly resourced so that they can engage experienced lawyers, anthropologists, and other experts to ensure that those resources which they do have are efficiently used;[186] and
- Rigorous case management may also assist to narrow the range of issues in dispute and focus resources on resolving the key issues.[187]

It also made suggestions for improving the efficiency and effectiveness of Court processes,[188] including suggestions that:

- The Court prepare and publish guidelines, protocols and/or model orders and precedents for use across the country. These might cover a wide range of matters such as particulars of the claim, programming orders, orders regarding draft expert reports and conferences of experts, and the format of reports to the Court; and
- The Court be encouraged to adopt a practice note setting out its preferred method for managing native title claims to ensure all parties have a shared understanding of the process. This could deal with a wide range of case management mechanisms, alternative forms of dispute resolution, and the specialist mediation role of the NNTT.

4.4 The Government's Response to the Hiley Levy Report

Once completed, the Attorney General forwarded the Hiley Levy Report, and the Government's initial response, to the President of the NNTT and the Chief Justice of the Federal Court.[189]

The Government accepted most of the recommendations in the Hiley Levy Report and preferred *Option Two*.[190] That is, the Government accepted Dr Levy's opinion that a 'shift' in the balance of functions in favour of the NNTT was required to better encourage agreements without duplicating alternative dispute resolution efforts. This change effectively reduces the Federal Court's role in managing mediation to removing a matter entirely from NNTT mediation. The Government agreed to give further consideration to the early particularisation of claims to assist the identification of relevant issues, and to seek further advice from the NNTT about the proposal for it to develop a database of current tenure material.[191] Since the change of government in late 2007, the recommendation that the NNTT develop a database of current tenure

[185] Hiley Levy Report, above n.2, recommendations 14.

[186] Hiley Levy Report, above n.2, [4.107].

[187] Hiley Levy Report, above n.2, [4.109].

[188] Hiley Levy Report, above n.2, [4.156]-[4.164].

[189] Response to Hiley Levy Report, above n.169, p.1.

[190] Response to Hiley Levy Report, above n.169.

[191] Hiley Levy Report, above n.2, recommendations 9 and 11.

material has not been implemented. It was referred to the 2008 funding review being undertaken by the Native Title Coordination Committee.

4.4.1 Implementing the Hiley Levy Report – the Native Title Amendment Bill 2006

Schedule 2 of the Amendment Bill reflects the findings of the Hiley Levy Report; it focuses on increasing the authority and effectiveness of the NNTT.

4.5 Description of Changes

In general terms the amendments deal with the following matters:

1. Greater communication and coordination between the Court and the NNTT, including by:
    a. Giving the NNTT the right to appear before the Court to provide assistance to the Court;
    b. Enabling the NNTT to provide reports about the progress of mediation in a particular State, Territory or region and to provide regional work plans to the Court; and
    c. Requiring the Court, when making orders, to take into account certain reports provided by the NNTT.
2. Removing the duplication of functions between the Court and the NNTT;
3. Improving the effectiveness of NNTT mediation, by giving the NNTT:
    a. Power to compel parties to attend mediation conferences and to produce documents;
    b. A new function to conduct a review into whether a native title claim group holds native title rights and interests;
    c. Power to conduct native title application inquiries into issues relevant to a determination of native title arising in one or more native title applications.
4. Addressing the behaviour of parties by:
    a. Requiring all parties to mediation before the NNTT to act in good faith;
    b. Empowering the Court to dismiss claims made in response to future act notices; and
    c. Empowering the Court to dismiss unregistered claims.
5. Miscellaneous matters including:
    a. Empowering the Court to make a determination over part of an application area; and
    b. Reducing both the range of people who can become parties and their role in the proceedings.

4.6 Particular Reforms

4.6.1 NNTT right to appear before the Court

4.6.1.1 Situation under the old NTA

Previously, the NNTT had no right to appear. It had the roles of having mediation referred to it and making reports about that mediation to the Court.[192]

4.6.1.2 The Amendments

The NNTT now has the right to appear in two types of hearings, those:

1. To determine whether to make an order that there be no mediation by the NNTT in relation to the whole or part of a proceeding; and
2. That relate to any matter that is currently before the NNTT for mediation for the purpose of assisting the Court in relation to a proceeding.[193]

The amendments mean that the Court will have to consider any submission made by the NNTT on the question whether there should be no NNTT mediation.[194]

The NNTT President may direct who can appear on behalf of the NNTT.[195] There does not appear to be any limitation on who could be directed to appear. Certainly, there seems to be no requirement that he or she be a legal practitioner. The person appearing on behalf of the NNTT should have adequate knowledge and experience in relation to the case; therefore it seems likely that NNTT case managers will be appearing.

When the NNTT does appear, it is bound by the confidentiality requirements of mediation conferences. However, the member who conducted a mediation conference in relation to a particular case can appear on behalf of the NNTT in relation to that case.[196]

4.6.1.3 Analysis of changes

This right of appearance does not mean that the NNTT is a party to native title proceedings.[197] It has no interest in the litigation, but a role as an independent mediator.[198]

The NNTT will have to be careful not to take too active a role in Court where there are disputes between the parties. Real or perceived loss of its

[192] Former ss.86B, 86E and 136G NTA.

[193] Sections 86BA(1) and (2) NTA.

[194] Section 86B(4)(ea) NTA.

[195] Section 123(1)(ca) NTA.

[196] Section 86BA(3) and (4), referring to ss.136A(4) and (5) NTA.

[197] Section 86BA(5) NTA.

[198] Hiley Levy Report, above n.2, [4.49].

impartiality may conflict with its role in facilitating agreement between the parties.

4.6.2 Enabling the NNTT to provide regional mediation reports and regional work plans to the Court

4.6.2.1 Situation under the old NTA

Previously, the NNTT could make reports about any mediation it was conducting, once it was completed, or at the request of the Court. It could also provide a report while mediation was in progress if the presiding member considered it would assist the Court.[199]

In practice, the NNTT provided regional work plans, allocating its resources and efforts regionally among particular matters, and regional mediation progress reports to provide the Court with regional information and to form the basis of Court orders, progress assessments and future planning:

> For example, the regional reports provide[d] information to the Court about regional anthropological research, the resources available to parties, prioritisation of applications by the major parties and the involvement of parties in other negotiations or proceedings that might affect their ability to engage fully in a particular mediation.[200]

4.6.2.2 The Amendments

The NNTT must now provide the following written reports to the Court:

1. A report after the successful conclusion of mediation;
2. A report on the progress of mediation, if requested to do so by the Court; and
3. A regional mediation progress report or a regional work plan, if requested to do so by the Court.[201]

In addition, the NNTT may also provide the following reports:

1. A report on the progress of mediation, if the NNTT considers it would assist the Federal Court in progressing the proceedings;
2. A regional mediation progress report or a regional work plan, if the NNTT considers it would assist the Court in progressing the proceedings;
3. A report concerning failure to comply with a direction, including details of the direction and reasons for giving it; and
4. A report that a party or its representative did not act, or is not acting, in good faith in relation to the conduct of a mediation.[202]

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[199] Former ss. 86E and 136G NTA.

[200] Hiley Levy Report, above n.2, [4.55].

[201] Subsections 136G(1), (2) and (2A) NTA. The requirement to provide a regional mediation progress report or a regional work plan is new.

4.6.2.3 Analysis of changes

These changes attempt to improve communication between the NNTT and the Court, and are implicitly aimed at giving the NNTT more control over the mediation process.

The changes exacerbate the exclusion of Representative Bodies from a substantive role in directing the mediation process. They take no account of the position of Representative Bodies and applicants, who have the least resources of any participant in native title processes, and notionally at least, are supposed to be driving the process. The Aboriginal and Torres Strait Islander Social Justice Commissioner is concerned about:

> … the potential for regional work plans to be made, and priorities to be set, without proper regard to the objectives and priorities of the relevant representative body or bodies. It is widely recognised that representative bodies are under-resourced. It is therefore essential that they be in control of how their resources are allocated. To the extent that NNTT reports could affect representative bodies' priorities, they should be considered in the context of the conditions in which representative bodies operate.[203]

Ideally, there should be consultation with Representative Bodies in the preparation of these reports and work plans. At the least, they should be given time to prepare proper responses to them in making submissions to the Court. This does happen in some circumstances, but may not occur in all.[204]

4.6.3 Requiring the Court to take into account certain NNTT reports

4.6.3.1 Situation under the old NTA

The Court had to consider reports it had requested and reports volunteered by the NNTT in making any decision whether mediation should cease.[205] In practice, the NNTT provided reports to the Court before every directions hearing into each matter in mediation. However, it appears that Judges around Australia did not take a uniform approach to accepting or considering these reports.[206]

4.6.3.2 The Amendments

The NNTT can provide:

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[202] Sections 136G(3), (3A) and (3B) and 136GA(4) NTA. The formal options of providing a regional mediation progress report or a regional work plan, or a report concerning failure to comply with a direction, or a report that a party is not acting in good faith are new.

[203] Calma Submission to Senate on Amendment Bill, above n.51, [80].

[204] See Calma Submission to Senate on Amendment Bill, above n.51, [86].

[205] Former s. 86C(5) NTA.

[206] Hiley Levy Report, above n.2, [4.51].

- Reports on the progress of mediation,
- Regional mediation progress reports, and
- Regional work plans,

whether at the request of the Court or not, for the purpose of deciding whether mediation should cease or if it considers that it would assist the Court.[207]

Now, the Court must take such reports and work plans, together with reports about failure to comply with a NNTT direction,[208] into consideration when deciding whether mediation should cease.[209]

In addition, the Court must take into account reports provided by the NNTT on the progress of mediation, after the conclusion of mediation, together with regional mediation progress reports and regional work plans, whether provided at the request of the Court or not, when making any order relating to an application that has been referred to mediation.[210]

The weight the Court gives any of these reports remains within its discretion.

4.6.3.3 Analysis of changes

These changes potentially give the NNTT far more influence over the orders the Court makes about the progress of native title proceedings. While, the Court retains ultimate control over the conduct of matters before it, it is likely that if the parties' views as to the appropriate progress of the matter differ from those of the NNTT, they will have to be very persuasive to obtain the orders they seek.

Further, the Court may frustrate efforts by Representative Bodies to adhere to their own strategic and operational plans, unless their views about the progress of matters on a regional basis are taken into account by it, either directly, or via the NNTT taking account of those views in preparing its reports.[211]

4.6.4 Removing the duplication of functions between the Court and the NNTT

4.6.4.1 Situation under the old NTA

Previously, the Court controlled the mediation process. It was required to refer all applications to mediation unless an order was made otherwise, and could order that mediation cease.[212] The Court could undertake alternative dispute resolution procedures, including mediation, at the same time that the NNTT was mediating the matter.

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[207] Subsections 136G(2), (2A), (3), (3A) and (3B) NTA.

[208] Made under s.136G(3B) NTA.

[209] Section 86C(5) NTA.

[210] Section 94B NTA.

[211] See, for instance, Carpentaria Submission to Senate on Amendment Bill, above n. 70, [32].

[212] Former ss.86B and 86C NTA.

4.6.4.2 The Amendments

The overall effect of the amendments is to ensure that once the Court refers a proceeding to the NNTT for mediation, only the NNTT can undertake mediation in respect of the proceeding. Thus, 'mediation' in the NTA means mediation undertaken by the NNTT.[213] The Court is not to have any role in alternative dispute resolution while the NNTT is mediating proceedings.

This aim is achieved by repealing s.86B(2), which provided that the Court could order that a matter not be referred to mediation. The Court will no longer have a general discretion not to refer a matter to mediation by the NNTT. It must refer every application to the NNTT for mediation as soon as practicable after the end of the period for notification of applications, unless it orders otherwise for a specific reason.[214]

However, the Court will still have power to order that there be no NNTT mediation if:

- Mediation by the NNTT or by the Court will be unnecessary;
- There is no likelihood of agreement through NNTT mediation; or
- There is insufficient detail in the application, or elsewhere, about the matters to be established in order for a determination of native title or a compensation determination to be made.[215]

Thus, a matter must be referred to mediation by the NNTT, unless there are clear reasons why it should remain before the Court. Factors to be taken into account are set out in s.86B(4). The NNTT will be able to appear before the Court if it is considering making such an order,[216] and the Court will have to take any submission it makes into account.[217]

If the Court refers any part of a proceeding to NNTT mediation, unless an order is made under s.86C that mediation cease, no aspect of the proceeding may be mediated under the *Federal Court of Australia Act 1976*.[218] In making such decisions, the Court is now required to take into account regional mediation progress reports or regional work plans provided under s.136G.[219] The Court must give priority to mediation by the NNTT, rather than having greater discretion about where mediation is to be conducted.

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[213] For example, see 86A(1) and (2), which set out the purpose of mediation. The amendments make it clear that such mediation is only to be undertaken by the NNTT. There are several other amendments that limit the concept of mediation in the NTA to mediation by the NNTT.

[214] Section 86B(1) NTA.

[215] Section 86B(3) NTA. Note that s.86B(3)(c) refers to insufficient detail about the matters mentioned in ss.86A(1) or (2). These provisions in turn refer to the matters required to be established before a determination of native title or a compensation determination can be made.

[216] Section 86BA(1) NTA.

[217] Section 86B(4)(ea) NTA.

[218] Section 86B(5) NTA.

[219] Section 86C(5) NTA.

This does not completely remove the power of the Court to determine when a matter should be referred to mediation. One of the potential reasons for ordering that there be no NNTT mediation is that other alternative dispute resolution tools, such as mediation by a Registrar of the Court and other action, are likely to produce agreement, while NNTT mediation is not.

The Court can refer a proceeding to NNTT mediation at any time if it considers that the parties might be able to reach agreement.[220] In addition, the Court will still be able to conduct 'directions hearings, most case management conferences, preservation of evidence hearings, and limited evidence hearings, and other forms of alternative dispute resolution, including arbitration'. It will also be able to order parties to attend before a Registrar to clarify the real issues in dispute.[221]

Thus, in summary:

- The Court may, of its own motion, order that NNTT mediation cease if mediation by the NNTT or by the Court will be unnecessary, or there is no likelihood of agreement through NNTT mediation.[222]
- After three months of NNTT mediation, a party may seek an order that mediation cease.[223]
- If the applicant or a government seeks the order, the Court must make it unless it is satisfied that the mediation is likely to be successful.[224]
- If another party seeks the order, the Court may make it unless it is satisfied that the mediation is likely to be successful.[225]

The amended provisions governing referral of mediation to the NNTT apply to all applications made after 15 April 2007 and to the referral of proceedings to mediation after that date.[226] If proceedings were in both NNTT and Court mediation on 15 April 2007, the Court had to order by 15 October 2007 that one of the mediations cease.

[220] Section 86B(5) NTA.

[221] Amendment Bill Explanatory Memorandum, above n.49, [2.34].

[222] Section 86C(1) NTA.

[223] Section 86C(2) NTA.

[224] Section 86C(3) NTA.

[225] Section 86C(4) NTA.

[226] Items 79 and 80(2), Part 2, Schedule 2, *Native Title Amendment Act 2007* (Cth) (**Amendment Act**).

4.6.4.3 Analysis of changes

These reforms signal a significant shift in the character of the NNTT. It is to play a far greater role in mediation, while the Court's role is reduced.

The Joint Parliamentary Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund Inquiry into the effectiveness of the NNTT[227] relied on the NNTT's own submission to describe its primary function as assisting people to resolve native title issues through agreement-making.[228] The NNTT has focused on facilitating dialogue, agreement, mediation and arbitration, while assisting its broader 'agreement making' objectives by providing information, support and resources to parties. In contrast, the Court has coercive powers to deal with parties behaving inappropriately or refusing to engage in mediation and negotiation. Giving greater directive powers to the NNTT risks blurring the distinction between the roles of mediator (NNTT) and decision-maker (the Court) and may ultimately lead to constitutional problems.

Sections 86B and 86C provide rather blunt tools to co-ordinate the roles of the NNTT and the Court. A matter, or part of it, must be before one of them; it, or part of it, cannot be mediated by both at once. There is no scope for any nuanced interplay of the mediation tools wielded by the Court and by the NNTT.

In addition, these changes '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'.[229] Once an application is filed with the Court it has 'carriage' of the matter until conclusion, subject to the NNTT's conduct of mediation. Where the matter is before the NNTT, removing the power of the Court to use its discretion to manage the proceeding may impede the Court's judicial independence.

While the matter is still filed and determined in the Court, it can no longer apply its judicial practices and case management skills to complex legal questions as distinct from factual misunderstandings. It is likely that this will cost the NNTT and the Court some of the efficiency the proposals are intended to facilitate. In some cases, the Court may order that NNTT mediation cease, or the NNTT may engage in stagnant mediation, without recourse to 'circuit breaker' action. The results might be longer mediations (if they occur at all) and increased delays.

Further, there are situations where automatic referral to NNTT mediation may be counter-productive, particularly where an application has been filed for the

[227] Joint Committee Report into the NNTT, above n.155, [2.7].

[228] Submission from the NNTT to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Submission 22, *Inquiry into the Effectiveness of the National Native Title Tribunal* (2002).

[229] Registrar of the Federal Court Submission to the Senate Committee on Legal and Constitutional Affairs, submission 8, *Inquiry into the Native Title Amendment Bill 2006* (2007)(**Federal Court Submission to Senate on Amendment Bill**), p.4.

sole purpose of forming the basis of a Court determined outcome through a particular litigation or settlement path, such as a test case.[230] The Court does have discretion under s.86B to order that a matter not be referred to mediation, but the presumption is strongly in favour of NNTT mediation.

4.6.5 NNTT power to compel parties

4.6.5.1 Situation under the old NTA

The NNTT had limited powers of compulsion to direct parties to participate properly in mediation. Some parties saw 'NNTT mediation as being a "soft" process and consider[ed] that timely and effective mediation [was] more likely to be achieved through Federal Court mediation'.[231] Given the adoption of an institutional structure that gives the NNTT control over the mediation process, the Hiley Levy Report argued that it is appropriate for it to be able to take steps to ensure that parties participate properly.

4.6.5.2 The Amendments

The presiding NNTT member at mediation conferences has gained new powers of compulsion regarding those conferences, which are directed to achieving more effective mediation.

The presiding member can direct a party to:

- Attend a mediation conference; and
- Produce a document to the presiding member if he or she considers it may assist the parties to reach agreement.[232]

If a party does not comply with such a direction, the presiding NNTT member may provide a written report about that non-compliance to the Court, which can make orders in similar terms to the direction.[233] Such orders would be enforced in the usual way by the Court.

4.6.5.3 Analysis of changes

These new powers to compel attendance and the production of documents are aimed at making NNTT mediation more effective and efficient at resolving issues between parties. These changes are directed to the perceived problems in the progress of claims in mediation, particularly the difficulty in getting early momentum toward an agreed settlement of the claim.

However, compulsion to produce documents has the potential to take control over the material to be provided in mediation from the parties. Such

[230] Federal Court Submission to Senate on Amendment Bill, above n.229, pp.6-7.

[231] Hiley Levy Report, above n.2, [4.33].

[232] Sections 136B(1A) and 136CA NTA.

[233] Sections 136G(3B) and 86D(3) NTA.

documents may well have been prepared with the understanding that they would be subject to privilege. NNTT directed production may be inconsistent with the mediation strategy formulated by a party. The new power may mean that parties are less willing to prepare such documents, or to hint that they exist. Mediation may be less successful with such reticence. Therefore, the capacity of parties to make the most of the opportunity presented by mediation may be compromised. If a party does not wish to produce particular documents, its only option might be to seek an order from the Court that mediation cease. This could be an excessive response in circumstances where mediation may lead to at least some resolution of the matters in issue.

Production of material in mediation by an applicant, which has the burden of proof on the establishment of native title, may prejudice it, if the matter proceeds to trial. This possibility should be taken into account in any decision to compel production.[234]

These powers illustrate the investment the system now makes in mediation as *the* means to resolve native title disputes. If mediation fails, the capacity of the system to deal fairly with the issues in dispute may be compromised by some of the procedures directed to achieving a mediated outcome.

Further, the Federal Court Registrar is concerned that these coercive powers may be subject to administrative review, as well as to judicial enforcement:[235]

> 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.[236]

This may mean more expense and delay. The possibility of ADJR Act review casts doubt on the enforceability of NNTT coercive orders.

4.6.6 NNTT review into whether a native title claim group holds native title rights and interests

4.6.6.1 Situation under the old NTA

The effect of the High Court's *Brandy* decision in 1995[237] is that the NNTT, as a non-Chapter III tribunal, cannot make decisions binding on the parties before it. That led to the institutional relationships between the Court and the NNTT being altered by the 1998 amendments to the NTA. Thus, the NNTT's role

[234] Calma Submission to Senate on Amendment Bill, above n.51, [92].

