

CHAPTER 5

SUMMARY AND CONCLUSION

5.1 This Bill is the first major amendment to the Native Title Act since the amendments undertaken in 1998 in response to the decision of the High Court in *Wik Peoples v Queensland*.¹ The committee is pleased to note that the package of proposed amendments is the outcome of rigorous review and consultation processes including the independent *Native Title Claims Resolution Review* (the Review). In essence, these amendments fine-tune a unique legislative scheme for the recognition of the customary rights of Aboriginal peoples and Torres Strait Islanders to land and waters.

Native Title Representative Bodies

5.2 The capacity of Native Title Representative Bodies (NTRBs) to undertake their responsibilities has been canvassed in this inquiry. The committee supports the capacity building initiatives the Government is undertaking with NTRBs. However, as noted in Chapter 3, the proposals for limited term recognition may militate against the effectiveness of NTRBs. Accordingly the committee recommends amending the Bill to increase the minimum period of recognition of an NTRB to two years.

Recommendation 1

5.3 The committee recommends that Schedule 1 of the Bill be amended to increase the minimum period of recognition of a Native Title Representative Body to two years.

Prescribed Bodies Corporate

5.4 The committee considers that the resources available to Prescribed Bodies Corporate (PBCs) will be critical to the successful management of land over which native title has been granted. The committee welcomes advice that the Federal Government has decided to fund PBCs in some circumstances. The committee recommends that the proposed funding arrangements should be finalised and implemented as a matter of high priority.

Recommendation 2

5.1 The committee recommends that the Federal Government finalise and implement the proposed funding arrangements for Prescribed Bodies Corporate as a high priority.

1 [1996] HCA 40 (23 December 1996).

Roles of the NNTT and the Federal Court

5.5 The role of the National Native Title Tribunal (NNTT) was significantly altered by the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission* barely two years after the Tribunal's establishment.² As a result of that decision, the Federal Court exercises most determinative functions in relation to native title, while the NNTT has continued to provide registration, education, research and mediation services.

5.6 In the Review, Mr Hiley and Dr Levy noted:

The present system is multi-dimensionally inefficient. This has led to an ineffective system where the public monies expended have created much activity for lawyers and others, but has resulted in little gain for Indigenous people. While some participants in the system have gained (particularly those providing legal and anthropological services), native title claimants and respondent parties have not been well served by a system which tends to advance claims very slowly.

We both agree that the NNTT is the best placed institution to advance agreement-making. We also agree that its performance will be enhanced by giving it additional powers and 'teeth'.³

5.7 The amendments in Schedule 2 of the Bill would return some of the responsibility for claims resolution to the NNTT. The committee generally supports these changes, including the requirement that parties act in good faith during mediation. The committee welcomes the development of a code of conduct to support the proposed 'good faith' provisions. The committee recommends that this code of conduct be developed without delay and made available to all parties in mediation before the NNTT.

Recommendation 3

5.8 The committee recommends that the code of conduct for parties participating in National Native Title Tribunal mediation be developed without delay and be made available to all parties in mediation before the National Native Title Tribunal.

5.9 The committee supports the amendments in Schedule 2 of Bill which will empower the NNTT to direct parties to produce documents or attend mediation. However, the committee recommends that the powers should be subject to a right of parties to object to directions on the basis of confidentiality, privilege or prejudice.

2 [1995] HCA 10 (23 February 1995).

3 Hiley and Levy, p. 64, also quoted in *Submission 17*, p. 25

Recommendation 4

5.10 The committee recommends that the proposed powers of the National Native Title Tribunal to give directions concerning the production of documents (proposed section 136CA) or attendance at mediation (proposed subsection 136B(1A)) be amended to include rights to object to the directions on the grounds of confidentiality, privilege and prejudice.

Recommendation 5

5.11 The committee recommends that guidelines for the exercise of the powers to give directions in proposed subsection 136B(1A) and proposed section 136CA be developed as a matter of priority.

5.12 The relationship between the Federal Court and the NNTT will be critical to the effectiveness of these proposed changes. The committee considers that the Court and the NNTT should develop a protocol which ensures that any failure by parties to comply with directions of the NNTT is dealt with as a matter of priority by the Court.

Recommendation 6

5.13 The committee recommends that the Federal Court and the National Native Title Tribunal develop a protocol which will allow non-compliance with the directions of the National Native Title Tribunal as to the production of documents and the attendance of parties at mediation to be dealt with as a matter of priority by the Federal Court.

5.14 The committee is also concerned at the lack of confidence in the NNTT mediation service expressed by some witnesses, particularly in light of the increased role proposed for the NNTT under the Bill. The committee therefore recommends that the NNTT develop an ongoing mediation training program for its members.

Recommendation 7

5.15 The committee recommends that the National Native Title Tribunal develop an ongoing mediation training program for its members having particular focus upon the characteristics and requirements of mediating native title matters.

5.16 The committee also supports the introduction of new Division 4AA which provides for the NNTT to conduct a review of documents regarding whether a native title claim group holds native title rights and interests. However, the committee recommends that the operation of Division 4AA be monitored by the Department. Further, the committee recommends that the Department provide the Parliament with a report on the effectiveness of proposed Division 4AA once the provisions have been in operation for two years.

Recommendation 8

5.17 The committee recommends that the operation of proposed Division 4AA be monitored by the Attorney-General's Department and a report prepared for the Parliament after two years operation to assess the following:

- the extent to which these measures are used;
- the effect they have on the resolution of claims in terms of both cost and time;
- the extent, if at all to which the parties' rights are compromised by this process; and
- the extent to which there is duplication between the functions of the Court and the National Native Title Tribunal in this area.

5.18 Schedule 2 of the Bill also makes amendment to section 87A of the Native Title Act, and would allow part of a native title application to be settled without the consent of parties who hold an unregistered or non-proprietary interest in land. The committee is concerned about the impact of these amendments on such parties. Accordingly, the committee recommends that the Government consider for inclusion in further amendments to the Native Title Act, anticipated later this year, the amendments to section 87A proposed by Telstra.

Recommendation 9

5.19 The committee recommends that the Federal Government consider inclusion of the amendments to section 87A proposed by Telstra in the further amendments to the *Native Title Act 1993* planned for later in 2007.

Conclusion

5.20 While it is possible that the number of native title claims may have peaked, the number awaiting resolution merit a more efficient process for their disposal. That process will be supported by the changes proposed by the Bill.

Recommendation 10

5.21 Subject to the preceding recommendations, the committee recommends that the Bill be passed.

Senator Marise Payne

Chair