CHAPTER 2

OVERVIEW OF THE BILL

2.1 As outlined in Chapter 2, the purpose of the Bill is to implement several elements of the native title reform package announced by the Attorney-General in 2005. These are contained in the four schedules to the Bill:

- Schedule 1: Native Title Representative Bodies;
- Schedule 2: Claims Resolution Review;
- Schedule 3: Prescribed Bodies Corporate; and
- Schedule 4: Funding for non-claimant parties.

Schedule 1: Native Title Representative Bodies

2.2 This section of the committee's report summarises the current functions and responsibilities of NTRBs and notes the significant changes to the Native Title Act proposed in the Bill.

Background

Functions of NTRBs

2.3 Section 203B of the Native Title Act sets out the functions of NTRBs. In summary they are:

- to assist and facilitate the preparation of native title applications (this includes consultations, mediations, negotiations and proceedings relating to native title and related processes);
- to provide written certification of applications for determinations of native title, and related processes for land or waters in the representative body's area;
- to promote dispute resolution between constituents about native title applications and related processes;
- to identify and notify as far as possible those who hold or may hold native title over lands or waters which may be in the area administered by the NTRB and which may be the subject of native title processes; and
- to be a party to indigenous land use agreements.

Recognition of NTRBs

2.4 Under the existing Native Title Act, there is a process for Ministerial recognition of eligible Aboriginal and Torres Strait Islander organisations as NTRBs.

In some cases statutory organisations may be determined as NTRBs provided they are eligible under the Native Title Act.[1]

2.5 At present, recognition remains until it is withdrawn for the reasons set out in current section 203AH. These include:

- the body ceases to exist;
- the body requests withdrawal of recognition; or
- the Minister is satisfied that the body is not satisfactorily performing its functions, particularly in consultation and representation, and is unlikely to do so within a reasonable period.

Proposed arrangements

2.6 The proposed arrangements provide transitional recognition for existing NTRBs from the day the amendments commence until 30 June 2007. After commencement the following will apply:

- At the commencement of the transition period, the Minister must invite existing representative bodies to apply to be recognised for their areas for terms (specified in the invitation) of between one and six years (the period of recognition is indefinite at present).
- The Minister must recognise an existing representative body that applies to be recognised in response to an invitation. Recognitions for all existing representative bodies who have applied to be recognised for their areas during the transition period will take effect on 1 July 2007.
- If a representative body does not apply to be recognised for its area in response to an invitation issued during the transition period, its recognition will cease at the end of 30 June 2007. In such cases, the Minister may invite other eligible bodies to apply to be recognised as the representative body for an area wholly or partly within the area.
- New powers are also given to the Minister to extend and vary representative body areas during the transition period.[2]

2.7 The Bill will also remove two criteria that the Minister is presently required to consider before recognising or withdrawing recognition from representative bodies, or extending, varying or reducing representative body areas (whether during or after the transition period).[3] The criteria to be removed are:

- whether the body does or will satisfactorily represent native title holders and persons who may hold native title in its area; and

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1 See the definition of 'eligible body' under section 201B of the Native Title Act.

2 See Items 6-9 of Schedule 1; and also Explanatory Memorandum, pp 5-6.

3 Items 13, 18-20 and 24 of Schedule 1.

- whether the body does or will consult effectively with Aboriginal peoples and Torres Strait Islanders living in its area.

2.8 However, when making these decisions, the Minister will still need to be satisfied that a body satisfactorily performs or would be able to satisfactorily perform representative body functions.[4]

2.9 Proposed subsection 203AI(1) will require the Minister to take into account whether, in the Minister's opinion, the body's organisational structures and administrative processes will operate, or are operating, in a fair manner.[5] Current subsection 203AI(2) sets out the criteria to be applied in assessing fairness. These focus on the opportunities for Aboriginal peoples or Torres Strait Islanders to participate in the processes of the NTRB, and the Bill makes no changes to these criteria.