[235] Federal Court Submission to Senate on Amendment Bill, above n.229, p.4.

[236] Federal Court Submission to Senate on Amendment Bill, above n.229, pp.5-6.

[237] *Brandy v Human Rights And Equal Opportunity Commission And Ors* (1995) 183 CLR 245.

was reduced to mediation, and other more administrative functions, while the Court determined any substantive issues between the parties. This decision still governs the comparative powers of the NNTT and the Court.

In addition, the development of new alternative dispute resolution practices by courts in general, and of Federal Court practices addressed specifically to resolving native title matters has led to it becoming more effective at resolving native title disputes by agreement. The new changes do not fully respect the ability of the Court to effectively assist in negotiated settlement.

4.6.6.2 The Amendments

Several amendments are directed to making the NNTT more effective in performing its mediation function. One of these is giving it the function of reviewing whether a native title claim group holds native title rights and interests, in particular, issues surrounding connection with land or waters in the application area. Providing an independent assessment of the likelihood of success in the litigation to the applicant or to the parties is one established means of achieving results in mediation.

The President of the NNTT may only refer this issue for review if it arises in the course of the mediation and the presiding member at a mediation conference recommends that the review be conducted. The presiding member may only make such a recommendation if he or she considers, after consultation with the parties, that the review would assist them to reach agreement.[238] All parties need not consent to the review; nor need they all participate. There is no power to compel attendance or the production of documents.

The review may be conducted by a NNTT member or a consultant engaged by the NNTT for the purpose, on the basis of documents or information given to it by a party. The person conducting the review can be assisted by another member or a staff member of the NNTT, which might be useful if the material provided includes anthropological or historical material.[239]

The review is to be without prejudice to the proceedings in the Court. Mediation can continue while the review is taking place, but it must cease if mediation ceases. A member participating in the review must take no further part in the proceeding, unless the parties all agree otherwise.[240]

The member conducting the review can direct that information or documents provided during the review be kept confidential. Contravention of such a direction is an offence.[241] A report setting out the findings of the review must be given to the presiding member in the mediation and to the participating

[238] Sections 136GC(1)-(3) NTA.

[239] Sections 136GC(5) and (6) and 131A(1) NTA; see Amendment Bill Explanatory Memorandum, above n.49, [2.135].

[240] Sections 136GC(7)-(10) NTA.

[241] Sections 136GD and 176 NTA.

parties. It may be given to the Court and to the other parties.[242] Regulations may be made governing the way any such review is to be conducted.[243] No such regulations have yet been made.

4.6.6.3 Analysis of changes regarding reviews

The Government anticipates that these reviews will largely be an assessment of material regarding 'connection', which is often the most significant question in determining whether a claim group holds native title rights and interests.[244] Presently State and Territory Governments make their own assessment of connection according to their own criteria, which differ from jurisdiction to jurisdiction. It may be that applicants will seek an independent assessment of connection from the NNTT, if State or Territory assessments are seen as too narrow.

The Western Australian Government is concerned that this will 'undermine State and Territory government connection assessment processes, cause further delays and place increased pressure on an already limited pool of experts in the system'.[245] If NNTT connection reviews are conducted by expert anthropologists, there may be further demands placed on them, leading to delay in the resolution of applications.[246]

This review process can potentially duplicate the State requirements for establishing connection.[247] Problems may arise if the NNTT review finds that the relevant connection is established and the State or Territory considers that its connection criteria are not met. In such circumstances, the State or Territory may not be willing to make any agreement that recognises native title. It may seek an order that mediation cease, or it may be subject to a finding that it is not participating in mediation in good faith.

A review will have to be conducted by parties with a similar level of care and attention to a trial, since an adverse outcome could have adverse consequences for the parties involved. The rules of natural justice will apply, so all parties will be able to provide evidence and make submissions. Reviews may be conducted in much the same form as Court proceedings, even though they are administrative processes. The Aboriginal and Torres Strait Islander Social Justice Commissioner believes that it is 'likely that reviews … will be routinely requested by respondents in the course of mediation.'[248] Therefore, the conduct of reviews might become quite onerous. This burden is likely to fall heavily on applicants, since Representative Body funding for them is limited.

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[242] Section 136GE NTA.

[243] Section 136H(1)(c) NTA.

[244] Amendment Bill Explanatory Memorandum, above n.49, [2.132].

[245] ONT(WA) Submission to the Senate on the Amendment Bill, above n.143, [9].

[246] ONT(WA) Submission to the Senate on the Amendment Bill, above n.143, [11].

[247] ONT(WA) Submission to the Senate on the Amendment Bill, above n.143, [10].

[248] Calma Submission to Senate on Amendment Bill, above n.51, [104].

It seems likely that a review will not take place if the applicant does not decide to participate. The NNTT and the other parties might place considerable pressure on it to participate. Respondents may seek to have the matter removed from mediation and set down for trial if the applicant does not participate. Since the applicant bears the burden of proof in establishing that the native title claim group holds native title rights and interests, its case will be the subject of the review. Therefore, it will need to make particular efforts in the review if it does decide to participate.

If the decision in the review is against the applicant, its only option will be to take the matter to trial, since it is unlikely that the respondents will wish to participate further in mediation. At trial, the parties participating in the review will have had the advantage of already having seen the material relied on in the review and report. Respondents will be alive to the weaknesses of the applicant's case. There is no absolute prohibition on that material and the report not being provided to the Court.[249]

The findings of a review are not binding on the parties, since it is simply a mediation tool: no party is ultimately bound by the mediation process. Each party can ignore the findings, refuse to reach a negotiated outcome, and seek to take the matter to trial. Thus, potentially, the intensive conduct of a review may have no impact on the final outcome of the proceedings, while using much time and resources.

The introduction of an additional review process for connection materials is illogical. There is no established benefit in investing more resources in duplicating a process that the States have insisted on before agreeing to enter into mediation. This creates the perception of a half hearted attempt to wrest control of the connection assessment bottleneck from the States without the requisite legislative mechanisms that will ensure that connection assessment processes carried out by State parties will be more transparent and efficient.

4.6.7 NNTT native title application inquiries

4.6.7.1 Situation under the old NTA

The NNTT cannot make decisions binding on the parties before it. Therefore, its alternative dispute resolution functions are limited to actions aimed at helping parties to resolve disputes between them. Amendments have been made to make the NNTT more effective in performing its mediation function, including giving it the function of inquiring into issues relevant to the determination of native title.

Previously, the NNTT could hold an inquiry in relation to a particular matter or issue relating to native title, if directed by the Minister. It was contemplated that these inquiries would cover the effects of validating past acts or intermediate period acts, alternative forms of compensation, and action that could be taken to assist Aboriginal peoples and Torres Strait Islanders where native title had been extinguished.[250] None of these matters are

[249] See generally, Calma Submission to Senate on Amendment Bill, above n.51, [107].

[250] Section 137 NTA.

particularly directed at resolving the substantive issues between parties in a determination of native title under s.225 NTA.

4.6.7.2 The Amendments

The amendments provide for the President of the NNTT to direct members of the NNTT to hold an inquiry in relation to a matter or an issue relevant to the determination of native title under section 225. The President can do so on his or her own initiative, at the request of a party, or at the request of the Chief Justice of the Court. Thus, the Court need not necessarily be involved in a decision to hold an inquiry. An inquiry cannot be held into a compensation application, but otherwise can cover more than one native title proceeding. The President must consider that resolution of the matter or issue would lead to some positive action being taken towards resolving the application. The applicant must agree to participate; if the applicant does not agree, the inquiry cannot take place.[251]

Before directing that such an inquiry be held, the President must give written notice to the Minister, the relevant State or Territory Minister, the Court, the relevant Representative Body or NTSP, the applicant, and all other parties to any application affected by the proposed inquiry. There is no requirement to notify the public. The inquiry cannot begin until seven days after notice is given,[252] in order to allow bodies or individuals time to decide whether to become, or seek to become, parties to the inquiry. Parties to an inquiry include:

- The applicant in relation to any application affected by the inquiry;
- Any Minister of the Commonwealth or any relevant State or Territory who informs the NNTT that she or he wishes to become a party; and
- Any other person, with the leave of the NNTT.[253]

Mediation can continue while an inquiry is being conducted. However, a request that an inquiry be held can be held before a matter is referred to mediation.[254] A review into whether a claim group holds native title rights and interests cannot occur at the same time as an inquiry.[255] An inquiry and a review potentially cover the same ground. A member holding an inquiry can take no further part in the proceedings.[256]

If a hearing is held as part of an inquiry, it must be held in private, unless it is appropriate to hold a public hearing and the parties consent. In making such a

[251] Sections 138B and 138G NTA.

[252] Section 138D NTA.

[253] Section 141(5) NTA. It appears that the parties to an inquiry could include persons who are not even parties in the proceedings, though it is unlikely that any such person would want to be involved.

[254] Section 136B(3) NTA.

[255] Section 138E NTA.

[256] Section 138C(2) NTA.

decision, the NNTT must have due regard to cultural and customary concerns.[257] A person may not be compelled to give evidence to an inquiry.[258]

An inquiry must cease if the Court orders that mediation must cease. If a party to the inquiry no longer agrees to participate, the President may direct that the inquiry cease.[259]

After holding an inquiry, the NNTT must make a report about the matters or issues covered by it. The report may contain recommendations to the parties, which are not binding on them, and must state any findings of fact.[260] The NNTT has to give a copy of the report to the Court.[261]

The Court must consider whether to receive the transcript of evidence from an inquiry into evidence in proceedings in the Court, and may draw any conclusions of fact from that transcript that it thinks proper. It may adopt any recommendation, finding, decision, or determination of the NNTT in relation to an inquiry.[262]

Thus, evidence given to an inquiry is not 'without prejudice'; it may end up as evidence in proceedings in the Court. Further, the NNTT's findings in an inquiry may influence the ultimate outcome of the litigation.

4.6.7.3 Analysis of changes regarding inquiries

It may be that few inquiries will take place. The ultimate decision lies with the President of the NNTT, who will be bound by the resource constraints operating on the NNTT, even though a request is made by a party or the Court. In addition, the consent of the applicant is necessary.

An inquiry is entirely voluntary. A party may not be compelled to attend, and a person may not be compelled to give evidence. However, the fact that evidence given to an inquiry could end up as evidence in the Court means that parties need to pay particular attention to the conduct of native title application inquiries. If inquiries occur, it is likely they will be full blown hearings conducted in a legalistic way by the NNTT. The fact that the results will end up in Court means that parties may be unwilling to participate as they find themselves leaping over another hurdle in a long process.

The facts that an inquiry can be conducted on the initiative of the NNTT, without involving the Court, and that the Court may receive the transcript and findings into evidence, means that the Court no longer has full control over the process of adjudicating native title proceedings. The NNTT determines the questions the inquiry is to be directed to and the manner in which it is conducted. There is great potential for duplication and confusion.

[257] Section 154A NTA.

[258] Section 156(7) NTA.

[259] Section 138F NTA.

[260] Section 163A NTA.

[261] Section 164(2) NTA.

[262] Section 86(2) NTA.

In addition, the conduct of inquiries is even more transparent than that of reviews. Hearings may be public, the report must be provided to the Court, and the Court can receive the transcript into evidence.[263] Conducting a native title inquiry may extend the NNTT's role beyond mediation, so that, effectively, its decisions shape the final adjudication of the issues in dispute. This is an inappropriate outcome for a mechanism directed to resolving a matter by agreement.

The concerns expressed above regarding reviews also apply to inquiries, particularly:

- The conduct of inquiries will be onerous for parties, and especially for applicants;
- Adverse findings may impact on a party's involvement in mediation and ultimate success at trial, since the other parties will be aware of weaknesses in its case; and
- The conduct of an inquiry may have a limited impact on the success of mediation, since a party may ignore the findings and seek to go to trial.

4.6.8 Analysis of changes regarding reviews and inquiries

Inquiries and reviews are likely to create further complications in a process that is already long and drawn-out, and that may well be resisted by native title (and other) parties.

At least in theory, reviews and inquiries are tools aimed at resolving native title matters in addition to:

- NNTT mediation;
- The referral of discrete issues of fact or law arising in the context of NNTT mediation to the Federal Court for determination pursuant to ss.86D and 136D(1);
- Conferences directed by the Court, including conferences in which evidence is taken by an assessor appointed by the Court;
- Case management conferences conducted by the Court for the purpose of managing the conduct of the proceedings;
- Court ordered mediation conducted under s.53A of the *Federal Court of Australia Act 1976* and Order 72 of the *Federal Court Rules 1979*;
- The determination of 'separate questions' of fact or law by the Court under Order 29 of the *Federal Court Rules*; and
- Hearings of evidence and argument by the Court at trial.[264]

They add to the complexity of possible mechanisms aimed at dealing with native title matters.

[263] Sections 154A(3), 164(2), and 86(2) NTA respectively.

[264] See Calma Submission to Senate on Amendment Bill, above n.51, [118].

4.6.9 All parties to NNTT mediation to act in good faith

4.6.9.1 Situation under the old NTA

The only requirement under the NTA for parties to act in good faith was for a native title party, a grantee party and a Government party to negotiate in good faith in relation to carrying out a future act subject to the right to negotiate.[265]

This minimum requirement did little to encourage good faith negotiations in mediation. There was 'a growing tendency for parties to mediation to exhibit a lack of good faith during mediation'.[266] A good faith obligation exists in relation to alternative dispute resolution ordered under s.34A of the *Administrative Appeals Tribunal Act 1975* (Cth).[267] The Hiley Levy Report recommended that consideration be given to including a good faith obligation for mediation under the NTA.[268]

4.6.9.2 The Amendments

Each party and each person representing a party must act in good faith in relation to the conduct of mediation.[269] Failure to act in good faith, together with the context in which it occurs, may be reported by the presiding member at the mediation:

- To the government body that funds the representation;
- To legal professional bodies; and
- To the Court.[270]

These reports are not made 'without prejudice' to professional bodies and to the Court[271], despite the mediation context.

The failure of parties to act in good faith can also easily become public information. If good faith is not shown by a government party, that failure and the reasons why the presiding member considers that the conduct was not in good faith may be included in the NNTT's annual report.[272]

However lack of good faith is not a barrier to mediation. Mediation can continue notwithstanding the failure of a party to act in good faith.[273]

[265] Section 31(1)(b) NTA.

[266] Hiley Levy Report, above n.2, [4.39].

[267] Hiley Levy Report, above n.2, [4.39].

[268] Hiley Levy Report, above n.2, recommendation 4.

[269] Section 136B(4) NTA.

[270] Section 136GA NTA.

[271] Sections 136GA(3) and (4) NTA.

[272] Sections 136GB and 133(2A) NTA.

[273] Section 136GA(9) NTA.

4.6.9.3 Mediation Guidelines

One of the recommendations of the Hiley Levy Report in association with the recommendation that there be a requirement that parties negotiate in good faith was that the Government develop a code of conduct for parties involved in native title mediations.[274]

In October 2007, the Attorney General approved *Guidelines for the behaviour of parties and their representatives in mediation in the NNTT*, which were 'developed to assist parties in meeting this obligation and to encourage parties to act in a way that is conducive to agreement-making'.[275] They are described as 'a guide for parties and their representatives about behaving in good faith'. They are not 'an exhaustive statement of the standards of behaviour expected of parties and their representatives', nor are they legally binding on the NNTT, or parties and their representatives. However, the presiding NNTT member '*may* take the Guidelines into account in considering if a party has acted in good faith'.[276]

The Mediation Guidelines deal with:

1. The behaviour of parties. Specific issues covered include integrity, co-operation, courtesy, cultural courtesy, 'without prejudice', disclosure of information, and cultural confidentiality;
2. Preparation for mediation, which sets out activities that might lead to a successful mediated outcome. These include identifying parties' concerns, timely production of relevant materials, and reading the material before mediation commences;
3. Effective resolution principles that might guide a successful outcome, including elements of effective participation in mediation, matters affecting a genuine desire to reach agreement, and what effective communication might require; and
4. Matters that might affect a mediation timeline, including avoiding unnecessary delay, obtaining instructions in a timely manner, compliance with mediation timetables, and avoiding substantive and last minute changes of position.[277]

4.6.9.4 Analysis of changes

No direct consequence of failing to act in good faith is prescribed. The consequences will be left to the body to which the report is made. The consequences could be severe.

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[274] Recommendation 4.

[275] Commonwealth Government, *Mediation Guidelines: Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal*, Attorney General, Commonwealth Government, Canberra, 2007 (**Mediation Guidelines**), p.2.

[276] Mediation Guidelines, above n.275, p.3.

[277] Mediation Guidelines, above n.275, pp.6-11.

In the context of the litigation, a report that a party has not negotiated in good faith to the Minister responsible for funding its participation in the mediation may impact on the availability of future funding. This applies to parties funded through Representative Bodies and to respondents funded by the Attorney General. It appears likely that any report of a lack of good faith made to the Commonwealth Minister will result in the withdrawal of, or the imposition of conditions on, funding. This may affect the course of litigation before the Court.[278]

An adverse report to a professional association, such a law society or a bar association, may have substantial effects on a legal representative's future capacity to practise, and thus represent any party.

There is no requirement for the NNTT to inform the party or representatives considered not to be acting in good faith before an adverse report is made. Thus, there is no explicit requirement to accord natural justice to such parties or their representatives.[279]

The fact that the NNTT's report can be made available through its annual report is also a serious concern. In particular, parties may be exposed to negative perceptions which may in turn affect their standing in mediation or at trial in other proceedings.

4.6.10 Dismissal of claims made in response to future act notices

4.6.10.1 Situation under the old NTA

One of the means the Hiley Levy Report identified for addressing the effectiveness and efficiency of the native title system was to reduce the backlog of native title applications. About one third of native title determination applications (about 200) appear to have been lodged in response to future act notices. In many cases, the application remains on foot even though the relevant future act has been done.[280]

This is one of the consequences of having an administrative and a judicial process (that is, the right to negotiate and a determination of native title) initiated by the *same* act of filing an application in the Court. Both processes require identification of the group of potential native title holders in respect of an identified area, being that affected by the future act or by a proposed determination of native title. Filing a native title application is directed to providing that information. However, the conduct of two processes that are necessarily linked in this way leads to procedural difficulties for each of them.

There are considerable advantages to applicants in having a registered claim filed with the Court. They avoid the work and uncertainty of having to re-file an application and seek its registration in response to another future act.

[278] NLC Submission to the Senate on the Amendment Bill, above n.139, p.5.

[279] ONT(WA) Submission to the Senate on the Amendment Bill, above n.143, [8].

[280] Hiley Levy Report, above n.2, [4.122].

Having the status of being registered claimants increasingly confers procedural rights under State and Territory legislation, as well as the NTA.[281]

A policy decision has been made that the 'time and resources of the Court, the [Representative Body], the NNTT, and other parties should not be used for claims that the applicants (*sic*) do not wish to progress'.[282] Applicants are deemed not to wish to progress applications made solely to gain access to the right to negotiate. Therefore, the Hiley Levy Report recommended that there should be a mechanism for them to be taken out of the system. Such a mechanism would be in addition to the current powers of the Court to strike out applications under the *Federal Court Act* or under s.84 NTA.

4.6.10.2 The Amendments

In order to achieve this aim, the Amendment Act introduced ss.66C and 94C. Originally, under s.66C, the NNTT Registrar was to advise the Court Registrar of the following matters: that an application was made within three months after notification of a future act, the applicant became a registered native title claimant within four months of that date, and the right negotiate process is complete. Under s.94C, the Court had to dismiss an application meeting these criteria, where the applicant was not taking steps to have the claim sought in the application resolved, unless there were compelling reasons not to do so.

These new provisions were amended by amendments to the Technical Amendments Act made in the Senate on 13 June 2007 in response to a submission by the NNTT to clarify that s.94C would apply to applications made before 30 September 1998.[283]

Section 66C

Section 66C empowers the NNTT Registrar to advise the Federal Court Registrar if sections 94C(1)(a)-(c) NTA apply.

This report is a statutory means for drawing to the attention of the Court applications which may meet the conditions for dismissal under s 94C.[284] The Court must satisfy itself that the conditions are met. In so doing it is not bound to act upon the advice of the NNTT Registrar.[285]

Section 94C

The purpose of s.94C is to provide for summary dismissal of native title determination applications that have been filed to secure procedural rights with respect to future acts covered by the right to negotiate provisions of

[281] For instance, the *Aboriginal Cultural Heritage Act 2003* (Qld); see Hiley Levy Report, above n.2, [4.121].

