The Senate

Standing Committee on Legal and Constitutional Affairs

Native Title Amendment Bill 2006 [Provisions]

February 2007

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Suite S1.61 Telephone: (02) 6277 3560 Fax: (02) 6277 5794
Parliament House E-mail: legcon.sen@aph.gov.au

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ABBREVIATIONS

ALRM	Aboriginal Legal Rights Movement
the Bill	Native Title Amendment Bill 2006
CAC Act	*Commonwealth Authorities and Companies Act 1997*
Carpentaria Land Council	Carpentaria Land Council Aboriginal Corporation
the Court	Federal Court of Australia
FaCSIA	Department of Families, Community Services and Indigenous Affairs
Federal Court Act	*Federal Court Act 1976*
MCA	Minerals Council of Australia
the Minister	Minister for Families, Community Services and Indigenous Affairs
Native Title Act	*Native Title Act 1993*
NNTC	National Native Title Council
NNTT	National Native Title Tribunal
NTRB	Native Title Representative Body
PBC	Prescribed Body Corporate
PBC Regulations	*Native Title (Prescribed Bodies Corporate) Regulations 1999*
PBC Report	*Structures and Processes of Prescribed Bodies Corporate*, Commonwealth of Australia, 2006
PJC	Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account
PJC Report	Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the operation of Native Title Representative Bodies*, March 2006

the Review	Mr Graham Hiley QC and Dr Ken Levy, *Native Title Claims Resolution Review*, Commonwealth of Australia, March 2006

RECOMMENDATIONS

Recommendation 1

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.

Recommendation 2

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

Recommendation 3

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.

Recommendation 4

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

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.

Recommendation 6

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.

Recommendation 7

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.

Recommendation 8

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.**

Recommendation 9

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.

Recommendation 10

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

CHAPTER 1

INTRODUCTION

Background

1.1 On 7 December 2006, the Senate referred the provisions of the Native Title Amendment Bill 2006 (the Bill) to the Senate Legal and Constitutional Affairs Committee, for inquiry and report by 23 February 2007.

1.2 The Bill amends the *Native Title Act 1993* (Native Title Act) to implement reforms to a number of aspects of the native title system. The proposed reforms were originally announced in September 2005 by the Attorney-General. Six connected elements of reform were identified:

- an independent review of native title claims resolution processes;
- technical amendments to the Native Title Act;
- consultation on measures to encourage the effective functioning of Prescribed Bodies Corporate (PBCs);
- reform of the native title non-claimants (respondents) financial assistance program to encourage agreement-making rather than litigation;
- measures to improve the effectiveness of Native Title Representative Bodies (NTRBs); and
- increased dialogue and consultation with the state and territory governments to promote and encourage more transparent practices in the resolution of native title.

1.3 The Bill gives effect to most of the recommendations from the independent review of the claims resolution process, together with reforms to PBCs, funding for non-claimant third parties, and the establishment, functions and accountabilities of NTRBs.

Conduct of the inquiry

1.4 The committee advertised the inquiry in *The Australian* newspaper on 12 December 2006 and 7 February 2007. Submissions were invited by 19 January 2007. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to over 60 organisations and individuals.

1.5 The committee received 18 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public. The committee held a public hearing in Sydney on 30 January 2007.

Acknowledgement

1.6 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.7 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

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.

CHAPTER 3

NATIVE TITLE REPRESENTATIVE BODIES AND PRESCRIBED BODIES CORPORATE

3.1 This chapter discusses key issues raised in submissions and evidence in relation to the following aspects of the Bill:

- Native Title Representative Bodies (Schedule 1); and
- Prescribed Bodies Corporate (Schedule 3).

Schedule 1 – Native Title Representative Bodies

3.2 Schedule 1 of the Bill introduces a new regime for Native Title Representative Bodies (NTRBs). While some organisations supported Schedule 1 of the Bill,[1] many others raised areas of concern. This section considers the following issues:

- funding and resourcing of NTRBs;
- recognition arrangements;
- variation in the geographical areas administered by NTRBs;
- accountability requirements; and
- other issues.

Funding and resourcing of NTRBs

3.3 The funding and resourcing of NTRBs was an overarching issue raised consistently in evidence to the committee.[2] For example, the National Native Title Council (NNTC) suggested that:

> Most representative bodies have to date operated effectively and efficiently within the constraints of the resources that have been provided to them…what is needed to make them even more effective is adequate funding…rather than seek ways to facilitate legal practices or other such organisations taking over the current functions of representative bodies, the Government should simply adequately fund the current NTRBs.[3]

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1 See, for example, Australian Petroleum Production and Exploration Association, *Submission 2*; Western Australian Local Government Association, *Submission 7*; Mr Ian Loftus, Association of Mining and Exploration Companies, *Committee Hansard*, 30 January 2007, p. 32.

2 See, for example, National Native Title Council, *Submission 9*, p. 2; Minerals Council of Australia, *Submission 4*, p. [2]; Mr Ian Loftus, Association of Mining and Exploration Companies, *Committee Hansard*, 30 January 2007, pp 32-33; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 10*, p. 8.