2.10 At present the bodies eligible for recognition include certain kinds of incorporated bodies (section 201B), but do not specifically include bodies incorporated under the *Corporations Act 2001*. The Bill proposes to specifically include these corporations into the definition of an 'eligible body'.[6]

2.11 The grounds for withdrawal of recognition have also been simplified. Proposed subsection 203AH(2) will be amended to remove the two criteria outlined above. The existing ground of unsatisfactory performance will be retained and a new ground – serious or repeated irregularities in the body's financial affairs – will be added.[7]

Variation in the geographical areas administered by NTRBs

2.12 These changes allow the Minister to extend or vary representative body areas on his or her own initiative and without the agreement of representative bodies. Provision is made for affected representative bodies and members of the public to be notified of any proposed extension or variation and to be given an opportunity to make submissions, but there is no requirement for an NTRB to consent to the changes.

2.13 However, representative bodies will be able to apply to extend their boundaries into an area for which there is no representative body, and it will be easier for them to apply to vary their boundaries.

2.14 Where the Minister gives notice of an intention to reduce the area administered by the representative body, or withdraw recognition of the NTRB, a

4 Explanatory Memorandum, p. 6; see also Item 27 of Schedule 1.

5 Item 27 of Schedule 1.

6 Item 5 of Schedule 1.

7 Item 24 of Schedule 1.

period of 60 days is allowed for submissions.[8] At present, the notification period is 90 days.

Accountability requirements

2.15 The current requirements under Part 11, Division 5 of the Native Title Act require NTRBs to prepare strategic plans, as well as annual reports, for tabling in Parliament. Items 29-33 remove these requirements and replace them with new accountability arrangements; however, NTRBs will still be required to keep accounting records which will allow them to be audited in accordance with the requirements of Part 11, Division 5 of the existing Native Title Act. The keeping of those records will be a requirement for funding.[9]

2.16 The Bill also allows Native Title Service Providers which are funded under subsection 203FE(1) of the Native Title Act to perform NTRB functions and to operate as representative bodies to the extent that this is appropriate.[10] This overcomes current impediments in the Native Title Act noted in the Explanatory Memorandum to the Bill.[11] They are:

- there are some things that representative bodies can or must do under the Native Title Act that persons or bodies funded under subsections 203FE(1) and (2) cannot do or are not obliged to do; and
- third parties have certain powers and obligations in relation to representative bodies under the Native Title Act that they do not have in relation to persons or bodies funded under subsection 203FE(1).

Schedule 2: Claims Resolution Review

2.17 Schedule 2 of the Bill deals with the recommendations of the independent review of the native title claims process. This review was undertaken by Mr Graham Hiley QC and Dr Ken Levy; their report, entitled *Native Title Claims Resolution Review* (the Review), was released on 31 March 2006.[12]

2.18 The Review focused on changes designed to expedite the resolution of native title claims. The areas of change included mediation, coordination between the Federal Court (the Court) and the National Native Title Tribunal (NNTT), dismissal of claims which fail to progress and limitation of the role of minor parties to claims. The recommendations also included a requirement for parties to negotiate in good faith.

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8 Items 21 and 25 of Schedule 1.

9 Item 29 of Schedule 1.

10 Item 45 of Schedule 1.

11 p. 7.

12 Graham Hiley QC and Dr Ken Levy, *Native Title Claims Resolution Review*, Commonwealth of Australia, March 2006 (in Attorney-General's Department and Department of Families, Community Services and Indigenous Affairs, *Submission 1*, Attachment C) (the Review).

2.19 In their report, the Review authors noted that, while the 1998 amendments to the Native Title Act were intended to provide agreement-making processes that were more efficient than resolution through the courts, only a relatively small number of claims have been resolved by agreement. They observed that:

> Most of the claims currently in the native title system were lodged over four years ago. Since 2002, between 24 and 56 new claims have been filed each year, many of which have replaced previous claims that have been withdrawn. By now it is likely that most land (and water) that can be claimed has been claimed. There is clearly a substantial volume of work on hand and an expectation of further claims for the foreseeable future which will continue to place demands on the native title system.[13]

2.20 At 30 June 2006, there were 604 current native title applications (553 claimant, 12 compensation and 39 non-claimant applications); this is just over 35 per cent of the 1,708 applications made since the Native Title Act commenced.[14]

2.21 The Federal Government response to the Review focuses on administrative and legislative reforms to expedite the claims process.

Claims process

2.22 The resolution of native title claims is a shared responsibility of the NNTT and the Federal Court, and their integrated functioning is necessary to the timely resolution of claims. Part of the terms of reference for the Review asked the authors to:

- enquire into the processes of the Federal Court and the NNTT to identify potential areas of improvement;
- maintain an emphasis on agreement-making through mediation rather than litigation; and
- identify, where possible, ways to streamline the system or, at least, avoid duplication of function.[15]

2.23 Examples of the more significant proposed amendments to the claims process are discussed in the following paragraphs.