[282] Hiley Levy Report, above n.2, [4.122].

[283] Senate Legal and Constitutional Affairs Committee, *Inquiry into Native Title Amendment (Technical Amendments) Bill 2007*, Senate Legal and Constitutional Affairs Committee, Canberra, 2007 (**Senate Committee Report on Technical Amendments Bill**), [3.47]-[3.50].

[284] *Webb v State of Western Australia* [2007] FCA 1342 (28 August 2007) (***Webb***), at [8].

[285] *Webb*, at [10].

Subdivision P of Division 3 of Part 2 of the NTA. Broadly, the mechanism for summary dismissal is enlivened when the procedural rights are effectively exhausted and the native title determination application is not being pursued to a mediated or litigated determination.[286]

The Court's power to dismiss may be activated on the application of a party to the application or on the Court's own motion.[287] The NNTT has no power to apply for such dismissal; its role is limited to providing the report under s.66C. Section 94C confers power on the Court to dismiss an application made by a person under s.61, if the four pre-conditions set out in s.94C(1)[288] are met, and if the Court is satisfied about the two conditions subsequent set out in s.94C(2) and (3).

The four pre-conditions are:

1. The application is for a determination of native title in relation to an area;[289]
2. It is apparent from the timing of the application that it is made in response to a future act notice given in relation to land or waters wholly within the area;[290]
3. The future act requirements are satisfied in relation to each future act identified in the future act notice;[291] and
4. Either the applicant has failed:
    a. To take steps to have the claim sought in the application resolved despite a direction by the Court to do so; or
    b. Otherwise, within a reasonable time, to take steps to have the claim sought in the application resolved.[292]

These pre-conditions are cumulative: the Court must be satisfied that the facts set out in each of them exist before the power described in s.94C is enlivened.[293] Given that the power to dismiss a native title application potentially reduces the capacity of a native title applicant to seek the recognition and protection of native title and precludes the making of a

[286] *Webb,* [8]. Note that this broad characterisation of the effect of s94C is subject to its precise language.

[287] Section 94C(1) NTA.

[288] As expanded by the definitions in ss.94C(1A)-(1E) NTA.

[289] Section 94C(1)(a) NTA.

[290] Section 94C(1)(b) NTA. Sections 94C(1A)-(1C) describe particular circumstances in which the Court ought be satisfied that the application was made in response to a future act notice, and allow for the prescription of other such circumstances by regulation. No regulations are yet made.

[291] Section 94C(1)(c) NTA. Sections 94C(1D)-(1G) describe particular circumstances in which the future act requirements are satisfied, and allow for the prescription of other such circumstances by regulation. No regulations are yet made.

[292] Section 94C(1)(e) NTA.

[293] *Webb,* at [10].

determination on that application that native title exists,[294] these pre-conditions should be interpreted narrowly.

A report under s.66C will cover the matters identified in ss.94C(1)(a)-(c), but does not deal with the matters identified in s.94C(1)(e). Strictly speaking, if all that is before the Court is a report under s.66C, there is no evidence before it that the pre-conditions in s.94C(1)(a)-(c) are met. The content of the report is given no evidentiary standing by the NTA.[295] The report merely brings the issue to the attention of the Court, allowing it to act on its own motion, if appropriate. However, in most cases, the existence of the procedural pre-conditions to the exercise of the Court's discretion will not be in dispute, and the Court's attention will turn to whether steps have been taken to have the mater resolved.

Further, the Court's power to dismiss is expressly subject to ss.94C(2) and (3), which provide that:

- The Court must not dismiss the application without first ensuring that the applicant is given a reasonable opportunity to present a case about why the application should not be dismissed; and
- Even if the power to dismiss an application is enlivened, the Court must not exercise it if there are compelling reasons not to do so.[296]

4.6.10.3 Analysis of changes

The Court can summarily dismiss native title determination applications that have been made to secure procedural rights once the procedural rights are exhausted and the application is not being pursued to a determination.

The Aboriginal and Torres Strait Islander Social Justice Commissioner is of the view that these:

> … amendments are discriminatory in that they treat native title application proceedings differently to other proceedings, apply a different standard to the dismissal of native title application proceedings than is applied in all other cases and the effect of these amendments is prejudicial to the interests of applicants. … [They] adopt a 'presumptive' approach to the dismissal of certain native title applications which effectively places the onus on the applicant to 'show cause' as to why the application should not be dismissed.[297]

However, the Court does retain considerable leeway in deciding whether to exercise its jurisdiction. French J, in *Webb v State of Western Australia*[298] [2007] FCA 1342 (28 August 2007) (***Webb***), considered that the power provides another 'tool or sanction to be used by the Court to dispose of

[294] See the objects of the NTA in s.3.

[295] *Webb*, at [10].

[296] Sections 94C(2) and (3) NTA.

[297] Calma Submission to Senate on Amendment Bill, above n.51, [128] and [130].

[298] [2007] FCA 1342 (28 August 2007).

applications lodged to get procedural rights and not otherwise being pursued'.[299]

Factors found in *Webb* to be relevant to the Court's consideration whether the application was filed simply to acquire future act procedural rights included the facts that:

- The application covered a much greater area of land than the areas affected by the future act notices.
- The applicants were represented by a Representative Body which was working with the NNTT in the mediation process.
- The application was subject to a regional mediation timetable.[300]

One difficulty in having such applications dismissed is that the mechanism providing for a report to be made by the NNTT Registrar alerting the Court to the possibility that the discretion can be enlivened does not address the Court's need for evidence that the pre-conditions governing the exercise of its jurisdiction have been satisfied.

There is also some uncertainty as to what a Court should do if it is not satisfied that the power should be exercised. In *Webb*, French J simply noted the NNTT Registrar's advice, as did Mansfield J in *Button Jones v Northern Territory*.[301] In an unreported decision on 10 September 2007 in a directions hearing concerning applications of the Dja Dja Wurrung People and the Wamba Wamba, Barapa Barapa and Wadi Wadi Peoples in Victoria, North J made declarations that s.94C did not apply.[302] Neither of these approaches prevents a respondent party bringing a motion for dismissal on these grounds in the future.

The fact that a party can bring a motion for dismissal on these grounds adds another weapon to the armoury of respondent parties seeking actively to contest a native title application, adding to the complexity of the native title system. A motion for dismissal can be used in addition to any other remedy addressing an applicant's failure to pursue litigation or mediation as directed by the Court. There is nothing to stop repeated applications for dismissal being brought by a combative respondent. A concern is that dismissal on this basis only applies to applications that happen to have been made in the timeframe contemplated by s.94C, and not to other applications that otherwise would be dealt with using the Court's ordinary powers.

The Court has other strike out powers[303] that apply to all applications, not just those made after a future act notice or that have failed the registration test. Adding this procedure to the NTA means that the resources of the NNTT, the

[299] *Webb*, at [12].

[300] *Webb*, at [13].

[301] *Button Jones (on behalf of the Gudim People) v Northern Territory of Australia* [2007] FCA 1802 (22 November 2007).

[302] *Dja Dja Wurrung People v State of Victoria and Others* (No VID 6001 Of 2000) and *Wamba Wamba, Barapa Barapa and Wadi Wadi Peoples v State of Victoria and Others* (No VID 6005 Of 2000).

[303] Under s.84C NTA and s.31 *Federal Court Act* 1976 (Cth).

Court and the parties are directed to addressing s.66C reports and the consequential consideration under s.94C, rather than to resolving native title matters.

4.6.11 Dismissal of unregistered claims

4.6.11.1 Situation under the old NTA

In addition to reducing the native title application backlog by recommending that applications made only to access future act procedural rights are taken out of the system, the Hiley Levy Report recommended that there be a mechanism for the dismissal of some unregistered applications that do not pass the merits element of the registration test.[304]

This would be a new method of dismissing applications, in addition to the Court's existing strike out powers.

4.6.11.2 The Amendments

The process of making the amendments

The Amendment Act inserted provisions:

1. Requiring the statement of reasons for a registration test decision to specify whether the merits requirements in s.190B were satisfied;[305] and
2. In such cases, where all avenues for review of the decision are exhausted, giving power to the Court to dismiss the application.[306]

It also contained transitional provisions directing the application of the registration test in particular circumstances.[307]

These new provisions were amended by the Technical Amendments Act. The only change to the substantive provisions was a renumbering to allow the insertion of provisions dealing with the internal review of registration test decisions by the NNTT.[308]

A new Schedule 5 was added to the Technical Amendments Act by amendments made in the Senate on 13 June 2007. The new Schedule provides transitional provisions for the application of the registration test to applications not caught by the transitional provisions in the Amendment Act.

The substance of the amendments

The amendments provide for:

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[304] Hiley Levy Report, above n.2, [4.125] and Recommendation 16.

[305] Then s.190D(1B) NTA.

[306] Then ss.190D(6) and (7) NTA.

[307] Amendment Act, above n.226, Schedule 2, Items 88-90.

[308] Subsection s.190D(1B) became s.190D(3) NTA. Subsections 190D(6) and (7) became ss.190F(5) and (6) NTA.

1. Early application of the registration test to applications that have already failed it and to those that have not yet had to have it applied;
2. Reporting applications that fail, or have failed, the merits requirements of the registration test to the Court; and
3. The Court to dismiss such applications.

Thus, the NNTT Registrar must use his or her best endeavours to apply the registration test:

1. By 15 April 2008 or as soon as practicable afterwards to:
    a. Unregistered applications made between 30 September 1998 and 15 April 2007; and
    b. Certain applications made before 30 September 1998;[309] and
2. By 1 September 2008 or as soon as practicable afterwards to certain unregistered applications not addressed by Items 89 and 90 of Schedule 2 of the Amendment Act.[310]

For applications made after 15 April 2007, the ordinary provisions regarding the timing of the registration test apply.[311]

If the application fails the registration test, the NNTT Registrar must give notice of the decision and the reasons for it to the applicant and to the Court. This act triggers the rights of review set out in ss.190E and 190F. An application for review of a registration test decision must be filed with the Court within 42 days of notification of the Registrar's decision.[312] The notice of reasons must identify whether the application satisfies all the merit conditions in s.190B and whether it is not possible to determine whether the merit conditions are met because the applications does not satisfy the procedural conditions in s.190C. This information will help the Court determine whether the pre-conditions to dismissing the application under s.190F(6) are met.[313]

If these conditions are met and all avenues for review of the registration test decision are exhausted,[314] the Court may, either on the application of a party or on its own motion, dismiss the application if:

1. The application has not been amended since consideration by the Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Registrar; and
2. There is no other reason why the application should not be dismissed.[315]

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[309] Amendment Act, above n.226, Schedule 2, Items 89 and 90.

[310] *Native Title Amendment (Technical Amendments) Act 2007* (Cth) (**Technical Amendments Act**), Schedule 5.

[311] See Amendment Act, above n.226, Schedule 2, Item 88; note that careful consideration should be given to the operation of the combined transitional provisions.

[312] *Federal Court Rules*, Order 78 Rule 12.

[313] Amendment Bill Explanatory Memorandum, above n.49, [2.207].

[314] Section 190F(5) NTA.

4.6.11.3 Analysis of changes

These changes provide an incentive for applicants to amend their unregistered applications to meet the merits requirements of the registration test. The test is likely to have been applied to applications to which it would not otherwise have been applied. Once it is applied, and an application fails the merits requirements of the test, s.190F(6) comes into operation and the Court may dismiss the application.

There would be time for applicants subject to this process to withdraw their applications, or to amend them or provide more information to address the deficiencies. Nothing would prevent an applicant filing a new application at any time.

The theory behind this approach is that applications with little prospect of success would be removed from the system. Previously, an unregistered application could stay in the native title system to be the basis for a determination that native title exists. Application of the registration test was only the precursor to the gaining of procedural rights in respect of future acts. The processes of determining whether native title exists, and accessing procedural rights in respect of future acts, both initiated by filing an application with the Court, were otherwise separate. These amendments remove that distinction.

Now, the registration test also plays the role of a sieve applied by an administrative officer through which applications are passed in the judicial process of determining whether native title exists. It is directed to encouraging applicants to improve the quality of their applications, which could make them easier for the Court to deal with in the litigation process, and also easier for the NNTT to mediate, since there will be more certainty as to the nature of the claims made.

However, the fact that an administrative decision potentially affects whether a judicial decision can even be made is problematic. In fact, the NLC in its submission to the Senate Committee Inquiry into the Amendment Bill indicated that its preliminary advice from counsel was that the review and inquiry provisions 'may well be unconstitutional in that they purport, in effect, to vest judicial functions in an administrative body'.[316] The Court expressed concern that mandating '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' might involve 'an impermissible intrusion of executive power into the judicial power of the Commonwealth'.[317] These concerns raise serious barriers to the validity and value of this amendment.

[315] Section 190F(6) NTA.

[316] NLC Submission to the Senate on the Amendment Bill, above n.139, p.4.

[317] Federal Court Submission to Senate on Amendment Bill, above n.229, pp.3-4.

Potential inconsistency between registration test decision and determination of native title

The application of the registration test can never have been intended to have any purpose beyond determining whether an application would have the status of a 'registered' claim entitling the applicants to procedural rights in relation to future acts. It had no significance in the ultimate resolution of an application, since it was part of the administrative process arising from the acquisition and exercise of procedural rights in respect of future acts, rather than the judicial process of determining whether or not native title can be recognised. This amendment means that this situation has changed.

The possibility exists that an application could fail the registration test, yet still reasonably form the basis of a determination that native title exists. Some determinations of native title could well fail the registration test if it had to be applied to them. For example, the Rubibi determination, made after a full trial in which the description of the native title holding group was one of the issues, defines it as comprising:

(a) the descendants of [a list of named people] save that where a person has only one Yawuru parent, that person self-identifies as Yawuru; and

(b) Aboriginal persons who have been adopted as children or been grown up by a Yawuru person as members of the Yawuru community under the traditional laws and customs of the community and who self-identify and are generally accepted by other members of the community, as Yawuru persons; and

(c) Aboriginal persons who possess high cultural knowledge and responsibilities in relation to the [determination area] and:

  (i) were born in; or

  (ii) have a long term physical association with,

  that area under the traditional laws and customs of the Yawuru community and who self identify and are generally accepted by other members of the community, as Yawuru persons; and

(d) the descendants of persons referred to in (b) or (c) save that where a person has only one Yawuru parent, that person self-identifies as Yawuru.[318]

Section 190B(3), one of the merits conditions of the registration test, requires that the NNTT Registrar or delegate be satisfied that either:

- the persons in the native title claim group are named in the application; or
- the persons in that group were described sufficiently clearly so that it could be ascertained whether any particular person is in that group.

These requirements differ from those in s.225, which describe the requirements for the Court to make a determination that native title exists.

If an application is made containing a description of the native title claim group in similar terms to the description of the native title holders in Rubibi, the Registrar or delegate might refuse to register the application on the basis

[318] Rubibi native title determination No.2, Schedule 1, see *Rubibi Community No 7*, above n.3. This part of the decision was confirmed on appeal: see *Sebastian*, above n.3. Special leave to appeal has not been sought in respect of this issue.

that the persons in the group are neither named nor described such that it can be ascertained whether any particular person is in the group. Similar applications are being refused registration,[319] and would be liable to dismissal, unless the Court is of the opinion that there are other reasons why they should not be dismissed. Persuading a Court so might be difficult without access to all the evidence that might be available at trial.

Requiring an application to meet pre-conditions of such a fixed nature before the Court hears all the evidence about the nature of the law and custom governing the composition of a native title holding group might prevent the dynamic expression of law and custom envisaged in the Rubibi determination. If a native title application must identify the members of the claim group in such a way that it is possible to ascertain whether any particular person is in the group, the Court's capacity to make such determinations might be unduly restricted.

4.6.12 Making a determination over part of an application area

4.6.12.1 Situation under the old NTA

The Court could previously make an order determining the existence of native title over part of an area subject to an application, but only where all parties in the proceedings consented.[320]

4.6.12.2 The Amendments

New s.87A allows the Court to make a determination of native title in relation to part of the area covered by an application, if some, but not all, parties agree, but only after notification of the application is complete. Therefore, interested parties will have had an opportunity to be joined as parties to the proceeding.

The parties who must agree to the proposed determination include:

- All native title parties including the applicant, other registered native title claimants who are parties, any Representative Body that is a party, and each person who claims to hold native title and is a party at the time the agreement is made;
- Each person who holds an interest in the relevant area and who is a party at the time the agreement is made;[321] and

[319] Calma Submission to Senate on Amendment Bill, above n.51, [137].

[320] Section 87 NTA.

[321] Note that this requirement was amended by the Technical Amendments Act, above n.310, from the original requirement that each person who holds a registered proprietary interest in land covered by the proposed determination be party to the agreement. This amendment was made at the instigation of Telstra, which holds interests in land that are not registered proprietary interests. See Senate Committee Report on Amendment Bill, above n.25, [4.66]-[4.76]. See below for a more detailed discussion.

- All of the Commonwealth Minister, relevant State or Territory Ministers, and local government bodies who are parties to (or have intervened in) the proceedings at the time the agreement is made.[322]

Thus, parties without an interest in the relevant area need not agree before a determination can be made over part of the application area.

The proposed agreed determination may be filed with the Court, and the Registrar must give notice of it to parties who have not agreed. The Court may make an order consistent with the proposed agreed determination if it considers that such an order is within its power and it would be appropriate to do so. It must take account of any objections made by the other parties to the proceeding.[323] The effect of the proposed determination on parties to the proceeding who are not parties to the agreement would be particularly relevant in deciding its appropriateness.

In making a determination over part of the application area, the Court must have regard to s.225 and s.87A, because of the consequences of making such an order, including:[324]

1. The application will be deemed to be amended to remove the area covered by the application;[325]
2. The amended application will be exempt from the reapplication of the registration test;[326] and
3. The Register of Native Title Claims will be updated to reflect the amended application.[327]

4.6.12.3 Analysis of changes

A greater degree of flexibility to make determinations over part of the area subject to an application will increase the options for resolving native title matters, and may increase the prospects for settling them. This will also help to resolve the issue of delays caused by parties with very little interest in the substantive issues in the matter.

4.6.13 Reducing the range of people who can become parties and their role

4.6.13.1 Situation under the old NTA

The applicant is a party to native title determination or compensation proceedings.[328] The State or Territory Minister is a party unless he or she opts

[322] Section 87A(1) NTA.

[323] Section 87A(2)-(5) NTA.

[324] Section 87(1)(d) NTA.

[325] Section 64(1A) NTA.

[326] Section 190A(1A) NTA.

[327] Section 190(3)(a) NTA.

[328] Section 84(2) NTA.

out.[329] The Commonwealth can intervene in proceedings at any stage.[330] These provisions have not changed.

Otherwise, a person could become a party to native title proceedings by:

1. Giving notice to the Court within three months after notification; or
2. Later joinder if the person's interests would be affected by a determination in the proceedings.

The NNTT Registrar had to give notice of the application to persons including any person who held a registered proprietary interest in any of the area covered by the application, relevant local government bodies, any person whose interests may be affected by a determination if the Registrar considers it appropriate, and the public.[331] This requirement has not changed.

If any of these persons notified the Federal Court within three months of notification, the person was a party. In addition, persons claiming to hold native title in the area covered by the application, and persons whose interests may be affected by a determination in the proceedings could become a party by giving notice to the Court within that period.[332]

In addition, the Court could at any time join any person as a party if the Court was satisfied that the person's interests would be affected by a determination in the proceedings.[333]

The phrase 'interests may be affected' has been interpreted very widely. It has a wider definition than 'interest in relation to land or water' which is defined in s.253. 'Interest that may be affected' may include a special, well established, non-proprietary connection with land or waters which is of significance to the person.[334] Parties have included owners of adjacent land with a public right of access over the area, holders of fossicking licences, and recreational users.[335]

The width of these provisions was justified by the fact that a native title determination is a decision *in rem* and binds everyone, whether or not they were party to the proceedings.

[329] Section 84(4) NTA.

[330] Section 84A NTA.

[331] Section 66(3) NTA.

[332] Section 84(3) NTA.

[333] Section 84(5) NTA.

[334] *Chapman v Minister for Land and Water Conservation* (NSW) [2000] FCA 1114 (28 July 2000)(***Chapman***), which decided that the decision in *Byron Environment Centre Inc. v Arakwal People* (1997) 78 FCR 1 still applied after the 1998 amendments.

[335] See *Chapman*, above n.334, and *Combined Mandingalbay Yidinji-Gunggandji Claim v Queensland* [2002] FCA 730 (14 June 2002).

4.6.13.2 The Amendments

Section 84 is amended to limit the categories of people who can become parties in native title proceedings, especially in cases where a party's interests may already be represented by Government respondents.