3 *Submission 9*, p. 2.

3.4 The Minerals Council of Australia (MCA) expressed broad support for the amendments. However, the MCA qualified its support by cautioning that the amendments 'are likely to be destabilising without appropriate funding and capacity building initiatives…'.[4] Ms Anne-Sophie Deleflie, Assistant Director of Social Policy at the MCA, told the committee that:

> ...there is a critical need to ensure that the legislative amendments are matched by increasing resources, both in terms of human and financial capital, and capacity-building initiatives...Without those additional resources we are concerned that these reforms will be seriously undermined.[5]

3.5 In particular, the MCA argued that the measures in the Bill:

> …have the potential to divert already limited resources towards bureaucratic processes, unnecessarily onerous compliance obligations or the winding-up and establishment of new services, and away from the primary functions of representing Indigenous interests and achieving native title outcomes. Without addressing the underlying capacity issues and resource constraints, such organisational changes may only provide a short-term impression of change.[6]

3.6 Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner strongly supported any change that is likely to improve the effectiveness of representative bodies.[7] However, the Commissioner made the point that:

> …representative bodies are not presently adequately funded to perform their extremely difficult and important role in the recognition and protection of native title.[8]

3.7 The Commissioner further submitted that:

> Without adequate funding, however, even the most well run representative bodies will find it extremely difficult to achieve results and it is inevitable that the enjoyment of native title rights and interests will be compromised. I believe that inadequate funding has, and continues to, undermine the capacity of representative bodies to provide effective representative [representation] and assistance and as a result has diminished the extent to which Indigenous people have been able to secure recognition of and enjoy their rights.[9]

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4 *Submission 4*, p. [3].

5 *Committee Hansard*, 30 January 2007, p. 36.

6 *Submission 4*, p. [2].

7 *Submission 10*, p. 8.

8 *Submission 10*, p. 8.

9 *Submission 10*, p. 8.

3.8 The Commissioner suggested that Schedule 1 should be considered in light of the likelihood that representative bodies will continue to be under resourced. The Commissioner supported the proposed amendments to the extent that they 'enhance, encourage or support representative bodies to make the most of their limited resources.' However, the Commissioner suggested that the amendments should be reconsidered to the extent that they:

> • reduce the ability of representative bodies [to] plan effectively, or
>
> • entail additional administrative burdens that are not likely to lead to a direct improvement in effectiveness….[10]

3.9 The committee notes that the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account (PJC) considered the issue of funding and resourcing in detail in its *Report on the Operation of Native Title Representative Bodies* (PJC Report).[11] The PJC made several recommendations to address these matters, including that:

> …the Commonwealth immediately review the level of operational funding provided to NTRBs to ensure that they are adequately resourced and reasonably able to meet their performance standards and fulfil their statutory functions. (Recommendation 8)[12]

3.10 The submission from the Attorney-General's Department and the Department of Families, Community Services and Indigenous Affairs (FaCSIA) noted that the amendments in the Bill 'are being complemented by non-legislative measures aimed at building the capacity of NTRBs to deliver services.'[13] In particular, they submitted that FaCSIA is funding significant capacity building activity:

> NTRBs frequently call for more funding to address these deficiencies. However, the key to improving performance is to increase capacity to provide professional services, rather than putting additional funds into organisations that are struggling through lack of appropriate skills and experience. The capacity building program includes specialist training in governance, administrative law and contract management. There is also a project designed to improve the capacity of NTRBs to attract and retain quality staff.[14]

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10 *Submission 10*, p. 9.

11 Under section 207 of the Native Title Act the PJC ceased operations on 23 March 2006.

12 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the operation of Native Title Representative Bodies*, March 2006 (PJC Report), p. 44. See also recommendations 5-7.

13 *Submission 1*, p. 8.

14 *Submission 1*, p. 10.

3.11 A representative of FaCSIA also told the committee that the Government has allocated '$15.6 million over four years specifically for the purpose of performance enhancement and capacity building in the rep body system.'[15]

Committee view

3.12 The committee acknowledges concerns about the level of funding and resourcing of NTRBs. In particular, the committee endorses the comments and recommendations made in relation to this issue by the PJC in its report on NTRBs. The committee welcomes the Government's evidence to the committee that the proposed amendments will be complemented by funding for capacity building activities directed at NTRBs. Nevertheless, the committee has concerns that some aspects of the proposed amendments, particularly the provisions for limited term recognition, have the potential to increase the administrative burden on NTRBs. The committee considers that its recommendations for amendments to these provisions, detailed below, will help to alleviate any potential increased burden on NTRBs.