Coordination between the Federal Court and NNTT

2.24 Items 3 to 6 amend section 84 of the Native Title Act to limit the category of persons who can automatically become a party to native title proceedings. The existing section has a very wide application which can result in persons becoming a

13 The Review, p. 18.

14 National Native Title Tribunal, *Annual Report 2005-2006,* p. 22.

15 The Review, p. 12.

party even though their interest would be adequately protected by the relevant state or territory government without their involvement in proceedings.

2.25 Item 7 is intended to avoid unnecessary duplication between the activities of the Federal Court and the NNTT. Proposed subsection 86(2) requires the Court to take into account the existence of any transcript of evidence of any native title application inquiry. The Court retains its discretion to consider whether to draw conclusions of fact from the transcript of any such proceedings.[16]

2.26 Items 8-36 concern the relationship between the Court and the NNTT in mediation. At present, the Court is required to refer native title applications to the NNTT for mediation, unless there is an order for no mediation. The *Federal Court Act 1976* (Federal Court Act) gives the Court power to use mediation and arbitration to resolve any application before it. It is possible therefore for the Court to order mediation under the Federal Court Act concurrent with NNTT mediation.

2.27 The amendments remove this duplication;[17] the Court is precluded from conducting mediation into any aspect of the proceedings at the same time as the NNTT mediation. However, the Court is not precluded from conducting a mediation if the NNTT process has been ineffective.

2.28 Items 18 and 20 provide the NNTT with a right of appearance to assist the Court in two circumstances:

- where the Court is considering whether to make an order that there be no mediation by the NNTT in relation to a particular matter; and
- where a matter is currently before the NNTT for mediation (that is, where a matter has been referred to the NNTT for mediation and has not been withdrawn from mediation).

2.29 The Court will also be required to consider any submission made by the NNTT when deciding whether to make an order that there be no mediation by the NNTT.

Efficiency of NNTT mediation

2.30 Recommendation 2 of the Review recommended that the NNTT be provided with statutory powers to compel parties to attend mediation conferences and to produce certain documents for the purpose of a mediation within a nominated period or by a nominated date.[18]

16 Proposed paragraph 86(2)(b).

17 Proposed paragraph 86B(6)(a).

18 Items 45 and 47 of Schedule 2.

2.31 If the party does not comply with the direction, the presiding NNTT member can report to the Court the failure to comply.[19] Proposed subsection 86D(3) then allows the Court to make a similar order to that made by the NNTT. [20] The Court can then impose sanctions for failure to comply with its direction. Sanctions can include costs orders or can result in a cessation of the NNTT mediation.

2.32 However, in matters in which participation is voluntary (native title reviews and native title application inquiries), the power to compel attendance or produce documents will not apply.

2.33 The Review also observed that 'there is a growing tendency for parties to mediation to exhibit a lack of good faith during mediation'.[21] The report noted that section 34A of the *Administrative Appeals Tribunal Act 1975* includes a good faith obligation in relation to alternative dispute resolution ordered under that Act. In recommendation 4, the Review proposed that consideration be given to including a similar good faith obligation in the Native Title Act, together with the development of a code of conduct for parties involved in native title.

2.34 Item 46 implements this recommendation. It is proposed that a failure by a party to negotiate in good faith could result in the matter being reported to Commonwealth, state or territory ministers, the secretaries of Commonwealth departments who fund participants in native title proceedings, legal professional bodies, and the Court, as appropriate. Item 52 deals in detail with the outcomes applicable to a failure to negotiate in good faith.

2.35 The Explanatory Memorandum to the Bill notes that the Federal Government is giving further consideration to the introduction of a code of conduct for parties involved in native title mediations.[22]

Reviews and native title application inquiries

2.36 Another proposal of the Review was to allow the NNTT to conduct proceedings designed to reach early agreement about whether a native title claimant group holds native title rights and interests, and in particular, issues surrounding the connection the claimant group has with the land or waters.