Both the ways in which a person may become a party have now been limited:

1. The right to become a party by giving notice within three months:
    a. Does not extend to persons to whom the Registrar gave notice of the application because they are a person whose interests may be affected by a determination in relation to the application;[336] and
    b. Only extends to persons with an interest in land or waters that may be affected by a determination in the proceedings;[337] and
2. The Court can at any time join any person as a party if the Court is satisfied that the person's interests would be affected by a determination in the proceedings and it is in the interests of justice to do so.[338]

These changes do not affect person who were parties to proceedings on 15 April 2007, when the amendments commenced.

In addition, there is an additional provision allowing the NNTT to refer questions about whether a party should continue to be a party to the Court. It may become clear during mediation that a party does not have the requisite interest. New s.136DA provides a mechanism by which parties without a 'relevant interest in the proceeding' might be removed.

If the presiding NNTT member in a mediation considers that a party does not have an interest that may be affected by a determination in the proceeding, he or she may refer the question of whether the person should cease to be a party to the Court. For this purpose, the usual restriction on disclosing information revealed in the course of the mediation is relaxed to the extent that the information relates to that question. In the meantime, mediation can continue with the other parties.[339]

4.6.13.3 Analysis of changes

These changes have the effect that persons with interests that may be affected by a determination are not able to become parties in proceedings merely by giving notice. Thus, owners of adjacent land with a public right of access over the area, holders of fossicking licences, and recreational users are not likely to be able to become parties by giving notice to the Court within the notification

[336] Section 84(3)(a)(i) NTA. Technically, this is done by removing reference to persons given notice of an application under s.66(3)(a)(vii) from the list of persons who can become a party by giving notice to the NNTT Registrar under s.84(3).

[337] Section 84(3)(a)(iii) NTA. 'Interest in relation to land or waters' is defined in s.253 NTA in a way that is much narrower than 'interest that may be affected'.

[338] Section 84(5) NTA.

[339] Section 136DA NTA.

period. Persons seeking to become a party automatically must have the narrower 'interest in relation to land or waters', as defined in s.253.

Persons with interests that may be affected by a determination can still become parties to proceedings, but must apply to the Court and satisfy it that the interest exists, and that it is in the interests of justice for them to be joined. In addition, there is a greater possibility that the Court can dismiss a party if he she or it has no relevant interest in the proceedings.

These changes mean that there are likely to be fewer respondent parties in native title litigation, and that, therefore, the proceedings are more likely to be resolved by agreement and easier to manage in litigation.

4.7 Analysis of Amendments to the Claims Review Process

These reforms signal a significant shift in the character of the NNTT. It is to play a far greater role in mediation, and gains new powers to assist it in that function. At the same time, the Court's role in mediation is reduced, and it must deal with the NNTT's new powers by enforcing them, by taking account of what the NNTT reports to it, and by adjusting its own functions to accommodate the NNTT's new functions.

These changes introduce NNTT powers which may be inconsistent with the basic characteristics of good mediation,[340] including:

- Coercive orders directing the production of documents at mediation conferences, which may mean that parties are less wiling to engage properly in mediation;
- A professional mediator who appears with the other parties in the Court, which is the forum for addressing disputes in an adjudicative way, may not appear to be disinterested and objective; and
- The NNTT will be performing more than one function, which may lead to at least a perception that it is subject to a conflict of interest. It will be involved in clearing up the backlog of native title applications by reporting various matters to the Court which may lead to them being struck out, at the same time as it is exercising its mediation function.

A greater role for the NNTT means less control over the mediation process for the Court, but also for the participants in the process, including Representative Bodies. The amendments allowing the Court to dismiss unregistered applications and those that were made in response to a future act notice in certain circumstances may also reduce the capacity of Representative Bodies to control the conduct of native title proceedings, particularly in prioritising and directing their limited resources to them, since some will be taken out of Court lists, and all parties will be subject to more control in mediation by the NNTT.

[340]The key traits of a good mediator include impartiality, disinterestedness and objectivity to facilitate agreements reached by parties outside court.

Finally, the Northern Land Council argues that these amendments are fundamentally flawed because they 'confuse the relationship between mediation and litigation and that between the NNTT and the Court', and that the provisions regarding reviews and inquiries 'encourage the NNTT to investigate questions that must ultimately be determined by the Court', leading to duplication of functions.[341] This confusion also potentially leads to questions of constitutionality, which may be a recipe for High Court challenge, expense, delay and uncertainty.[342]

[341] NLC Submission to the Senate on the Amendment Bill, above n.139, p.1.

[342] NLC Submission to the Senate on the Amendment Bill, above n.139, p.5.

5. Review of the Structures and Processes of Prescribed Bodies Corporate

5.1 The old Prescribed Body Corporate system

When it determines that native title exists, the Court must also determine a PBC to hold the native title rights and interests for the common law native title holders.[343] Eventually, after all possible determinations of native title are made, all dealings with native title holders will occur through PBCs.[344] As at 19 May 2006, there were 42 PBCs.[345]

The NTA continues to provide that a PBC can either hold the native title in trust for the native title holders, or act as agent for them.[346] Regulations can prescribe, inter alia, the functions of PBCs, the manner in which they consult with the common law holders, and the replacement of a PBC.[347]

Previously, the regulations dealt with:

- Requiring all PBCs to be incorporated under the ACA Act, only have native title holders as members, and have the purpose of being a PBC;
- The functions of trustee and agent PBCs; and
- The method by which native title holders are to be consulted about decisions to surrender, or that might affect, native title rights and interests, and the manner in which such consultation is to be evidenced.[348]

None of this basic structure has been altered by the reform process.

In addition, no funding was made available to PBCs for their operating costs by the Commonwealth Government.[349] Under the terms of the provision of funding assistance to Representative Bodies, they were not able to support or contribute to the operating costs of PBCs or to assist them to comply with their regulatory governance obligations. Their assistance was limited to assisting PBCs:

- To incorporate, including their operation until their first annual general meeting; and
- To perform their functions by assisting PBCs in consultations, mediations and negotiations regarding native title applications, future acts, and other agreements relating to native title.[350]

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[343] Section 55 NTA, referring to the orders to be made under ss.56 and 27.

[344] Attorney General's Department, Commonwealth of Australia. *Structures and Processes of Prescribed Bodies Corporate* (January 2006)(**PBC Report**), [2.1].

[345] PBC Report, above n.344, [2.3].

[346] Sections 56(2)(b) NTA [trust] and 56(2)(c) and 57(2) NTA [agent].

[347] See ss.56(4), 58, 59 and 60 NTA.

[348] *Native Title (Prescribed Body Corporate) Regulations 1999* (**PBC Regulations**).

[349] PBC Report, above n.344, [5.1].

[350] PBC Report, above n.344, [5.2] and [5.3].

Even for this limited amount of assistance, PBCs had to compete with the other demands on Representative Body funding.

Thus, if funds were not available by way of agreement with developers or other governments, or through other grants for specific purposes on an ad hoc basis, a PBC could not operate or perform many of its corporate governance function, its native title related functions such as land management and heritage protection, or meet community expectations regarding such things as economic and social development and cultural maintenance.[351] They could not even meet their statutory obligations. This had long been recognised as one of the major problems with the PBC system.[352] Even the Government's own PBC Report acknowledged that 'the level of resources currently available will not meet all of the requirements imposed on PBCs under the current regime.'[353]

5.2 Process of Reform

5.2.1 The Changes announced

The six interconnected elements of reform to the native title system announced on 7 September 2005 included 'an examination of the current structures and processes of Prescribed Bodies Corporate … with a view to finding ways to improve their effectiveness'.[354]

The Government agreed that the examination of PBCs should:

- Identify the basic functions and resource needs of PBCs;
- Ensure those functions and resource needs are aligned with existing funding sources from Australian Government, State and Territory and non-government sectors; and
- Assess the appropriateness of the existing statutory governance model for PBCs.[355]

[351] See PBC Report, above n.344, [4.3]-[4.10].

[352] See for instance, *Nangkiriny v State of Western Australia* [2004] FCA 1156 (8 September 2004), [9]-[11].

[353] PBC Report, above n.34, [6.1].

[354] Media release 7 September 2005, above n.5.

[355] PBC Report, above n.344, p.5.

5.2.2 The PBC Report

This examination was undertaken by the preparation of report by the Attorney General's Department: *Structures and Functions of Prescribed Bodies Corporate* (the **PBC Report**). The report was progressed by a Steering Committee chaired by the Attorney General's Department and including representatives of OIPC and the Office of the Registrar of Aboriginal Corporations (**ORAC**).[356] The Steering Committee undertook targeted consultations between November 2005 and January 2006, primarily through personal meetings or accepting written submissions from PBCs, Representative Bodies, government, industry bodies and other stakeholders.[357] The Committee also drew information from public sources,[358] including the Joint Committee Representative Body Report,[359] and the Senate Committee Inquiry into the *Corporations (Aboriginal and Torres Strait Islander) Bill 2005.*[360]

The PBC Report was released on 27 October 2006. The Government decided to implement all its recommendations.[361]

5.2.3 Legislative process

No further submissions were invited directly by Government, but stakeholders were able to make submissions to the Senate Committee's inquiries into the provisions of the Amendment Bill and the Technical Amendments Bill.

Most of the recommendations of the PBC Report can be dealt with administratively. Two of its 15 recommendations are dealt with in the Amendment Act and two in the Technical Amendments Act. One is dealt with in the CATSI Act.

The Amendment Bill was introduced into Parliament on 7 December 2006, and assented to on 15 April 2007. Most of Schedule 3, dealing with PBCs, commenced on that day.

The Technical Amendments Bill was introduced into Parliament on 28 March 2007 and assented to on 20 July 2007. Most of the provisions in Schedule 3, dealing with PBCs, commenced on 21 July 2007. However:

- The amendment to the definition of 'registered native title body corporate commenced on 1 July 2007, on the commencement of the *Corporations*

[356] PBC Report, above n.344, [3.1].

[357] PBC Report, above n.344, [3.2] and Appendix 1.

[358] PBC Report, above n.344, [3.3].

[359] Joint Committee Representative Body Report, above n.16.

[360] Senate Legal and Constitutional Affairs Committee, *Inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 and associated Bills*, Senate Legal and Constitutional Affairs Committee, Canberra, 2006.

[361] P. Ruddock (Attorney General) and M Brough (Minister for Families, Community Services, and Indigenous Affairs), *Reforms to improve management of native title rights*, media release, Canberra, 27 October 2006 (**Media Release 27 October 2006**).

(Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006; and

- The provisions governing PBCs' capacity to charge third parties for their services do not commence until 1 July 2008.[362]

5.3 Recommendations of the PBC Report

The Report acknowledges the lack of resources available to PBCs to perform their functions. It seeks to address them by:

- Ensuring that there is more information generally available about existing resources available for PBCs;
- Recommending reforms to the existing statutory governance model to accommodate the varied interests and circumstances of native title holders; and
- Recommending the creation of new options to meet PBCs' resource needs.

None of the recommendations go so far as to advise the Commonwealth Government to provide funds for the operation of PBCs.

The Report does usefully detail the existing sources of assistance and funding for PBCs. Recommendations one and two deal with the provision of advice to PBCs and other stakeholders about the availability of resources from Representative Bodies for native title functions, and from government and the private sector. State and Territory governments should be pressed to place PBC needs on the agenda for consideration when negotiating native title determinations and future act agreements.[363]

The resource needs of PBCs are likely to vary from area to area, since there are widely varying factors governing their capacity to be self-funding. The Report does not recommend that basic establishment and operational needs, such as communication, administration, records storage, resources for consultation, access to professional services, training, and office costs, be met by government. It does recommend that ORAC co-ordinate the provision of relevant information on PBCs to native title claimants in the lead up to a determination, so that PBCs are better able to address these issues. Such information would include information and training on the roles, responsibilities and governance of PBCs, and about sound decision making processes and record keeping.[364]

The recommended reforms to the existing governance model are aimed at providing more flexibility, so native title holders have more choice of structures that might meet their specific circumstances.[365] Several

[362] Section 2, Technical Amendments Act, above n.310.

[363] PBC Report, above n.344, Recommendation 3.

[364] PBC Report, above n.344, Recommendation 4.

[365] PBC Report, above n.344, [7.2].

recommendations are directed to reducing the demands on PBCs, thus reducing their costs. These include:

- Reducing the circumstances in which a PBC is required to consult with native title holders. This required changes to the legislation and the regulations;[366]
- Allowing a single PBC to represent multiple native title holding groups;[367]
- Relaxing the requirement that all members of a PBC be native title holders, on the basis that this might increase its skill base and make the structure more representative of the community in which it operates. This was one of the more controversial aspects of the PBC Report;[368]
- Asking ORAC to provide educational material on PBC obligations and requirements under the CATSI Act, including material on good governance and model rules.[369]

The PBC Report also suggests that PBCs should be able to charge third parties for costs incurred in performing a PBC's statutory functions on request.[370] It encouraged the provision of support for PBCs via Shared Responsibility Agreements and/or Regional Partnership Agreements,[371] and recommended that State and Territory land rights corporations act as PBCs where the traditional owners agree.[372]

Finally, the Report recommended that there be a default PBC available if the native title holders cannot agree on their own PBC, an administrator has been appointed, or the native title holders want one.[373]

The Government accepted all the PBC Report's recommendations.[374]

The explanatory memorandum accompanying the Amendment Bill suggests that most of the changes recommended by the PBC Report can be implemented administratively.[375] Few of them require legislative amendment.

[366] PBC Report, above n.344, Recommendations 5 and 6.

[367] PBC Report, above n.344, Recommendation 7.

[368] PBC Report, above n.344, Recommendation 8.

[369] PBC Report, above n.344, Recommendation 9.

[370] PBC Report, above n.344, Recommendation 11.

[371] PBC Report, above n.344, Recommendation 13.

[372] PBC Report, above n.344, Recommendation 14.

[373] PBC Report, above n.344, Recommendation 15.

[374] Amendment Bill Explanatory Memorandum, above n.49, p.73.

[375] Amendment Bill Explanatory Memorandum, above n.49, p.73.

5.4 The Amendments

5.4.1 General description of legislative changes

The legislation deals with:

1. Requirements for consultation with native title holders;[376]
2. Determining an existing PBC as the PBC for a subsequent determination of native title;[377]
3. Allowing a PBC to charge a third party for costs and disbursements incurred in performing its statutory functions at the request of the third party;[378]
4. Determining a default PBC in certain circumstances;[379]
5. Replacing a PBC at the initiative of native title holders; and
6. Obtaining the written consent of a PBC before a determination that it act as an agent PBC.

These issues are dealt with below. In addition, recommendation eight proposed to relax the requirement in the Regulations that all members of a PBC be native title holders. This issue does not require legislative change, but will be discussed below.

5.4.2 Requirements for consultation with native title holders

5.4.2.1 Consultation with native title holders

Currently, the *Native Title (Prescribed Body Corporate) Regulations 1999* (**PBC Regulations**) require a PBC, whether acting as agent or trustee, to consult with and obtain the consent of the common law holders before making any decision to surrender native title rights and interests or to do, or agree to do, any other act that would affect native title rights and interests.[380] This means that:

1. The PBC must ensure that the common law holders understand the purpose and nature of such a decision by consulting and considering the views of the Representative Body and, if appropriate, informing the common law holders of those views;[381]
2. The common law holders may consent to the decision either through a traditional decision making process or through an agreed decision making process;[382] and

[376] PBC Report, above n.344, Recommendations 5 and 6.

[377] PBC Report, above n.344, Recommendation 7.

[378] PBC Report, above n.344, Recommendation 11.

[379] PBC Report, above n.344, Recommendation 15.

[380] Regulation 8(2) PBC Regulations, above n.348.

[381] Regulation 8(3) PBC Regulations, above n.348.

[382] Regulations 8(4) and (5) PBC Regulations, above n.348.

3. If consent is given, the PBC must make a certificate stating that the common law holders have been consulted about and have consented to the decision, or that the decision is of a kind that the common law holders have decided can be made by the PBC.[383]

These regulations apply to all decisions made by a PBC that concern an act that affects native title rights and interests. This is a very broad category of decisions.

Previously, the regulations required an agent PBC to consult the common law native title holders about any agreement it makes that is binding on them, and the common law holders to have authorised the agreement. That requirement is removed. Such an agreement must now be made in accordance with processes set out in the regulations, which need not include a requirement that the common law holders have been consulted about, and have authorised, the agreement.[384]

This amendment means that native title holders need not be consulted about and authorise all agreements made by an agent PBC on their behalf, so long as it otherwise complies with the processes set out in the regulations. Therefore, in theory, there will be less demand placed on the resources of PBCs.

However, new regulations have not yet been made.

Removing the requirement in the legislation that before a PBC makes such an agreement, the common law holders must have been consulted about, and have authorised it, makes no difference to the demands on PBCs' resources if the requirement is still in the regulations.

The Aboriginal and Torres Strait Islander Social Justice Commissioner is concerned that any limitation of the definition of 'native title decisions' in the PBC Regulations would reduce the scope of future acts that PBCs are required to consult native title holders about and obtain their consent to. Native title holders 'will not be relevantly informed about that act and will have no opportunity to give their specific consent to it'.[385]

The rules of a PBC may still require notification and consultation in similar terms to that currently required, notwithstanding these changes. However, if native title is affected by a PBC decision, native title holders would only have rights against the PBC; the future act would most likely still be valid. Further, responsibility for determining the appropriateness of the procedures would lie with the members of the PBC and the Office of the Registrar of Indigenous Corporations (**ORIC**, formerly ORAC, and then ORATSIC between 1 July 2007 and 30 April 2008), rather than with the Government.[386]

5.4.2.2 Certification of consultation with native title holders

[383] Regulation 9(2) PBC Regulations, above n.348.

[384] Section 58(e) NTA.

[385] Calma Submission to Senate on Amendment Bill, above n.51, [158].

[386] Calma Submission to Senate on Amendment Bill, above n.51, [161].

Recommendation 6 of the PBC Report recommends streamlining the certification requirements for such decisions by changing the current requirement for a certificate in respect of each decision by a PBC to a requirement that there need be only one certificate for all decisions of a particular kind that the PBC has been authorised to make by the native title holders. This would substantially reduce the workload of PBCs.

This recommendation requires amending Regulation 9(2) of the PBC Regs. Currently, there needs to be a certificate for each decision of a PBC regarding each separate future act. This change to the regulations has not yet occurred. Presumably, the same criticism can be made of this change, as was made by the Aboriginal and Torres Strait Islander Social Justice Commissioner above: namely that such a change would reduce the scope of future acts to which native title holders would specifically be required to consider and given their consent to.

5.4.3 *Determining an existing PBC as PBC for a subsequent determination*

The PBC Regulations have, and previously had, the effect that all members of a PBC must hold native title rights and interests in relation to the land or waters to which the determination relates.[387] This prevented a PBC being determined for subsequent native title determinations where membership of the native title holding group is different. These regulations have not been amended.

However, new s.59A allows an existing PBC to be determined as a PBC for a subsequent determination of native title, even where membership of the group is different. All the native title holders covered by both determinations must agree. This may encourage economies of scale.[388]

Thus, if a PBC already holds native title in trust or as agent for native title holders, the Court may determine that it also hold native title rights and interests in trust or as agent, respectively, for other native title holders, so long as all of the native title holders consent to the determination.[389] An agent PBC cannot perform the functions of a trustee PBC, and vice versa.

Regulations may be made prescribing the way that consent is to be obtained.[390] No such regulations have yet been made.

This change potentially reduces the accountability of a PBC to the native title holders it represents, since it may have conflicting responsibilities to its members and to the native title holders it represents in a particular situation. The same criticisms described below in respect of non-native title holder members of a PBC apply to this situation.

5.4.4 *Charging a third party for costs and disbursements*

[387] Regulation 4(2) PBC Regulations, above n.348.

[388] Amendment Bill Explanatory Memorandum, above n.49, [3.6].

[389] Section 59A(1) and (2) NTA.

[390] Section 59A(3) NTA.

Currently, in making decisions about future acts and their effects on native title, PBCs can obtain the assistance of Representative Bodies.[391] They have also received help from future act proponents or from State and Territory governments.[392]

From 1 July 2008, PBCs will be able to charge the third party proponents directly for costs and disbursements incurred by the PBC at its request, in negotiating an agreement under the right to negotiate regime or an indigenous land use agreement.[393] Statutory bodies such as PBCs must have explicit or implied authority to charge fees for the performance of a statutory duty or function.[394] Otherwise, they cannot do so.

The regulations may specify other PBC functions, for which it will be able to charge a fee for performing.[395] There are no such regulations yet.

There are limits on the extent to which such fees may be charged. They may not be charged to the common law holders, another PBC, a Representative Body, or relevant native title claimants.[396] The fees charged cannot include the PBC's costs of being a party in NNTT proceedings or inquiries concerning the future act, or in any court proceedings.[397] The fee cannot be such as to amount to taxation.[398] It must be for services delivered.[399]

There is also provision for what effectively amounts to a taxation (in a legal sense) of the amount of fees charged. The Registrar of Aboriginal and Torres Strait Islander Corporations can be asked for an opinion whether the fee is one that the PBC can charge under s.60AB. That opinion is binding on the PBC.[400]

There are no criteria defining the circumstances in which such an application can be made; nor does there appear to be any provision for review of the Registrar's decision. Without seeing the regulations, it is difficult to assess the adequacy of any procedures governing the manner and timeframe in which the Registrar is to make these decisions, whether he or she is to take submissions from the PBC, or provide reasons, and so on.

However, it does appear that the scheme provides a great deal of discretion in the Registrar in making such decisions.

[391] Section 203BB(1)(a) NTA.

[392] PBC Report, above n.344, [8.6] and [8.7].

[393] Section 60AB(1) NTA.

[394] PBC Report, above n.344, [8.8].

[395] Section 60AB(2) NTA.

[396] Section 60AB(4) NTA.

[397] Section 60AB(5) NTA.

[398] Section 60AB(3) NTA.

[399] Technical Amendments Bill Explanatory Memorandum, above n.50, [3.16].

[400] Section 60AC(3) NTA.

5.4.5 Determining a default PBC

The three circumstances contemplated by the PBC Report where there might be a need for the determination of a default PBC by the Court are:

- Where the common law holders fail to nominate a PBC on the making of a determination of native title, as required by s.57(2)(c);
- Where an liquidiator is appointed to a PBC because it is unable to perform its native title functions; or
- Where the native title holders choose to do so.[401]

The changes to the NTA allow regulations to be made that address each of these possibilities. No such regulations have yet been made.

5.4.5.1 Failure to nominate a PBC

Previously, regulations could be made prescribing the kinds of bodies corporate that could be determined on a failure by the native title holders to nominate a PBC. Now, the regulations can prescribe the body corporate or the kinds of body corporate that can be determined by the Court under s.57(2)(c).[402]

5.4.5.2 Appointment of Liquidator

Regulations may now provide for the termination of a native title holding trust upon the appointment of a liquidator to the PBC.[403] They can also provide for the determination by the Court of a PBC to perform the PBC functions.[404] This could be a default PBC.[405] Similar provisions apply to agent PBCs.[406]

5.4.5.3 Native title holders choose a default PBC

Native title holders can replace a PBC: see the discussion below. A PBC could be replaced by a default PBC if the native title holders wished.

5.4.5.4 Analysis

A default PBC must be an agent PBC. It would be government funded.[407] Since its form and the circumstances in which it could be used are to be

[401] PBC Report, above n.344, [8.27].

[402] Section 59(2) NTA.

[403] Section 56(4)(d)(ii) NTA.

[404] Section 56(4)(e) NTA.

[405] Technical Amendments Bill Explanatory Memorandum, above n.50, [3.5].

[406] Section 60 NTA.

[407] Technical Amendments Bill Explanatory Memorandum, above n.50, p.75.

determined in accordance with regulations that are yet to be made, it is not yet possible to make any further comment.

The Technical Amendments Bill was amended to partially accept a recommendation of the Minority Report of the Senate Committee to ensure that only the Court can determine a PBC, including a default PBC.[408] This avoids the possibility that the regulations could provide for the prescription of the exact body corporate that will be the default PBC.

5.4.6 Replacing a PBC

Previously, a trust PBC could be replaced and an agent PBC could be replaced.[409] It was not clear whether an agent PBC could be replaced by a trust PBC or a trust PBC could be replaced by an agent PBC. Nor was it clear whether a trust PBC could become an agent PBC, or vice versa.[410]

The amendments provide that regulations can be made so that:

- A trust PBC can be replaced by an agent PBC;[411]
- A trust PBC can become an agent PBC;[412]
- An agent PBC can be replaced by a trust PBC;[413] and
- An agent PBC can become a trust PBC.[414]

In each case, the regulations may make provision for the transition from one PBC or status to the other. This change adds needed flexibility to the PBC system.

5.4.7 Relaxing the requirement that all members of a PBC be native title holders

The PBC Report recommends that the regulations should be amended to remove the requirement that all members of a PBC be native title holders.[415] The justification for this recommendation is that it would provide more flexibility to the existing governance model. In particular, a PBC would thus become 'more representative of the broader community' in which it operates, and would have a broader skill base.[416] The regulations have not yet been amended in this regard.

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[408] Senator Johnston, Senate, Debates (in Committee), 13 June 2007, p.144.

[409] Former ss.56(4)(e) and 60 NTA.

[410] Technical Amendments Bill Explanatory Memorandum, above n.50, p.74.

[411] Section 56(4)(d)(i) and (4)(e) NTA.

[412] Section 56(4)(e) NTA.

[413] Section 56(7)(a) NTA.

[414] Section 56(7)(a) NTA.

[415] PBC Report, above n.344, Recommendation 8.

[416] PBC Report, above n.344, [7.17].

In the Senate debate, Senator Johnston, for the Government, argued that non-native title holders and non-Indigenous people would only become PBC members if that is what the native title holders want. Notwithstanding the nature of PBC membership, only native title holders would have the 'right to be involved in making native title decisions'.[417] The issue of the appropriate membership of PBCs would be left to native title holders, who may want to have non-Indigenous spouses or advisers as non-voting members.[418]

A PBC represents native title holders, either as an agent or as a trustee. In either case, it owes a fiduciary duty to the native title holders, not to the broader community. This obligation is inconsistent with owing duties, under the CATSI Act, to members who are not native title holders, and who may not even be Aboriginal people or Torres Strait Islanders. Further, PBCs, which hold native title, should reflect the membership of the group of common law native title holders, since native title is based on their traditional laws and customs.[419]

In addition, the CATSI Act provides another mechanism for PBCs to access a broader skills base. It does not require directors of CATSI corporations (such as PBCs) to be either Indigenous people or members of the corporation.[420] Thus, directors of PBCs can have a broader range of skills than those possessed by the members of the PBC. There is no need to open membership of PBCs to non-native title holders for this purpose.

5.4.8 Obtaining the written consent of a PBC before a determination that it act as agent

A further amendment to the PBC regime was made by the Technical Amendments Act. It is now necessary to obtain the written consent of a PBC before the Court can determine that it can act as agent for the native title holders.[421] Previously this requirement only applied to trust PBCs.[422] This is only a technical change.

5.5 Analysis of Amendments regarding Prescribed Bodies Corporate

5.5.1 Resources

The PBC Report highlighted the difficulties experienced by the growing number of PBCs whose actions are constrained by a lack of resources. It usefully identified the existing sources of funding that PBCs can access, and

[417] Senator Johnston, Senate, Debates (in Committee), 13 June 2007, p.149.

[418] Senate Committee Report on Technical Amendments Bill, above n.283, [3.73].

[419] See National Native Title Council, Submission to the Senate Legal and Constitutional Affairs Committee, submission 5, *Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007* (2007)(**NNTC Submission to Senate on Technical Amendments Bill**), p.4.

[420] Section 246-1 CATSI Act, above n.89.

[421] Section 57(2)(a) NTA.

[422] Section 56(2)(a)(ii) NTA.

recommended that they be informed about them. It also encouraged State governments to provide increased PBC resources in the settlement of native title matters.

However, the Report did not recommend that PBCs have access to additional resources. This remains a shortcoming in the system. Thus, unless a PBC is financially independent due to funding from an agreement with a third party and/or Government about a future act or compensation for the extinguishment of native title, it is not likely to have sufficient resources even to perform its statutory governance obligations.

It is disappointing that the PBC Report suggests procedures addressing the failure of PBCs, but does not recommend the provision of better resources for PBCs.

5.5.2 Education and Training

In addition, the PBC Report identified sources of information, education and training, such as from ORIC and the Australian Institute for Aboriginal and Torres Strait Islander Studies (**AIATSIS**), which can develop information, resources and materials aimed specifically at the responsibilities of PBCs.

The Native Title Research Unit within AIATSIS has already held the first in a series of workshops focussing on the responsibilities of Representative Bodies in the establishment and support of PBCs. It is holding a second PBC National Meeting and PBC case study participant workshop to bring together PBCs and conduct more intensive research over the next year or so. Resources have been developed for inclusion on the AIATSIS website: http://ntru.aiatsis.gov.au/major_projects/pbc_rntbc.html. The Unit is also conducting research into the taxation of native title payments, construction of trusts and corporate structures, and the distribution of benefits: http://ntru.aiatsis.gov.au/major_projects/taxation_trusts.html. This project aims to explore the optimal organisational structures that incorporate traditional laws and customs while enabling parties to maximise the outcomes of their native title claims.

Education and training about the role, function, and capabilities of PBCs is vital for them to be able to become stable and mature organisations. They should be developed, nurtured and guided by appropriate expert advice from early in the claims resolution process. Such education and training should be directed to the skills needed for, among other things:

- Successfully establishing PBCs;
- Financial, tax and governance obligations; and
- Managing native title rights once they are recognised.

5.5.3 Legislative and Regulatory Amendment

The Government accepted the PBC Report's recommendations. Only a few of these recommendations required legislative amendment, and much of the detailed reform in those areas will be done by making regulations, which has

not yet occurred. Most of the PBC Report recommendations will be dealt with by changing administrative policy. The details of the way in which the new Government proposes to implement the majority of the recommendations are not yet publicly available.

Therefore, while the general intention behind the PBC Report and the brief aspects of its findings reflected in the amendments to the NTA are commendable, the overall impact of the changes on PBCs cannot yet be assessed. It is hoped that any regulatory or administrative policy changes are made only after proper consultation with stakeholders.

5.5.4 Representative Body Amendments and PBCs

It is possible that some additional assistance for PBCs will come from Representative Bodies. Representative Bodies, which are accountable to the communities they represent, are ideally placed to assist PBCs discharge their obligations. Many of the organisations recognised as Representative Bodies existed prior to that recognition as advocates for their constituents in relation to a wide range of issues including land rights, cultural heritage, and community and economic development. These activities and aspirations are much the same as those which could now be undertaken by PBCs, often on behalf of the same people.

It does not appear that the Government has taken account of the impact of the NTA reform package as a whole on Representative Bodies and their capacity to meet the requirements of PBCs. The suggestion that Representative Body funding be adjusted to enable them to assist PBCs in their day to day operations[423] should be considered in the context of other amendments affecting the workload of Representative Bodies and its prioritisation. For instance, the performance of Representative Bodies' facilitation and assistance function, particularly in respect of determinations and negotiations may be adversely affected by such an adjustment, if additional resources are not provided.

Further, increased Ministerial discretion concerning the recognition of Representative Bodies and the boundaries of their areas means that from time to time a PBC may have to form a new relationship with a Representative Body that takes up responsibility for the area in respect of which the PBC holds native title. The newly inbuilt uncertainty in the Representative Body system may mean that PBCs are less able to gain assistance from them.

[423] PBC Report, above n.344, Recommendation 12.

6. Reform of the Native Title non-claimants (respondents) financial assistance program

6.1 The old non-claimants (respondents) financial assistance program

Section 183 of the NTA provides that the Attorney General may provide legal or financial assistance in native title matters or in relation to negotiating an agreement. Assistance may not be given to persons holding, or asserting that they hold, native title, or to State, Territory or Commonwealth Ministers. Thus, assistance is limited to non-government non-native title party respondents. The Attorney General may make guidelines governing the provision of the assistance.[424]

Previously, there is no hardship test imposed before a respondent could receive these funds. This contrasts with legal aid funding provided, for instance, in criminal and family law matters. In addition, 'grants [were] largely open ended and [did] not specify financial assistance in stages'.[425] The distribution of funds to respondents has increased since 1996. Notwithstanding this funding, all non-indigenous interests in land extinguish or prevail over native title rights.[426] Given that their interests are protected in this way, the favourable treatment given to these respondents seems excessive, especially when compared with the limited funding available for Representative Bodies.

In the view of the Aboriginal and Torres Strait Islander Social Justice Commissioner:

> … proceedings relating to native title determination applications have been unnecessarily overburdened by minor respondent parties, often funded by the Commonwealth pursuant to section 183 of the Act. The Act already provides for the protection of other valid interests. Further, the protection of other interests is always the primary concern of the State and Commonwealth governments acting as the major respondent parties in the proceedings. A multiplicity of minor respondent parties unnecessarily slows down the resolution, and significantly increases the costs, of native title proceedings.[427]

The reforms go a little way to addressing these issues.

6.2 Process of Reform

6.2.1 Amending Guidelines on the Provision of Financial Assistance (to Respondents)

[424] Section 183(4) NTA.

[425] Australian National Audit Office, Report number 1 for 2006/2007, 'Administration of the Native Title Respondents Scheme', tabled on 30 August 2006, accessible at http://www.anao.gov.au/director/publications/auditreports/2006-2007.cfm?item_id=5D810B5D1560A6E8AA9EE85091780E8E.

[426] Calma Submission to Joint Committee on Representative Bodies, above n.17, p,10.

[427] Calma Submission to Senate on Amendment Bill, above n.51, [69].

One of the elements of reform announced on 7 September 2005 was 'amending the guidelines of the native title respondents financial assistance program to encourage agreement making rather than litigation'.[428]

On 23 November 2005, the Commonwealth Attorney General released a consultation draft of proposed guidelines for the Native Title Respondents' Financial Assistance Scheme to strengthen the focus of the scheme on agreement-making over litigation. Submissions were sought by 10 February 2006.[429]

On 15 December 2006, the Attorney General made new 'Guidelines on the Provision of Financial Assistance by the Attorney-General under the *Native Title Act 1993*' (the **Assistance Guidelines**), which commenced operation on 1 January 2007.

6.2.2 *Legislative amendments*

In addition, amendments were made to s.183 to expand its scope by providing for assistance to be provided to develop standard form agreements for mining agreements. These amendments were made in Schedule 4 of the Amendment Act, which commenced on 15 April 2007.

6.3 Guidelines on the Provision of Financial Assistance by the Attorney-General

6.3.1 *Content of Assistance Guidelines*

Under s.183(1), a person who is, or intends to be, a party to an inquiry, mediation or proceeding in relation to a native title determination (claimant or non-claimant), a NNTT mediation, a special inquiry by the NNTT, or a right to negotiate mediation or arbitration, may apply to the Attorney General for assistance.

Under s.183(2), a person who is, or intends to be, a party to an Indigenous Land Use Agreement (**ILUA**) may apply to the Attorney General for assistance in relation to such an agreement or an inquiry, mediation or proceedings in relation to such an agreement. A similar right is available to a person who is a party to an agreement or is in a dispute about rights of access to a pastoral or other non-exclusive lease for traditional activities.

Before any grant of assistance, the Attorney General must be satisfied that the applicant for assistance is not eligible to receive assistance from any other

[428] Media release 7 September 2005, above n.5.

[429] Media release 23 November 2005, above n.7.

source, including a Representative Body.[430] Further, in summary, a person is ineligible for assistance if he or she holds or claims to hold native title.[431]

Factors to be taken into account in determining whether assistance is to be granted include:

- The financial situation of the applicant for assistance;[432]
- The nature of their interest in relation to the native title rights asserted;
- Whether the future act regime applies;
- The likely benefit to the applicant in participating;
- Whether a group representative is involved on behalf of another party;
- Whether the applicant's interest is adequately protected by the participation of other parties; and
- The chances of success in the proceedings or in negotiating an agreement.[433]

Assistance will not be provided if the applicant's interest extinguishes native title, or is a low impact future act.[434] Nor will assistance be provided for proceedings in Court unless:

- The proceedings raise a new and significant question of law directly relevant to the applicant's interest;
- The court requires the applicant's participation; or
- The proceedings will affect the applicant's interest in a real and significant way and mediation has failed for reasons beyond the applicant's control.[435]

In addition, the Guidelines specify:

- The form and requirements of an application for assistance;[436]
- The process of decision making for assistance decisions;[437]
- The timing and limits of assistance;[438]
- That assistance can only be provided for services provided by a member of the Native Title Practitioners Panel established by the Attorney-General;[439]

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[430] Section 15, *Guidelines on the Provision of Financial Assistance by the Attorney General under the Native Title Act 1993*. Commonwealth House of Representatives, Canberra, enacted 15 December 2006 by Attorney General, Philip Ruddock, effective 1 January 2007 (**Assistance Guidelines**).

[431] Section 16, Assistance Guidelines, above n.430.

[432] A public company is deemed to have sufficient resources. A contribution may be payable; see ss.24 and 25 Assistance Guidelines, above n.430.

[433] See ss.17 and 20, Assistance Guidelines, above n.430.

[434] See ss.18 and 21, Assistance Guidelines, above n.430.

[435] See s.19, Assistance Guidelines, above n.430.

[436] See ss.28 and 29, Assistance Guidelines, above n.430.

[437] See ss.30-35, Assistance Guidelines, above n.430.

[438] See ss.36-40, Assistance Guidelines, above n.430.

- The nature of the assistance which may be authorised, whether by group representative or individually;[440]
- The extent of the assistance that may be authorised including the amount of legal costs and disbursements allowed;[441] and
- The conditions applicable to any assistance that is authorised;[442] and
- The rights of review for decisions in relation to applications for assistance and in relation to costs and disbursements claimed.[443]

[439] See ss.41-42, Assistance Guidelines, above n.430.

[440] See ss.47-53, Assistance Guidelines, above n.430.

[441] See ss.54-70, Assistance Guidelines, above n.430.

[442] See ss.71-99, Assistance Guidelines, above n.430.

[443] See ss.100-106, Assistance Guidelines, above n.430.

6.3.2 *Analysis of Assistance Guidelines*

The Assistance Guidelines do focus the financial assistance scheme for respondents on agreement-making over litigation. Thus, relevant factors in deciding to extend assistance to particular respondents include whether their presence in the proceedings is likely to add anything of substance to their agreed or other outcome, and whether their interests can be represented in some other way. There is some additional focus on agreement making instead of litigation, but funding for litigation is still likely to be a major component of this funding pool.

It appears that the Government appreciates that high quality representation and resolution of native title proceedings depends on provision of adequate resources to the parties. It has therefore provided a means by which respondents in native title matters can access funding for access to legal services, in order to protect their interests in the context of a determination to be made *in rem*, as against the world, as opposed to *inter partes*, between the parties. The clarity and transparency of the eligibility for funding provided by the Assistance Guidelines is a welcome aid to procedural fairness.

It would be appropriate if the funding of Representative Bodies was similarly clear and transparent. In contrast, the Representative Body amendments rely excessively on ministerial discretion. In summary, although these guidelines are likely to assist in achieving their stated purpose, they still represent an inconsistency in approach by the Government between native title applicants and non-government respondents, which may pose a substantial barrier to achieving justice between the parties.

6.4 Legislative Changes

Grantee parties to a future act to which the right to negotiate applies may seek assistance from the Attorney General in relation to the development of a standard form of agreement:

- To facilitate negotiation in good faith; or
- Which, if agreed by a grantee party, would make it more likely that the government party doing the future act would consider that it attracts the expedited procedure.[444]

This change may facilitate more agreement making and reduce transaction costs in future act matters.

[444] Section 183(2A) NTA.

7. Dialogue between the Commonwealth and State and Territory Governments

7.1 The Changes announced

On 7 September 2005, the Commonwealth announced that one of the six inter-connected aspects to the reforms was 'increased dialogue and consultation with the State and Territory Governments to promote and encourage more transparent practices in the resolution of native title issues.'[445] This acknowledges the critical role of State and Territory Governments in seeking to resolve native title issues.[446]

Initiatives have included two annual Native Title Ministers' Meetings in 2005 and 2006. No such meeting took place in 2007, probably because of the Federal election and change of government. Another meeting took place in July 2008. They are proposed to occur annually.

7.2 Meeting of Native Title Ministers – 16 September 2005

On 16 September 2005, the Commonwealth Attorney General convened a meeting of State and Territory Native Title Ministers to discuss the challenges of the native title system.

The meeting recognised that 'governments can play a central role in facilitating the resolution of native title issues and … provided an opportunity for governments to discuss how they can cooperate and contribute to the achievement of practical and sustainable outcomes for all parties.'[447]

The meeting agreed to consult about the other aspects of the reform package just announced by the Commonwealth. In addition, it agreed to promote the resolution of native title issues by agreement where appropriate.