2.37 This has resulted in the proposed introduction of two new kinds of NNTT proceedings. The first is a review function which would be conducted by examining papers and documents relating to connection, rather than through a hearing.[23] The second is called a native title application inquiry and is intended to facilitate the

19 Item 51 of Schedule 2.

20 Item 31 of Schedule 2.

21 The Review, p. 23.

22 para 4.216.

23 Item 53 of Schedule 2.

resolution of native title claims through the mediation process.[24] The Explanatory Memorandum notes that these inquiries could be particularly valuable in examining issues relating to multiple or overlapping claims where more than one claimant application has been filed over the same area.[25]

2.38 Participation in a native title application inquiry would be voluntary. The outcome may include recommendations which, while not binding on the parties, may constitute a guide to resolving the application.

2.39 It should be noted that, since participation in the native title reviews and inquiries would be voluntary, the proposed power to compel the attendance of parties and to produce documents would not apply.

Dismissal of certain claims – future act applications

2.40 The Review found a further source of delay is the large number of claims (about one-third) which appear to have been lodged in response to future act notices (future act claims). Future act notices are issued under section 29 of the Native Title Act to notify potential claimants of the intention to grant mining rights, review or extend leases or compulsorily acquire native title rights. In response, the parties affected may lodge a native title claim.

2.41 The Review noted that:

> Many future act claims were only lodged to obtain procedural rights, with no current desire to proceed to a determination of native title… Once future act claims are registered, there appears to be little incentive for the claimants to seek to progress their claim…[26]

2.42 The Review also observed registration may also give the applicants procedural rights under other legislation, such as the *Aboriginal Cultural Heritage Act 2003* (Qld), and also gives claimants a basis for holding themselves out as the traditional owners of the relevant land.

2.43 Many of these claims do not progress, and recommendation 15 of the Review proposed that the Native Title Act be amended to require the Court to order that a claimant application be dismissed where:

- the application was made in response to a notice under section 29 of the Native Title Act;
- the future act has occurred; and

24 Items 54-56 of Schedule 2.

25 p. 32.

26 The Review, pp 37-38.

- the applicant has not produced connection material or sought to advance the substantive resolution of the application.[27]

2.44 Item 36 gives effect to this recommendation.

Dismissal of certain claims – unregistered claims

2.45 After a native title claim is lodged, the NNTT undertakes a registration test. Claimants whose claim passes the registration test obtain certain procedural rights under the Native Title Act. If an application fails the registration test, the unregistered application may still proceed to determination: there is no requirement for claimants to amend their claim.

2.46 Recommendation 16 of the Review proposed that currently unregistered claims should undergo the registration test again, and those which do not meet the requirements should be dismissed by the Court.

2.47 The Review noted that:

> These amendments focus on the responsibility of applicants to take steps to improve the quality of their claims, recognising that poor quality claims are a burden on the native title system.[28]

2.48 Item 73 would give effect to this recommendation.

Schedule 3: Prescribed Bodies Corporate

2.49 Schedule 3 of the Bill proposes to introduce measures to address concerns about the functioning of PBCs.

Prescribed Bodies Corporate

2.50 Under section 55 of the Native Title Act, where the Federal Court determines that native title exists, the native title holders must establish a body corporate to administer their native title rights and interests. When a body is approved by the Court as a PBC it is placed on the National Native Title Register, which is maintained by the NNTT.

2.51 Once registered, the PBC is the legal entity and contact for that group of native title holders. The PBC conducts business between the native title holders and other people with an interest in the area such as pastoralists, governments or developers.

27 The Review, p. 38.

28 The Review, p. 39.

Types of PBCs[29]

2.52 When the Court makes a determination that native title exists, the Court will request that the native title holders elect to establish one of two alternative kinds of PBC. The alternatives are:

- the native title is held in trust by the PBC; or
- the native title is held by the common law holders of native title and the PBC acts as their agent.

2.53 These alternatives have different legal consequences and implications and, in particular, affect the sort of legal relationship that the native title holders have with the PBC. If no choice is made by the native title holders, the Court selects the second alternative.

2.54 For both alternatives, the PBC can only agree to do things that will affect native title if it has consulted with any native title holder who will be affected by that decision and the native title holder(s) have given their consent.

2.55 In October 2006, the Attorney-General and the Minister for Families, Community Services and Indigenous Affairs released a report: *Structures and Processes of Prescribed Bodies Corporate* (the PBC Report).[30] The commissioning of the PBC Report was also part of the six-part plan for native title reform announced in September 2005.