The Governments agreed to build on the June 2004 Council of Australian Governments (**COAG**) agreement for all jurisdictions to cooperate on native title, and to a renewed commitment to work together to make the native title system more effective to achieve improved outcomes for all parties.

They also recognised that all parties have a responsibility to ensure there is appropriate communication and transparency to assist in the expeditious resolution of native title issues, while having appropriate regard to claimants' requests for confidentiality, and the importance of appropriate consultation mechanisms between governments, including bilateral and multilateral discussions, about the native title system.

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[445] Media release 7 September 2005, above n.5.

[446] Attorney General's Department and Department of Families Community Services and Indigenous Affairs, Submission to the Senate Legal and Constitutional Affairs Committee, submission 6, *Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007* (2007), [2.16].

[447] Ministers' meeting communiqué 16 September 2005, above n.6.

7.3 Meeting of Native Title Ministers – 15 December 2006

The next meeting of the Native Title Ministers took place on 15 December 2006.

This meeting acknowledged that all jurisdictions have taken steps to ensure good communication and transparent processes, and agreed that, 'having appropriate regard to claimants' requests for confidentiality:

- open communication and transparent procedures can build and strengthen effective relationships between all stakeholders;
- early information exchange between governments and other parties can contribute to more efficient resolution of native title issues, including by:
    - increasing awareness of native title processes and encouraging other parties to focus on their specific legal interests in native title claims, and
    - providing other parties with the opportunity to understand better the government's views of the basis for proposed determinations.'[448]

In addition, the Ministers agreed that action should be taken to maintain open communication between the Court and the NNTT about the prioritisation of applications, and that it was necessary to review the status of claims and seek to remove claims which should no longer be in the system.

No legislative changes have been made to further this aspect of the reform package.

7.4 Analysis

State and Territory Governments are obviously integral to the streamlining of the claims resolution process and the post-determination phase of the native title scheme. As well as being respondent parties to claims, Governments routinely enter into ILUAs, and are usually responsible for the provision or regulation of public amenities and infrastructure. The PBC Report also identifies PBCs as an area of high resource and development need, where State and Territory governments should play a major role.

The Native Title Ministers Meeting communiqués promise a continuing dialogue between States, Territories and the Commonwealth to fulfil NTA obligations and to identify lessons learned. The 2005 and 2006 meetings both acknowledged that Representative Bodies and PBCs required close 'monitoring' to ensure they effectively discharge their responsibilities. Both meetings stopped short, however, of recognising the potential role of States and Territories in actively enhancing the development and fostering the success of Representative Bodies and especially PBCs.

[448] Attorney General's Department, Commonwealth of Australia. *Native Title Ministers' Meeting Communiqué* (15 December 2006), Canberra (**Ministers' meeting communiqué 15 December 2006**).

The Native Title Ministers meetings are important elements of the reform of the native title system for a number of reasons. There are limited forums for high level native title policy discussions at a national level. The two most recognised are the COAG, which may become more important under the new Commonwealth Government, and the Attorney General's native title consultative forum, which is a meeting of officials that tends to implement rather than direct policy.

These Ministerial meeting should be essential collaborative efforts by State, Territory and Commonwealth Governments to share knowledge, triage issues, and allocate resources. However, the meetings have been too infrequent, which is exemplified by the number of recommendations of reports which name the catalyst for inefficiency to be poor communication and co-ordination between the Australian Government and the relevant State or Territory counterpart. For example, Recommendation 3 of the Government's own PBC Report is that the Native Title Ministers' Meeting should place PBC establishment and needs on the agenda for consideration of all parties as a matter of practice when negotiating consent determinations or future act agreements, and should actively promote a better understanding of the functions, needs and responsibilities of PBCs among the other stakeholders in the native title system.[449]

Other aspects of the reform package also challenge individual State's approaches to native title. For example, the amendments provide the NNTT with a role in assessing connection material, which in practice was previously undertaken solely by the States and Territories, in accordance with criteria that vary from jurisdiction to jurisdiction. To date, there has been little discussion about the criteria the NNTT will use to make such assessments.

The State and Territory Governments should become more prominent and proactive in the setting and administration of native title policies and initiatives. This responsibility extends beyond mere inter-state diplomacy, to supporting, funding and building independent and successful PBCs, as well as better resource-sharing with each other and the Federal Government.

[449] PBC Report, above n.344, [5.32].

8. Technical amendments

8.1 Process of Reform

On 7 September 2005, the Government announced that it would be preparing 'exposure draft legislation for consultation on possible technical amendments to the Native Title Act to improve existing processes for native title litigation and negotiation'.[450]

The first of two discussion papers setting out proposals to fine tune the operation of the native title system with a view to achieving better outcomes for all parties was released on 22 November 2005 (the **Technical Amendments First Discussion Paper**). The Government said it was not proposing to wind back native title rights and was open to receiving further suggestions. Submissions were sought by 31 January 2006, and an exposure draft was to be released for comment early in 2006.[451]

The Government did not release an exposure draft, but did release a further discussion paper on 22 November 2006 (the **Technical Amendments Second Discussion Paper**). Some of the proposals in the First Discussion Paper were not pursued, some were modified, and additional proposals were made. The Government sought comments on these proposals by 22 December 2006.[452]

The technical amendments were dealt with in the Technical Amendments Bill, introduced into Parliament on 28 March 2007. The Technical Amendments Act was assented to on 20 July 2007. The technical amendments are set out in Schedules 1 and 4. Most commenced on 1 September 2007; some commenced earlier.

8.2 General description of changes

The explanatory Memorandum to the Technical Amendments Bill described Schedule 1 as making a large number of minor and technical amendments to the NTA, most of which would clarify or improve existing provisions, though some would provide for new processes. Schedules 2 and 3 deal with Representative Bodies and PBCs. The changes in Schedule 4 are consequential on the operation of the *Legislative Instruments Act 2003* (Cth).[453]

The amendments in Schedule 1 deal with the following areas:

1. Future act and ILUA processes;

[450] Media release 7 September 2005, above n.5.

[451] P. Ruddock (Attorney General), *Comments invited to help fine-tune Native Title Act*, media release, Canberra, 22 November 2005 (**Media Release 22 November 2005**).

[452] P. Ruddock (Attorney General), *Native title reform discussion paper*, media release, Canberra, 22 November 2006 (**Media Release 22 November 2006**).

[453] Technical Amendments Bill Explanatory Memorandum, above n.50, p.3.

2. Processes for making and resolving native title claims;
3. The obligations of the Registrar in relation to the registration of claims;
4. Miscellaneous amendments; and
5. Notes and overview provisions, and previous drafting errors.

8.3 Future act and Indigenous Land Use Agreement processes

The amendments to future act and ILUA processes address:

1. The process for notifying ILUAs;
2. Ensuring the NNTT provides a report after an inquiry into an objection to registering an alternative procedure ILUA;
3. The inclusion of automatic weather stations as facilities for services to the public for the purposes of the future act regime;
4. The combination of two or more existing leases, licences, permits or authorities is to be a 'permissible renewal' for the purpose of the future acts regime; and
5. Assistance provided by the Native Title Registrar to parties seeking to register an ILUA.

8.3.1 The process for notifying ILUAs

When a party applies to the NNTT Registrar to have an ILUA registered, the Registrar must give notice of that application to certain people or bodies who are not party to the agreement, as well as to the public, by advertisement in relevant newspapers.

Notice given in relation to area agreements and alternative procedure agreements must specify a notification day, prior to which people who claim to hold native title in the area subject to the agreement may object to registration. There was no such notification date specified for body corporate agreements, because the only persons able to object to the ILUA being registered were the parties to it, who were not required to be notified.

Section 24BH is amended to require the NNTT to specify a notification day in notices of a body corporate agreement.[454] It must also notify any non-party Representative Bodies and the parties to the ILUA of the commencement of the notification period.[455]

In addition, the public will no longer be notified about body corporate agreements, since they have no procedural rights or rights to object to their registration.[456] These agreements can only be made in respect of land or

[454] Sections 24BH(3) and (4) NTA.

[455] Sections 24BH(1)(c) and (5) NTA.

[456] Section 24BH(1) NTA; see Technical Amendments Bill Explanatory Memorandum, above n.50, p.10.

waters in respect of which there has been a determination that native title exists. The NNTT has never received a response to such a public notification.[457]

Other changes made in relation to the notification of ILUAs include new discretions in the NNTT to include in the notice:

- Identification of the area covered by the agreement by including a map or otherwise, rather than necessarily by written description;[458] and
- A summary of any statement about the validation of any future acts, whether prospective or already done, that is set out in the ILUA, rather than necessarily the full statement.[459]

These changes potentially make the actual notices of ILUAs easier to understand.

8.3.2 NNTT to report after an inquiry into an objection to registering an alternative procedure ILUA

The NNTT must determine whether an objection by a person claiming to hold native title in the area covered by an alternative procedure agreement should be upheld and registration prevented.[460] The NNTT does so through an inquiry under s.139(d).

After other inquiries under s.139, the NNTT must make a report in writing about the matters covered by the inquiry and any findings of fact upon which it is based. The amendments extend that requirement to inquiries under s.139(d).[461] The NNTT is now required to report to interested parties about all the inquiries it makes.

In addition, changes are made to require that any NNTT member who assisted a party to the alternative procedure agreement must not conduct an inquiry into whether the agreement should be registered.[462]

8.3.3 Extending scope of acts validated under the future act regime

8.3.3.1 Automatic weather stations

From the Government's point of view, s.24KA is 'intended to ensure that services to the public can be provided unimpeded by native title'.[463] The

[457] Commonwealth Government, *Technical Amendments to the Native Title Act 1993: Second Discussion Paper*, Attorney General's Department, Commonwealth Government, Canberra, 2006 (**Technical Amendments, Second Discussion Paper**), p.7.

[458] Sections 24BH(2)(a) NTA (body corporate agreements), 24CH(2)(a) NTA (area agreements), and 24DI(2)(a) NTA (alternative procedure agreements).

[459] Sections 24BH(2)(c) NTA (body corporate agreements), 24CH(2)(c) NTA (area agreements), and 24DI(2)(c) NTA (alternative procedure agreements).

[460] Sections 24DJ and 24DL NTA.

[461] Section 163AA NTA.

[462] Section 124(3) NTA.

provision sets out a list of such facilities, including roads, navigation markers, street lighting, and communications facilities, as well as other facilities similar to these, the construction or establishment of which is automatically validated, and thus affects native title. Compensation is payable, and native title holders have the same procedural rights as ordinary title holders. The non-extinguishment principle applies.

The amendments clarify that automatic weather stations are covered by the provision.[464]

8.3.3.2 Combination of two or more existing leases etc

The renewals and extension of leases, licence, permits and authorities are also automatically validated.[465] Native title holders are entitled to compensation and procedural rights, and the non-extinguishment principle applies in some circumstances.[466]

Previously, the replacement of a single such interest by multiple interests of the same type was taken to be a renewal of the original grant, and the grant of each of the multiple interests is taken to be valid.[467] The amendments add the converse situation to this validation process: where multiple grants are replaced by a single grant, which now is also valid.[468] The single grant must have taken place after the commencement of this part of the Technical Amendments Act on 1 September 2007.[469]

8.3.3.3 The effect of these amendments

Both these amendments expand the scope of the future acts that are validated without any procedural rights accruing in registered native title claimants or native title holders. To that extent, they result in a reduction of the native title rights and interests of Aboriginal and Torres Strait Islander people.

8.3.4 NNTT Registrar assistance to parties seeking to register an ILUA

Any party to an ILUA can, if the other parties agree, apply to the NNTT Registrar for the agreement to be registered.[470]

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[463] Technical Amendments, Second Discussion Paper, above n.457, [27].

[464] Section 24KA(2)(la) NTA.

[465] The scope of the future acts subject to this automatic validation is set out in s.24IC NTA.

[466] Section 24ID NTA.

[467] Section 24IC(2) NTA.

[468] Section 24IC(2A) NTA.

[469] Item 124, Part 2, Schedule 1, Technical Amendments Act, above n.310.

[470] Sections 24BG NTA (body corporate agreements), 24CG NTA (area agreements), 24DH NTA (alternative procedure agreements).

The amendments confer power on the Registrar to assist a party to prepare the application for registration and to prepare material in support.[471] This seems an appropriate reform.

8.3.5 Other future act regime amendments

Other future act regime amendments were made.

8.3.5.1 Enabling notices under s.29 to cover more than one act

Previously, a notice to the public of two or more future acts covered by the right to negotiate could be given in the same notice.[472] Separate notices of two or more future acts had to be given to registered native title claimants, Representative Bodies and grantee parties.

The amendments allow the Minister to determine the circumstances and manner in which such notification can be given to registered native title claimants, Representative Bodies, and grantee parties.[473]

If such notices contain reference to too many future acts, the possibility increases that important notifications will not be noticed by native title groups. One State has commonly notified hundreds of licences at the one time.[474] Only a small proportion of such a number are likely to be relevant to a particular group. In addition, time would run for the same period for each of the acts notified together, which might overburden the resources of a Representative Body that had to respond to many of them.

8.3.6 Some proposed amendments not proceeded with

Some of the amendments to the future act regime proposed in the discussion papers were not proceeded with. No reason appears to have been given for this. These proposals include:

- Allowing ILUAs to be amended after registration, without having to go through the same procedure as for the original registration of the ILUA. This change would have been restricted to body corporate agreements, and to area agreements where the amendment would not affect native title to any greater extent than under the original ILUA;[475]

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[471] Sections 24BG(3), 24CG(4), 24DH(3) NTA.

[472] Former s.29(8) NTA.

[473] Section 29(8) NTA.

[474] Submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment (Technical amendments) Bill 2007, Submission 10, *Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007* (2007) (**Calma Submission to Senate on Technical Amendments Bill**), [6].

[475] Technical Amendments, Second Discussion Paper, above n.457, [16]-[20].

- Clarification of how the validation of the construction or establishment of facilities for services to the public applies to 'mixed purpose' infrastructure – partly for the benefit of the public and partly for private benefit. An example is the situation where a mining company provides electricity for its mine, but also for a local community;[476]
- Allowing government bodies to continue to carry out certain low impact future acts under s.24LA for community benefit or public safety following a determination of native title.[477] Section 24LA only applies before a determination of native title. This proposal was not proceeded with because of very strong concerns that were raised during the Attorney General Department's consultations and the fact that there had been no practical problems with the way in which s.24LA operated;[478]
- Allowing government parties to request an independent hearing under s.24MD(6B) in relation to objections over certain acts subject to the freehold test. Some additional protections would have been provided for the native title party;[479] and
- Aligning the right to negotiate with the lodgement of objections to the expedited procedure. This change would have meant that only native title parties that object to the application of the expedited procedure could gain the right to negotiate. If some of the native title groups in respect of the area subject to the future act did not object to the application of the expedited procedure, they could not later gain access to the right to negotiate.[480]

8.4 Processes for making and resolving native title claims

The amendments to processes for making and resolving native title claims address the following:

1. Requiring certain types of information to be provided in applications;
2. Ensuring appropriate parties are notified of new or amended applications;
3. Streamlining the process for replacing the native title applicant;

[476] This would require an amendment to s.24KA; see Technical Amendments, Technical Amendments, Second Discussion Paper, above n.457, [28] and [29].

[477] This would require an amendment to s.24LA; see Technical Amendments, Second Discussion Paper, above n.457, [30] and [31].

[478] Senate Committee Report on Technical Amendments Bill, above n.283, [3.56].

[479] This would require amendments to s.24MD(6B); see Commonwealth Government, *Technical Amendments to the Native Title Act 1993: Discussion Paper*, Attorney General's Department, Commonwealth Government, Canberra, 2005 (**Technical Amendments, First Discussion Paper**), p.6; and Technical Amendments, Second Discussion Paper, above n.457, [8] and [9].

[480] This would require an amendment to s.32 NTA; see Technical Amendments, Second Discussion Paper, above n.457, [35] and [36].

4. Giving the Court greater ability to deal with questions about the authorisation of applications which arise during proceedings and ensuring that native title applicants identify the basis of their authorisation;
5. Encouraging access by parties to hearings (such as directions hearings) through teleconferences and other facilities; and
6. Clarifying the timeframe in which a respondent may simply withdraw from a proceeding.

In addition, two amendments contemplated in the First Discussion Paper were not proceeded with:

1. Amendments to ss.62(2) and 62(3) – information requirements for compensation applications; and
2. Amendments to ss.64 and 87 – splitting applications to facilitate resolution.

8.4.1 Information to be provided in applications

8.4.1.1 Preventing applications being made over areas where native title has already been determined

A native title determination application must be accompanied by an affidavit made by the applicant that includes a statement that the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register. The aim is to prevent native title applications being made over areas where native title has already been finally determined.

However, entries on the register need not be determinations of whether native title exists or not. Therefore an entry on the register could unnecessarily prevent a native title determination application being made.

This situation is changed to require that the statement sworn to should address whether there is an approved determination of native title that covers the area covered by the application.[481]

8.4.1.2 Searches about non-native title rights and interests

An amendment is made to clarify that the requirement to provide the details and results of all searches carried out to determine the existence of non-native title rights and interests in the area subject to the application only applies to searches made by or on behalf of the native title claim group.[482] An applicant does not have to provide the results of searches carried out by the Government.

8.4.1.3 Other changes to the contents of applications

[481] Section 62(1)(a)(ii) NTA.

[482] Section 62(2)(c) NTA.

Other changes to the form and content of applications include requiring details of:

- The process of authorising the application. This is aimed at providing the Court with the information necessary for it to consider questions of authorisation if they arise;[483] and
- Notices given under s.24MD(6B)(c), similarly to the existing requirement to include details of notices under s.29. This is aimed at ensuring the NNTT Registrar applies the registration test to the application in a timely fashion after the giving of notices in respect of acts that pass the freehold test but are not subject to the right to negotiate.[484]

8.4.2 Notification of new or amended applications

8.4.2.1 Notification of new applications

The Hiley Levy Report found several difficulties with the provisions governing the notification of native title applications, including:

- The fact that notification could not occur until after the application had been subjected to the registration test led to avoidable delays before potential parties became aware of the matter, or the matter could be advanced;
- The requirement to notify any person who has a proprietary interest (including licences and leases which are not ascertainable from title searches) leads to delay because of the other searches that must be carried out;
- There is no point to notification if issues not involving all parties ought to be resolved first, or if the purpose of making the application is only to gain access to future act procedural rights; and
- Other potential parties whose identity is readily ascertainable should be notified earlier.[485]

The Report considered that there ought to be greater flexibility in the requirements for notifying applications. Advantages would include not involving parties unnecessarily in aspects of the litigation that do not concern their interests, and possibly avoiding the need to make searches in order to identify the holders of minor proprietary interests.

The Report recommended that the notification requirements in s.66(3) be amended to provide the Court with greater flexibility in relation to who should be notified and when.[486]

[483] Section 62(1)(a)(v) NTA (see below).

[484] Section 62(2)(ga) NTA (see below).

[485] Hiley Levy Report, above n.2, [4.110]-[4.115].

[486] Hiley Levy Report, above n.2, recommendation 14.

These recommendations were not followed through in their entirety. No amendment was made making notification of an application made after notification of a future act discretionary.

However, the requirement to notify proprietary interest holders was changed from notifying those who held their interests when the application was filed in the Court to those who held their interests when notice is given.[487]

8.4.2.2 Notification of amended applications

The area subject to a determination application can be increased, but only to the extent that it includes land or waters covered by the original application.[488] The possibility exists that when an application is amended to reduce its area, a party no longer affected by the application will withdraw as a party, and then the application area will be increased again to include the area subject to the party's interest.

Section 66A is amended to ensure that, when a change to an application results in the inclusion of land or waters additional to those subject to the application immediately before the amendment, persons with interests in the added areas will be notified.[489] In addition, persons who receive such a notice have the right to become parties to the amended application.[490]

8.4.3 Replacing the native title applicant

A member or members of native title claim group can apply to the Court to replace the applicant, under s.66B. An applicant can, and generally does, comprise more than one person. Previously, the applicant could be replaced on the basis that it was no longer authorised or had exceeded its authority. Some of these applications have become very contested and costly procedural matters. It can be difficult to show the Court that a new applicant is appropriately authorised. Any change to simplify the process while ensuring that the wishes of the native title claim group are implemented, is to be welcomed.

Section 66B(1) has been amended to add to the grounds for replacing an applicant, the ground that a person who, either alone or jointly with others comprises the current applicant, consents to his or her replacement or removal, or has died or become incapacitated.[491]

Any replacement applicant must still satisfy the Court that it is authorised to make the application and deal with matters arising in relation to it. This can

[487] Section 66(3)(a)(iv) NTA.

[488] Section 64(2) NTA: see *Kogolo v State of Western Australia* (2000) 102 FCR 38.

[489] Section 66A(1A) NTA.

[490] Section 84(3)(b) NTA.

[491] Section 66B(1)(a) NTA.

require substantial evidence of authorisation meetings that have been properly notified, conducted and recorded.[492]

In addition, the possibility of amending an application to replace an applicant under s.64(5) has been removed. Thus, the only way to replace an applicant is by application under s.66B. Once an applicant has been replaced under s.66B, the Register of Native Title Claims is amended to reflect the order.[493] Thus, the application is not put through the registration test as a consequence of replacing the applicant.

A recommendation of the Technical Amendments Second Discussion Paper[494] that a simplified procedure be implemented to allow the removal of members of the applicant group who are deceased, incapacitated or wish to be removed was not adopted, because there is a risk that claims may not be properly authorised if there is such a streamlined procedure. Such people can only be removed, under s.66B, if the replacement applicant is properly authorised.[495] According to the Government, this could not be ensured if there was a simple process for removing such people. This argument seems rather specious, since such people would not themselves be able to consent to being a member of the applicant.

It will therefore be necessary to convene a full authorisation meeting under s.66B in order to remove a deceased, incapacitated or unwilling member of the applicant group. It seems likely that such expensive meetings will not be convened merely to remove such people from applications. For most claim groups, it will be 'easier and safer in terms of the registration test, to leave the names of such applicants on the application and deal with associated hurdles when they arise'.[496]

8.4.4 Authorisation of claims

8.4.4.1 The Federal Court and authorisation questions

The applicant in an application must be authorised to make the application and to deal with matters arising in relation to it.[497] That authorisation must be in compliance with a process of decision-making under traditional laws and customs, or an agreed process.[498]

[492] See for example, *Anderson v State of Western Australia* [2007] FCA 1733 (13 November 2007).

[493] Section 66B(4) NTA.

[494] At [13].

[495] Senator Johnston, Senate, Debates, 13 June 2007, p.133.

[496] Carpentaria Land Council, Submission to the Senate Legal and Constitutional Affairs Committee, submission 7, *Inquiry into the Native Title Amendment (Technical Amendments) Bill 2006* (2007), pp.2-3.

[497] Section 61(1) NTA.

[498] Section 251B NTA.

The Hiley Levy Report recommended that the authorisation provision be amended to remove ambiguities.[499] Concerns included whether:

- Lack of authorisation is fatal to an application;
- Defective authorisation can later be cured; and
- What proportion of the claim group must give instructions to the applicant?

The Technical Amendments Second Discussion Paper states that:

- Whether deficiencies in the authorisation processes are fatal to the application is a matter that should be left to the Court. Therefore, a blanket statutory rule would not be appropriate;
- It might be appropriate to provide a mechanism for curing defects;[500] and
- It is not appropriate to specify the proportion of the claim group that must give instructions, since authorisation rests on a traditional or on an agreed decision-making process under s.251B. However, it might be appropriate to clarify that s.251B prescribes the decision making process by which authorisation may be withdrawn.[501]

The Technical Amendments Act inserts s.84D, which provides that:

1. The matter of authorisation of the applicant can be brought up at any time, on the application of a member of the native title claim group, that of another party, or on the Court's own motion;
2. The Court may order a person who comprises, or is one of the people comprising, the applicant to produce evidence that he or she was authorised to make the application or deal with a matter arising under it;
3. If the Court finds that a person was not appropriately authorised, in accordance with s.251B, the Court's jurisdiction to deal with the authorisation question arises; and
4. Under that jurisdiction, the Court may hear and determine the application despite the defect in authorisation, after balancing the needs for due prosecution of the application and the interests of justice, or may make such other orders as it deems appropriate.

Relevant factors to the exercise of the Court's power to hear and determine the application despite a defect in authorisation might include the nature of the defect, the stage the matter has reached, and whether the applicant is now authorised.[502]

Orders that could be made include orders about the use of evidence already taken or orders about the replacement of the applicant.[503] The applicant

[499] Hiley Levy Report, above n.2, Recommendation 13.

[500] Technical Amendments, Second Discussion Paper, above n.457, [46].

[501] Technical Amendments, Second Discussion Paper, above n.457, [47].

[502] Technical Amendments Bill Explanatory Memorandum, above n.50, [1.286].

[503] Technical Amendments Bill Explanatory Memorandum, above n.50, [1.288].

should only be replaced under s.66B, not under s.84D(4), because of the consequences of an order under s.66B.

These changes are part of the shift from the administrative inquiry into the Aboriginal relationship with country undertaken under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), where there is a general inquiry into who can satisfy the statutory criteria for recognition as traditional owners, to a more adversarial claim and party-based system under the NTA. Increasingly, native title groups are bound by the cases they make and the basis on which their claims are made.[504]

This change also means that the issue of authorisation can be raised, and must be dealt with, at any time in the proceedings. There is no pre-condition to any party being able to raise this issue. There are no guidelines in the NTA directing how an applicant should deal with the question of authorisation; the matter is left to the Court, presumably on the basis of s.251B and existing case law. Dealing with such interlocutory applications has the potential to provide another barrier to the recognition of native title.[505]

8.4.4.2 *Ensuring native title claimants identify the basis of their authorisation*

Authorisation is also dealt with the native title determination application. Previously, the affidavit in support of the application had to state the basis on which the applicant was authorised.[506] Some of these affidavits provided little or no information about the basis of authorisation.[507]

The amendments require the affidavit to set out the details of the decision making process by which the applicant was authorised.[508] This should include setting out whether the process was traditional or agreed under s.251B.[509]

This amendment requires more information to be included with an application, and to that extent makes it more difficult for a native title claim group to make an application. Sometimes, a member of the applicant group will have little direct knowledge of the authorisation process.[510] However, he or she will still have to make an affidavit that contains the necessary information, even if it is only from information and belief.

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[504] See, for instance, *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31 (5 February 2007).

[505] See, for example, [884]-[945].

[506] Former ss.62(1)(a)(v) NTA (determination application) and 62(3)(a)(iv) NTA (compensation application).

[507] Technical Amendments Bill Explanatory Memorandum, above n.50, [1.223].

[508] Section 62(1)(a)(v) NTA (determination application) and 62(3)(a)(iv) NTA (compensation application).

[509] Technical Amendments Bill Explanatory Memorandum, above n.50, [1.224].

[510] Evidence of Martin Dore, Principal Legal Officer, North Queensland Land Council to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007, Senate, Legal and Constitutional Affairs Committee, 2 May 2007, p.3.

Including more information about authorisation with the application itself makes the process of applying the registration test easier for the NNTT Registrar. This may mean that the Registrar, or delegate, does not need to seek further information about authorisation from the applicant,[511] making the process quicker. In addition, having this information available with the application makes it more likely that an application will be brought under s.84D to have proceedings affected by a possible defect in authorisation dealt with immediately.

This process will add 'another layer of complexity for native title claimants in a already legally complex process'.[512] Similar material must already be provided in Schedule R of the application.

8.4.5 Access to hearings through teleconferences and other facilities

The *Federal Court Act 1976* (Cth) provides for the use of video links, audio links and other methods of communication in proceedings at the discretion of the Court.[513] The Court has used such technology to facilitate parties' attendance. 'However, the Court has not always been prepared to agree to parties' attendance at interlocutory proceedings, such as directions hearings, through such means'.[514] Attendance in person can be expensive and time consuming.

Section 82 deals with the Court's way of operating. It is amended to require the Court to use such links, if the pre-conditions for their use are met and it is not contrary to the interests of justice to do so.[515]

This change maximises the use of video links, audio links and other methods of communication, and potentially reduces the costs of the litigation.

8.4.6 Withdrawal of a party

A respondent party may withdraw from native title proceedings before the first hearing by giving notice to the Court.[516] After the first hearing, it is necessary to seek leave to do so.[517]

Since there is some uncertainty about what 'first hearing' means, and proceedings may take years before they get to trial,[518] these provisions have been changed. For the purpose of determining when the first hearing is, it is

[511] Evidence of Chris Doepel, Registrar NNTT to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007, Senate, Legal and Constitutional Affairs Committee, 2 May 2007, p.13.

[512] NNTC Submission to Senate on Technical Amendments Bill, above n.429, p.1.

[513] *Federal Court Act 1976* (Cth), s.47B.

[514] Technical Amendments, Second Discussion Paper, above n.457, [55].

[515] Section 82(3) NTA.

[516] Section 86(6) NTA.

[517] See s.86(7) NTA.

[518] Technical Amendments Bill Explanatory Memorandum, above n.50, [1.278].

now necessary to disregard directions hearings.[519] Thus, a respondent party may withdraw from the proceedings at any time before the first substantive hearing by giving notice to the Court.

This change will make it easier for respondent parties to withdraw from the proceedings before trial, and may encourage the making of agreements that satisfy their concerns.

However, there is no provision for such a party to pay costs. This may be necessary if it has made unwarranted and expensive interlocutory applications, and no orders for costs have been made on those applications.[520]

8.4.7 *Information required for compensation applications (amendment not proceeded with)*

When a compensation application is made, information is required to accompany it, including information enabling the area covered by the application to be identified, a map, details of searches in relation to non-native title rights and interests, and a description of the native title rights and interests claimed.[521]

The Technical Amendments First Discussion Paper proposed amendments to reduce the amount of information required to accompany compensation applications in circumstances where there has already been a determination that native title is not recognised.[522] Such information would only have been required if there is a material difference between the nature of the group, the rights and interests claimed, or the area covered by the two applications.

Some stakeholders were concerned about the uncertain meaning of 'material differences'. The proposed amendment was not proceeded with.[523] It was considered likely that the information provided in relation to the native title application could be adapted for the compensation application.

8.4.8 *Splitting applications to facilitate resolution (amendment not proceeded with)*

A native title application can be split to facilitate a consent determination over part of the area subject to the original application.[524] Thus, the Gunditjmara application was split to enable the making of a determination over part of the area, and negotiations to continue in respect of the other part where one respondent did not agree to the making of the determination in favour of the Gunditjmara native title holders.[525] This possibility is particularly useful

[519] Section 86(6A) NTA.

[520] NNTC Submission to Senate on Technical Amendments Bill, above n.419, p.2.

[521] See ss.62(3)(b), 62(1)(b) and 62(2) NTA.

[522] Technical Amendments, First Discussion Paper, above n.479, p.8.

[523] Technical Amendments, Second Discussion Paper, above n.457, [3].

[524] Section 87(3) NTA.

[525] *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474, at [7].

where one or more parties without an interest in the determination area do not agree. However, doing so means that the remaining part of the application must go through the registration test again.[526] This prospect may discourage applicants from agreeing to split applications for this purpose.

The Technical Amendments First Discussion Paper proposed amendments to enable applicants to apply to the Court for a consent determination over part of the claim area and authorise the Court to make such a determination. All parties with an interest in the area covered by the proposed determination would have had to consent. The proceedings would have continued with a reduced party list.[527]

The proposal was not proceeded with.[528] It was subsumed into more substantive measures recommended by the Hiley Levy Report involving the removal of parties who do not have a relevant interest and limiting the right to participate of non-government respondents to issues relevant to their interests.[529]

8.5 Registration of claims

The amendments to the claim registration process address the following:

1. Requiring the timely application of the registration test, particularly where procedural rights would flow from registration of a claim;
2. Exempting amended claims from going through the registration test where the amendments would not affect the interests of other parties, such as where the rights and interests being claimed are reduced; and
3. Providing for *de novo* review of registration decisions by the Registrar (or delegate), in addition to the existing provision for review by the Court.

8.5.1 Requiring the timely application of the registration test

Notification of some future acts gives rise to procedural rights if there is a registered native title claimant in respect of the area subject to the future act at the end of a set time after notification.[530] Therefore, in some cases, an application is lodged and must be registered within a short period of time. The NNTT Registrar must endeavour to apply the registration test in cases where

[526] Section 64(4) NTA.

[527] Technical Amendments, First Discussion Paper, above n.479, p.9.

[528] Technical Amendments, Second Discussion Paper, above n.457, [5].

[529] See the discussion above covering the amendments to ss.87A and 84 NTA concerning making a determination over part of an area and parties, respectively.

[530] See for example, s.30(1)(a) NTA, which provides that the right to negotiate accrues to a person who is a registered native title claimant four months after notice is given under s.29.

there is a relevant s.29 notice within four months.[531] This obligation did not extend to other future acts.

The amendments extend the obligation of the NNTT Registrar to apply the registration test in a timely fashion to applications made in response to the notification of future acts giving rise to procedural rights under s.24MD(6B), and future acts under an alternative State or Territory regime.[532] In any other case, the test is to be applied as soon as is practicable.[533] Provision is also made for the Registrar to be informed of the notification of future acts under s.24MD(6B).[534]

In the Technical Amendments Second Discussion Paper, it was proposed that this requirement be extended to the registration testing of applications made in response to non-claimant applications.[535] However, this proposal was not proceeded with.

8.5.2 Exempting amended claims from going through the registration test

The Federal Court Registrar must provide a copy of all amended applications to the NNTT Registrar, who must apply the registration test.[536] A consequence of this requirement has been that the applicant is reluctant to amend applications because the registration test will be reapplied, and registered claimant status may be lost along with potential future act procedural rights. Therefore, the application often does not reflect the current state of the claim sought to be established by the applicant, which is not conducive to successful mediation or litigation of the matter.

The amendments aim to address these problems by allowing the applicant to amend the application without the application of the registration test where:

- The area subject to the application is reduced;
- A right or interest is removed from those claimed;
- The name of the Representative Body or NTSP is changed; or
- The address for service of the applicant is changed.[537]

In all these situations, the NNTT Registrar must amend the Register to reflect such changes.[538]

In addition, changes to the identity of people who are members of the applicant are now dealt with only under s.66B. This includes removing the names of deceased people and people who consent to having their names

[531] Former s.190A(2) NTA.

[532] Section 190A(2) NTA.

[533] Section 190A(2A) NTA.

[534] Sections 24MD(6B)(c)(iv) and 62(2)(ga) NTA.

[535] Technical Amendments, Second Discussion Paper, above n.457, [62].

[536] Section 64(4) NTA.

[537] Section 190A(6A) NTA.

[538] Section 190(3)(a)(iii) NTA.

removed.[539] Before the Court makes an amendment under s.66B, it must be satisfied that the new applicant is properly authorised. If not, the application is not amended. Therefore, the registration test is now not applied to such amendments.[540]

8.5.3 De novo review of registration decisions by the Registrar

Previously, the only mechanism for reviewing a registration test decision was for the applicant to apply to the Court to review it,[541] which was time consuming and expensive. The amendments add the opportunity to seek *de novo* review of a registration test decision by a member of the NNTT.

New ss.190D-190F replace the old provision governing the provision of reasons for the decision and review by the Court (s.190D), and create a scheme that provides for:

1. The provision of reasons;[542]
2. Application in writing for review within 42 days, stating the basis on which reconsideration is sought. The application for internal review may only be made once, and not after review by the Court;[543]
3. The claim to be reconsidered by a member of the NNTT in a timely fashion, taking account of the information the Registrar was required to take into account along with any other information the NNTT considers appropriate;[544] and
4. Review by the Court, which takes the same form as review under old s.190D, and can be sought either without or after internal review.[545]

The Technical Amendments Bill was amended in Committee in the Senate to require this review to be undertaken by a member of the NNTT, rather than the Registrar, in order to ensure that fresh eyes are considering the question.[546]

This amendment is potentially beneficial for applicants. It reduces the need to seek an order for review in Court, which is time consuming and expensive, and provides for review by a person who intimately knows the nature of the issues that might arise.

[539] Section 66B(1)(a)(i) and (ii) NTA.

[540] Section 66B(4) NTA.

[541] Former s.190D(2) NTA.

[542] Sections 190D(1) and (3) NTA.

[543] Sections 190E(2)-(4) NTA.

[544] Sections 190E(5) and (7)-(9) NTA.

[545] Section 190F(1) NTA.

[546] Senator Johnston, Senate, Debates (in Committee), 13 June 2007, p.144.

8.6 Miscellaneous amendments

Miscellaneous amendments contemplated or implemented include:

1. Restricting the use of information obtained by the NNTT in exercising its assistance function;
2. Clarifying the scope of the alternative state regimes authorised under s.43;
3. Making clear that a determination for an alternative state regime must be revoked where that regime ceases to have ongoing effect, thereby ensuring resumption of the right to negotiate provisions of the NTA;
4. Implementing changes to sections 87 and 87A to clarify that all persons holding an interest (not just a proprietary interest) in any part of the determination area and who are parties to the proceedings must consent to a determination over part of the application area;[547]
5. Changing the notification provisions to ensure that native title holders who are yet to set up a PBC are notified of future acts where the PBC would otherwise have been notified;
6. Clarifying that certification of a claim or ILUA by a Representative Body is still valid if that Representative Body is subsequently derecognised or ceases to exist;
7. Establishing a more flexible scheme for payments held under right to negotiate processes;
8. Clarifying when information is added to, amended or removed from the registers setting out details of native title claims, determinations and ILUAs;
9. Ensuring that agent PBCs consent to managing native title rights and interests before their determination;
10. Clarifying the scope of the Native Title Registrar's ability to provide assistance pursuant to s.78 NTA; and
11. Clarifying the status of NNTT mediation reports.

8.6.1 Restricting the use of information obtained by the NNTT in exercising its assistance function

The NTA provides in many places that a person may seek the assistance of the NNTT to perform specific statutory tasks.[548]

[547] Senate Committee Report on Amendment Bill, above n.25, Recommendation 9.

[548] These include making a body corporate agreement (s.24BF), making an area agreement (s.24CF), negotiating with an objector to the registration of an area agreement (s.24CI(2)), making an alternative procedure agreement (s.24DG), negotiating with an objector to the registration of an alternative procedure agreement (s.24DJ(2)), mediating among negotiation parties under the right to negotiate (s.31(3)), making an agreement about rights of access over pastoral leases (s.44B(4)), mediating among persons in dispute about rights of access over pastoral leases (s.44F), negotiating an agreement that involves matters other than native title (s.86F(2)), and assisting a Representative Body to perform its dispute resolution functions (s.203BK(3)).

Each of these provisions is amended to prohibit the NNTT from using or disclosing information gained during the provision of that assistance without first obtaining the permission of the person who provided the information. This restriction does not apply to information that the NNTT could have obtained from public sources.

Thus, for instance, the NNTT cannot use information gained while assisting a party to negotiate an ILUA when it is later dealing with an application to register it, or mediating the associated native title determination application. Similarly, the NNTT or the Registrar of the NNTT cannot use information gained in the process of negotiations about an objection to registration later when deciding whether to register the ILUA. These proposals received broad support from stakeholders.[549]

8.6.2 Clarifying the scope of the alternative state regimes under section 43

Section 43 NTA enables a State or Territory to establish right to negotiate procedures which operate to the exclusion of the NTA provisions if they meet certain criteria. The only alternative regime set up to date is in South Australia, though schemes are proposed for some other States.

There was some uncertainty as to whether alternative regimes could include all aspects of the right to negotiate regime under the NTA, particularly the expedited procedure provisions and the provisions regarding conjunctive agreements covering several stages of a mining development.[550]

The amendments provide that State or Territory alternative regimes can be valid even if they include expedited procedure or conjunctive agreement/determination provisions.[551] Thus, the determination regarding the South Australian regime is valid.

This amendment has the effect of disturbing the balance of interests enacted by the 1998 amendments to the NTA. Therefore, it is not a technical amendment.

It retrospectively validates any future acts that might otherwise have been invalid by reason of the invalidity of the certification of the State scheme. It does so by validating the Minister's determination, not by validating the grants of the South Australian tenements.[552] There appears to have been little consultation with Aboriginal people in South Australia about this provision. Further, there is no provision for compensation for any loss that might have been suffered by native title holders or registered native title claimants. The Minority Report of the Senate Legal and Constitutional Affairs Committee Inquiry into the provisions of the Technical Amendments Bill recommended

[549] Technical Amendments, Second Discussion Paper, above n.457, [6].

[550] See ss.32 and 237 NTA, and s.26D(2) NTA, respectively.

[551] Sections 43(2A) and (5) NTA.

[552] Calma Submission to Senate on Technical Amendments Bill, above n.474, [13].

that these provisions be delayed, pending consultation and 'negotiation of just compensation where appropriate'.[553] However, that did not happen.

8.6.3 Revoking the determination for an alternative state regime where that regime ceases to have ongoing effect

Previously, there was no provision governing the situation when an alternative State or Territory regime no longer existed.