2.56 The PBC Report noted that the primary roles of PBCs are to:

- protect and manage determined native title in accordance with the wishes of the broader native title holding group; and
- ensure certainty for governments and other parties with an interest in accessing or regulating native title lands and waters by providing a legal entity through which to conduct business with the native title holders.[31]

2.57 The PBC Report confirmed concerns about the effective operation of PBCs and observed that few PBCs are operating effectively:

> Of the 42 PBCs which have been established to date, most are not complying with all of the requirements of the legislation they are required

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29 Material for this section of the report was sourced from the National Native Title Tribunal, "What is a Prescribed Body Corporate?" *Fact Sheet No.2d*, Available at: http://www.nntt.gov.au/publications/1021859460_4854.html (accessed 20 December 2006).

30 *Structures and Processes of Prescribed Bodies Corporate*, Commonwealth of Australia 2006, http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(1E76C1D5D1A37992F0B0C1C4DB87942E)~Structures+and+processes+of+PBC.pdf/$file/Structures+and+processes+of+PBC.pdf (accessed 9 January 2007). See also Attorney-General's Department and Department of Families, Community Services and Indigenous Affairs, *Submission 1*, Attachment F.

31 p. 6.

> to incorporate under, and there has been increasing criticism from stakeholders about their workability.[32]

2.58 The report made 15 recommendations, many of which can be implemented administratively or through amendments to the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations). However, there are areas in which the Native Title Act will require amendment to implement the recommendations.

2.59 Recommendation 5 of the PBC Report states that:

> The PBC regime should be amended to make clear that the statutory requirements for PBCs to consult with and obtain the consent of native title holders on 'native title decisions' are limited to decisions to surrender native title rights and interests in relation to land or waters.[33]

2.60 Item 2 of Schedule 3 implements this recommendation by removing the statutory requirement contained in paragraph 58(e) of the Native Title Act for PBCs to consult with the common law holders on all agreements and decisions affecting native title.

2.61 The Explanatory Memorandum to the Bill notes that:

> Consultation requirements are imposed on PBCs by regulations made under section 58 (Native Title (Prescribed Bodies Corporate) Regulations 1999). Existing subparagraph 58(e)(i) limits the power to make regulations for agent PBCs, such that the common law holders would have to be consulted about and agree to agreements in relation to native title. This limitation is not applied to trust PBCs.[34]

2.62 The amendment will allow the regulations to provide for agent PBCs to enter native title agreements that are binding on the common law holders provided the agreements have been made in accordance with processes set out in the regulations.

2.63 Item 3 of Schedule 3 implements recommendation 7 of the PBC Report.

2.64 The PBC Report noted the regulations governing PBCs 'currently limit the possibility of an existing PBC being determined in respect of a subsequent determination of native title, even where the native title holders may agree to this'.[35]

2.65 Recommendation 7 proposes that existing PBCs should be able to be determined as a PBC for 'subsequent determinations of native title in circumstances where the native title holders covered by all determinations agree to this'.[36]

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32 p. 6.

33 p. 20.

34 p. 74.

35 p. 21.

36 p. 22.

2.66 Item 3 of Schedule 3 inserts proposed section 59A, which would allow an existing PBC to be determined by the Court as a PBC for subsequent native title determinations if all common law holders concerned agree.

2.67 The Explanatory Memorandum explains that:

> Proposed subsection 59A(3) allows regulations to prescribe how the consent of the common law holders for the existing PBC, and the consent of the common law holders proposing to use the existing PBC, may be obtained.[37]

Schedule 4: Funding

2.68 The proposals contained in Schedule 4 concern funding for non-claimant parties to native title matters. Under section 183 of the Native Title Act, the Attorney-General may grant assistance to non-claimant parties to an inquiry, mediation or proceeding related to native title, and to non-claimant parties negotiating indigenous land use agreements.

2.69 The proposed amendments contained in Items 1 and 2 will allow the Attorney-General to grant assistance to non-claimant parties for:

- the development of standard form agreements; or
- the review of existing standard form agreements,

relating to the 'right to negotiate' process for mining related acts.

2.71 The following chapters examine the provisions in detail in the context of the submissions and evidence taken at the hearing.

37 para 4.8.