The amendments provide that if the alternative provisions cease to have ongoing effect, the Commonwealth Minister must, by legislative instrument, revoke the determination approving the alternative scheme.[554] Therefore, the NTA processes would resume. There is no provision governing the situation if the Minister fails to comply with the statute in this regard. Therefore, action would lie against the Minister seeking an order for him or her to comply with his or her statutory duty.

8.6.4 Changes to sections 87 and 87A regarding determinations over part of the application area, in line with Telstra's concerns

The Amendment Act inserted s.87A, giving the Federal Court power to make determinations for part of the area subject to a native title application, where some, but not all, parties agree to the determination. The parties who had to agree in order for such a determination to be made included all persons holding a registered proprietary interest in the area who are parties to the proceedings.

Telstra was concerned that this provision may exclude parties with significant interests in the application area that are not proprietary interests, for example, owners of infrastructure installed under statutory powers, such as telecommunications networks, electricity and gas transmission and distribution systems.[555] The Senate Committee inquiring into the provisions of the Amendment Bill recommended that 'any significant impediment to [Telstra's] ability to [contribute to the efficiency of communications across Australia] should be examined, and where necessary, rectified'.[556]

Accordingly, the NTA has been further amended, so that the parties who must agree in order for a s.87A determination to be made now include all persons holding an interest in relation to land or waters in any part of the determination area and who are parties to the proceedings.[557]

This amendment makes it more difficult to make a determination over part of an application area, since more parties must be involved. It also potentially

[553] Senate Legal and Constitutional Affairs Committee, *Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007: Minority Report by the Australian Labor Party*, Senate, Legal and Constitutional Affairs Committee, Canberra. 2007, [1.5].

[554] Sections 43(3A) and 43A(9A) NTA.

[555] Technical Amendments Bill Explanatory Memorandum, above n.50, [1.302].

[556] Senate Committee Report on Amendment Bill, above n.25, at [4.73].

[557] Section 87A(1)(c)(v) NTA.

will allow a party without a proprietary interest to engage with the proceedings late, and to de-rail settlement of part of them. However, the amendment may protect the interests of Telstra and other owners of infrastructure.

In addition, the Technical Amendments Act repealed a provision which required that the Federal Court consider that a determination could not be made under s.87A before it exercises its jurisdiction under s.87 to make a determination by consent.[558]

8.6.5 Change notification provisions to ensure that native title holders who are yet to set up a PBC are notified of future acts where the PBC would otherwise have been notified

Certain future acts yield native title holders and registered native title claimants the same procedural rights as corresponding non-native title rights and interests holders.[559]

Since the holders of these corresponding rights and interests have a right to be notified about the acts that might affect those rights and interests, it is appropriate that native title holders, PBCs, and registered native title claimants are accorded similar rights to be notified. This is done by providing that, if no native title determination of native title has been made, one way of doing so is to give notice to the relevant Representative Body and to any registered native title claimants.[560] In addition, if such a procedural right requires another person to do any thing in relation to the native title holders, any registered native title claimants are given that right and the Representative Body have a right to comment on the doing of the act.[561] After a determination, the PBC has these rights.

However, these provisions do not cover all potential situations between the registration of a native title determination application and a determination that the native title is held or managed by a PBC on behalf of the native title holders. In some cases, no PBC is determined on the day that a native title determination is made, often because the composition of the native title holding group is one of the issues in dispute in the litigation. This means that the membership and structure of the PBC cannot be decided before the determination of native title is made. Those decisions must be made after the determination of native title.

In some cases, the common law native title holders have been given up to twelve months after the determination to nominate a PBC to the Court, and the native title determination has not taken effect until the PBC has been determined. In the meantime, a declaration has been made that the proceedings are not finalised for the purpose of removing the claim from the

[558] Section 87(1)(c) NTA, inserted by the Amendment Act, above n.226.

[559] These future acts are the provision of facilities for services to the public (s.24KA(7) NTA), acts that pass the freehold test (s.24MD(6A) NTA), and acts that affect offshore places (s.24NA(8) NTA).

[560] Former ss.24KA(8), s.24MD(7), and s.24NA(9) NTA.

[561] Former ss.24KA(9), s.24MD(8), and s.24NA(10) NTA.

Register of Native Title Claims until a PBC has been determined.[562] This means that the registered native title claimants continue to have the procedural rights that would otherwise pass to the PBC. This procedure is not supported by any specific provision in the NTA.

The amendments address this issue by changing the application of these notification provisions to cases where there is no PBC for any part of the area affected by the future act, rather than where there is no determination of native title.[563] In addition, the Register of Native Title Claims can be amended to reflect the fact that no PBC has yet been determined, so the application can still be registered. Thus notice should still go to the Representative Body and to the registered native title claimants, who have procedural rights under the future act regime.

8.6.6 Certification still valid if the Representative Body is subsequently derecognised or ceases to exist

One of the functions of Representative Bodies is to certify applications.[564] Certification by Representative Body, or being satisfied that the applicant is a member of the native title claim group and is authorised to make the application, is one of the procedural pre-conditions to the NNTT Registrar registering an application.[565]

Previously, the application must have been certified 'by each Representative … Body that could certify the application'.[566] That provision was ambiguous as to whether a Representative Body for part of the application area could certify if there was no Representative Body for the rest of the area, and also as to the status of a certificate if the Representative Body is no longer recognised.[567]

The changes address these ambiguities by:

1. Clarifying that a Representative Body may certify an application even if it is only the Representative Body for part of the area claimed. Implicitly, the Registrar need only form an independent view about the authorisation of the application, under s.190C(4)(b) NTA, in respect of the rest of the area;[568] and
2. Clarifying that certification, of either an application or of an ILUA, is not affected by the withdrawal of a Representative Body's recognition.[569]

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[562] See, for instance, the orders accompanying the determination in *Rubibi No.7*, above n.3, orders [2] and [3] and declaration [10]; and see s.190(4)(e) NTA.

[563] Sections 24KA(8) and (9), s.24MD(7) and (8), and s.24NA(9) and (10) NTA.

[564] Section 203BE NTA.

[565] Section 190C(4) NTA.

[566] Former s.190C(4)(a) NTA.

[567] Technical Amendments, Second Discussion Paper, above n.457, [63].

[568] Note at the end of s.190C(4) NTA.

[569] Section 190C(4A) NTA (certification of an application) and s.24CG(5) NTA (certification of an ILUA).

This change clarifies the status of such certificates.

8.6.7 A more flexible scheme for payments held under right to negotiate processes

The NNTT or the Minister may determine that a future act subject to the right to negotiate be done subject to conditions, which can include that an amount of money be paid and held in trust in accordance with regulations, which have not yet been made.[570] There are prescribed circumstance governing how such money should be paid out of trust.[571]

This scheme has been changed so that instead of having to pay money into trust, a future act proponent would only have to provide a bank guarantee secured in favour of the Registrar.[572] A similar provision would be made in respect of alternative State or Territory regimes.[573]

This means that the proponent would retain the use of the money until called upon to pay it to the native title party. The bank guarantee would provide security to the native title party that the money would be paid when and if due.[574]

Section 52 NTA sets out the consequences for the bank guarantee in various circumstances. For instance:

- If the Government no longer intends to do the act, or there is a determination that there is no native title in respect of the area concerned, the bank guarantee is to be cancelled; and
- If a determination is made on a compensation claim that a person is entitled to compensation in accordance with the Division of the NTA dealing with compensation, the amount secured by the bank guarantee is to be paid to the Registrar, who must pay that amount to the person entitled to compensation.

8.6.8 Information added to, amended on or removed from the registers setting out details of native title claims, determinations and ILUAs.

The NTA provides for registers of native title claims, determinations, and ILUAs.[575]

Amendments have been made to clarify the circumstances in which information is to be added to, amended on or removed from these registers.

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[570] Sections 41(3) NTA (arbitral body decision), 42(5) NTA (Ministerial override of arbitral body decision), and 36C(5) NTA (Ministerial decision if arbitral body decision delayed).

[571] Section 52 NTA.

[572] Section 36C(5) NTA.

[573] Section 43(2)(j) NTA.

[574] Technical Amendments, Second Discussion Paper, above n.457, [40].

[575] Sections 190 NTA (claims), 192 and 193 NTA (determinations), and 199A-199C NTA (ILUAs).

8.6.9 Consent of agency PBC to manage native title rights and interests

Where native title holders nominate a PBC to hold native title rights and interests on trust, that PBC must consent before a determination of the PBC can be made. Previously there was no requirement that an agent PBC had to consent before it could be nominated. Thus, technically, a body corporate could be determined to be an agent PBC without its consent or even knowledge.

This situation has been changed to require an agent PBC to consent to its nomination before it can be determined as a PBC.[576]

8.6.10 Scope of the Registrar's ability to provide assistance pursuant to s.78 NTA

An amendment to s.78 to clarify that the NNTT Registrar could assist a person applying to register an ILUA was proposed in the First Discussion Paper.[577] These changes were not proceeded with in the Technical Amendments Act.

8.6.11 Status of mediation reports

An amendment to s.136G was proposed in the First Discussion Paper to clarify that when the NNTT provides a written report of the mediation to the Court, it should not include confidential information, as required by s.136A(4).[578] These changes were not proceeded with in the Technical Amendments Act.

[576] Section 57(2)(a) NTA.

[577] Technical Amendments, First Discussion Paper, above n.479, p.11.

[578] Technical Amendments, Second Discussion Paper, above n.457, [57].

9. Conclusion

In order for native title law and policy to operate with integrity in a difficult environment, the system must be seen to deliver justice in a way which is accessible, expeditious and capable of addressing the complexities of the jurisdiction.

The timing of these Amendments provided an opportunity to implement resource saving changes which recognised the benefits of a generally stable native title system. However, they make substantive changes in relation to Representative Bodies and also to the claim resolution functions of the NNTT and Federal Court, which go beyond making the system more efficient.

Firstly, the reforms risk forcing Representative Bodies to reprioritise their services within the same funding parameters, leading to a restriction of services to Indigenous communities. This may ultimately mean a reduction in the accessibility of legal assistance where it is needed most in the native title system. At a minimum, these provisions create uncertainty for Representative Bodies, while increasing executive discretion and control over their existence and operation.

Secondly, the NNTT is to play a far greater role in mediation, and gains new powers to assist it in that function, while the Court must adjust its own functions to accommodate it. There is some potential for confusion in the relationship between mediation and litigation, and in the roles of the NNTT and the Court. The changes may mean that the parties have less capacity to control their own involvement in the mediation process. Procedural fairness may be compromised by giving coercive powers to the NNTT.

Thirdly, the Court's new powers to dismiss certain applications over and above existing strike out powers may also reduce the capacity of applicants and Representative Bodies to influence the conduct of native title proceedings, and to make their own decisions prioritising their limited resources.

Fourthly, the new regime will rely heavily on the good will and cooperation of the State and Territory Governments on issues which require a collaborative approach to ensure the system is uniform and, hopefully, better resourced. The work of PBCs and Representative Bodies and the fast resolution of claims rely on all Governments taking a more proactive and conciliatory interest in their native title responsibilities. This cannot be legislated for.

Finally, concerns have been expressed about the extent of the public discussion before the enactment of the legislation. This may affect the operational success of the revised regime. It is regrettable that requests for lengthier and more regional consultation have gone unheeded.

It is likely that the native title system will boast some of the longest litigated matters in the Australian legal system. The complexity of this jurisdiction is undeniable. It is clear that an already difficult system can be made more cumbersome by the behaviour of parties, burdensome obligations and lack of resources. These changes do address these problems a little, but more could be done.

Native title can be used as a tool for the recognition of Indigenous peoples' inherent rights to land, as leverage to bring about the resolution of past injustices, and to allow native title holders and applicants to engage in economic development. Greater attention needs to be paid to innovative and good faith efforts to bring matters to their earliest and most just resolution. More than ever under these proposals the just administration of the native title system will continue to rely on the sense of fairness and decisions of individuals within it. So long as the system and its institutions are improved so as to encourage the exercise of that sense of fairness and justice, the promise of native title might not prove elusive.

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APPENDIX 1: Timeline of Reform Process

The reform process included the following steps:

7 September 2005	The Commonwealth Attorney General, the Hon, Philip Ruddock MP, announces a package of coordinated measures aimed at improving the performance of the native title system.[579]
16 September 2005	First Native Title Minister's Meeting, which commits all governments to: • a renewed commitment to work together to make the native title system more effective to achieve improved outcomes for all parties; and • open communication and transparent procedures, which can contribute to achieving successful and timely native title outcomes.[580]
17 October 2005	Mr Graham Hiley QC and Dr Ken Levy appointed to undertake an independent review of the processes for resolving native title claims, particularly how the Court and Tribunal can work together more effectively in managing and resolving native title claims. The review is to be overseen by a high-level steering committee, including representatives of the Federal Court, the National Native Title Tribunal, the Attorney General's Department, and the Office of Indigenous Policy Coordination, and is to report to the Attorney General by the end of March 2006. Public submissions are sought before 1 December 2006.[581]
22 November 2005	The Attorney General releases the first of two discussion papers with proposals for minor technical amendments to the NTA. Comments and suggestions for further amendments are sought by 31 January 2006.[582]
23 November 2005	The Attorney General and the Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon Amanda Vanstone, announce reforms addressing the performance and accountability of Representative Bodies. Informal consultation with Representative Bodies and other stakeholders is promised, but there is no formal public inquiry. Consultation is undertaken by the Attorney General's Native Title Unit.[583]
23 November	The Commonwealth Attorney General releases a consultation

[579] Media release 7 September 2005, above n 5.

[580] Ministers' meeting communiqué 16 September 2005, above, n.6.

[581] Media Release 17 October 2005, above n.148.

[582] Media Release 22 November 2005, above n.451.

[583] Media release 23 November 2005, above n.7.

2005	draft of proposed guidelines for the Native Title Respondents' Financial Assistance Scheme to strengthen the focus of the scheme on agreement-making over litigation. Submissions are sought by 10 February 2006.[584] The draft is made available online during this period with requests for submissions. The Department receives 25 written submissions and also consults a number of peak bodies for input.
23 November 2005 to 15 December 2006	Review conducted by the Native Title Unit of the Attorney General's Department, leading to new *Guidelines on the Provision of Financial Assistance by the Attorney-General under the* Native Title Act 1993.[585]
November 2005 to January 2006	Targeted consultation for Prescribed Bodies Corporate Review undertaken by a Steering Committee chaired by the Attorney General's Department and comprising officers of the Office of Indigenous Policy Co-ordination and the Office of the Registrar of Aboriginal Corporations.[586]
23 March 2006	By the operation of the sunset clause in s.207 of the NTA the Parliamentary Joint Committee on Native Title, and the Aboriginal and Torres Strait Islander Land Fund (**Joint Committee**) ceases operations. All future Native Title Bills will be examined by the Senate Standing Committee on Legal and Constitutional Affairs (**Senate Committee**).
31 March 2006	Completion of the Hiley Levy *Native Title Claims Resolution Review* (**Hiley Levy Report**).[587]
21 August 2006	Attorney General releases report of the Hiley Levy Report, together with the Government's Response.[588] No further submissions on the Report are sought.
22 November 2006	Attorney General releases the Second Discussion Paper proposing technical amendments to the NTA.[589] Written submissions on the modified and additional proposals for technical amendments are sought by 22 December 2006.
27 October 2006	Report on *Structures and Processes of Prescribed Bodies Corporate* released by the Attorney General and the Minister for Indigenous Affairs, the Hon. Mal Brough MP. The Government agrees to implement all of the report's recommendations.[590]

[584] Media release 23 November 2005, above n.7.

[585] Assistance Guidelines, above n.430.

[586] PBC Report, above n.344, [3.1]-[3.2]; see also Media Release 22 November 2005, above n.451.

[587] Hiley Levy Report, above n.2.

[588] Media Release 21 August 2006, above n.149.

[589] Media Release 22 November 2006, above n.452.

[590] Media Release 27 October 2006, above n.361.

7 December 2006	*Native Title Amendment Bill 2006* introduced into the House of Representatives. Second Reading Speech given.[591] The Bill was transmitted to the Senate and immediately referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 27 February 2007. The Committee received 18 written submissions and held a public hearing in Sydney on 30 January 2007.[592]
15 December 2006	Meeting of Native Title Ministers in Canberra. Commitments made include continuing to: • Work together to secure better outcomes from the native title system; and • Take steps to ensure good communication and transparent processes.[593]
15 December 2006	Attorney General makes new *Guidelines on the Provision of Financial Assistance by the Attorney-General under the* Native Title Act 1993.[594]
19 January 2007	Submissions to the Senate Committee Inquiry into the Amendment Bill due.[595]
30 January 2007	Public hearing for the Senate Committee Inquiry into Amendment Bill over one day in Sydney.[596]
13 February 2007	Debate in the House on the Amendment Bill.[597]
23 February 2007	Senate Committee Report published.[598] It includes a Minority Report by ALP and Greens Members of the Senate Committee and additional comments from the Australian Democrats.
20 March 2007	Second Reading Debate in the Senate on the *Native Title Amendment Bill 2006*.[599]
23 March 2007 26 March 2007	A Government amendment increases the minimum period of recognition for a Representative Body from one to two years in most circumstances. A Democrats amendment accepted that provides that a native title application inquiry hearing can only be held in public with the parties' consent. Other amendments moved by the Opposition, the Democrats and the Greens

[591] Amendment Bill, Second Reading Speech, above n.47.

[592] Senate Committee Report on Amendment Bill, above n.25, [1.1], [1.4] and [1.5].

[593] Ministers' meeting communiqué 15 December 2006, above n.448.

[594] Assistance Guidelines, above n.430.

[595] Senate Committee Report on Amendment Bill, above n.25, [1.4].

[596] Senate Committee Report on Amendment Bill, above n.25, [1.5].

[597] House of Representatives, Debates, 13 February 2007.

[598] Senate Committee Report on Amendment Bill, above n.25.

[599] Senate, Debates, 20, 23 and 26 March 2007.

	defeated. Amended Bill passed by the Senate and returned to the House of Representatives.
28 March 2007	*Native Title Amendment Bill 2006* passed by Parliament.[600]
29 March 2007	*Native Title Amendment (Technical Amendments) Bill 2007* introduced into the House of Representatives. Second Reading Speech.[601] The Bill was transmitted to the Senate and immediately referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 8 May 2007. The Committee received 12 written submissions and held a public hearing in Adelaide on 2 May 2007.[602]
15 April 2007	Most provisions in the *Native Title Amendment Act 2007* come into force on Royal Assent.[603]
20 April 2007	Submissions to the Senate Committee Inquiry into the Technical Amendments Bill due.[604]
2 May 2007	Public hearing for the Senate Committee Inquiry into Technical Amendments Bill over one day in Adelaide.[605]
8 May 2007	Senate Committee Report published.[606] It includes a Minority Report by ALP Members of the Senate Committee and additional comments from the Australian Democrats and Greens.
10 May 2007	Debate in the House on the Amendment Bill.[607]
12 June 2007	Second Reading Debate in the Senate on the Technical Amendments Bill.[608] Many Government amendments made. Amendments moved by the Opposition, the Democrats and the Greens defeated. Amended Bill passed by the Senate and returned to the House of

[600] House of Representatives, Debates, 28 March 2007.

[601] The Hon Philip Ruddock, Attorney General, 'Second reading speech: Native Title Amendment (Technical Amendments) Bill 2007', House of Representatives, Debates, 29 March 2007.

[602] Senate Committee Report on Technical Amendments Bill, above n.283, [1.1], [1.5] and [1.6].

[603] Amendment Act, above n.226, s.2(1).

[604] Senate Committee Report on Technical Amendments Bill, above n.283, [1.5].

[605] Senate Committee Report on Technical Amendments Bill, above n.283, [1.6].

[606] Senate Committee Report on Technical Amendments Bill, above n.283.

[607] House of Representatives, Debates, 10 May 2007.

[608] Senate, Debates, 12 June 2007.

	Representatives.
20 June 2007	*Native Title Amendment (Technical Amendments) Bill 2006* passed by Parliament.[609]
20 July 2007	The *Native Title Amendment (Technical Amendments) Act 2007* given Royal Assent.[610]
21 July 2007	Most amendments in the Technical Amendments Act concerning Representative Bodies and PBCs commence.[611]
1 September 2007	Most of the technical amendments in the Technical Amendments Act commence.[612]
1 July 2008	Amendments in the Technical Amendments Act concerning the ability of PBCs to charge fees commence.[613]

[609] House of Representatives, Debates, 20 June 2007.

[610] Technical Amendments Act, above n.310, s.2(1).

[611] Technical Amendments Act, above n.310, s.2(1).

[612] Technical Amendments Act, above n.310, s.2(1).

[613] Technical Amendments Act, above n.310, s.2(1).