Recognition arrangements

Limited term recognition

3.13 As outlined in Chapter 2 of this report, the Bill would replace the current system of indefinite recognition of NTRBs with a scheme where NTRBs will be recognised for fixed terms of between one and six years.[16]

3.14 This proposal was another key concern for many organisations. For example, the NNTC strongly opposed the periodic recognition of NTRBs.[17] The NNTC felt that this would cause a number of problems for NTRBs, including:

- potential conflict of interest: NTRBs may feel the need to compromise their activities to produce 'outcomes' for government in order to obtain re-recognition;
- inability to plan for the long term future; and
- diversion from core business to focus on re-recognition processes.[18]

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15 *Committee Hansard*, 30 January 2007, p. 58; see also Government Response to the Report by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account on the Operation of Native Title Representative Bodies, p. 3, tabled 15 February 2007

16 See especially item 7 of Schedule 1, which would insert proposed subsection 203A(3A) into the Native Title Act. Note also that the Bill makes provisions for transitional arrangements: see Explanatory Memorandum, pp 5-6, and the discussion in Chapter 2.

17 *Submission 9*, pp 3-4.

18 *Submission 9*, p. 4.

3.15 The NNTC suggested that there are already sufficient controls to ensure that NTRBs operate effectively, including the deregistration processes currently in the Native Title Act, review provisions and grant conditions.[19]

3.16 Mr Philip Vincent, Counsel for the NNTC, suggested that the periodic recognition provisions would effectively punish all representative bodies 'by making their tenure so indeterminate that they cannot operate in any confident way.'[20] Mr Vincent also pointed out that the lack of certainty caused by the proposed periodic recognition would make it more difficult for third parties to deal with NTRBs.[21]

3.17 Ms Anne-Sophie Deleflie of the MCA gave an example of the potential for problems arising from limited term recognition for NTRBs:

> Negotiations involving big projects for mining companies can take two years. You develop relationships, you understand how a particular rep body works and you might have reached certain agreements on points that are not yet formalised in an agreement. If you suddenly derecognise a rep body and change some boundaries and appoint a new body, there can be some very big disruptions to those negotiations involved in that process…[22]

3.18 The MCA recommended that the fixed terms should be for a minimum of three to six years, rather than the proposed terms of one to six years.[23]

3.19 Mr Andrew Chalk, of Chalk and Fitzgerald Lawyers and Consultants, was similarly concerned about the proposal for periodic recognition of NTRBs, pointing out that NTRBs might need to divert resources to the process of re-recognition:

> It is ironic that the explanatory memorandum speaks of cutting red tape by abandoning the strategic plans but imposes a very high burden on rep bodies in terms of constantly having to go back and reapply to be able to do their job.[24]

3.20 Mr Chalk also expressed the view that this proposal would cause uncertainty for NTRBs over their status. Mr Chalk pointed out that:

> The proposal is for recognition as short as one year. In one year you will be doing nothing other than preparing your application for the next round…[25]

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19 *Submission 9*, p. 5.

20 *Committee Hansard*, 30 January 2007, p. 10.

21 *Committee Hansard*, 30 January 2007, p. 10; see also Ms Anne-Sophie Deleflie, MCA, *Committee Hansard*, 30 January 2007, p. 36.

22 *Committee Hansard*, 30 January 2007, p. 37.

23 *Submission 4*, p. [2]; see also Ms Anne-Sophie Deleflie, MCA, *Committee Hansard*, 30 January 2007, p. 36.

24 *Committee Hansard*, 30 January 2007, pp 3 and 5.

25 *Committee Hansard*, 30 January 2007, p. 3.

3.21 Mr Chalk again drew the committee's attention to the fact that the Native Title Act already provides mechanisms for the withdrawal of recognition of a body that is not performing.[26] Mr Chalk argued that:

> …you must have a mechanism to take away recognition where bodies are not performing but that does not mean to say that you jump to the other extreme and require every body to go through quite an intensive process on a regular periodic basis. [27]

3.22 Mr Anthony McAvoy, representing Queensland South Native Title Services, described the proposal for periodic recognition as 'harsh'.[28] Mr McAvoy was also concerned that if recognition were to be withdrawn from an NTRB, the process of transition to a new NTRB would be problematic and time consuming. He told the committee that applicants or traditional owners would be 'left in positions where they are unable to be represented or where the level of representation that is able to be provided is not as you would hope to deliver.'[29] Mr McAvoy suggested a minimum recognition term of at least two years.[30]

3.23 The Aboriginal and Torres Strait Islander Social Justice Commissioner opposed the enactment of provisions relating to limited period recognition. However, the Commissioner made a number of suggestions for amendments if the provisions were to be enacted, including that:

- the minimum period of recognition should be increased from one to three years;
- a formal legal link between recognition and funding should be established, such that the Department will be required to provide funds to recognised representative bodies for the whole recognition period;
- the Minister should be required, no later than a specified time before the expiry of the period of recognition of a representative body, to invite that representative body to apply for a further period of recognition;
- there be some criteria in the Native Title Act (or regulations) for making decisions about the length of the recognition period that NTRBs will be offered.[31]

3.24 Several other organisations made similar suggestions in relation to the proposal for periodic recognition.[32] For example, the Carpentaria Land Council

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26 *Committee Hansard*, 30 January 2007, p. 5.

27 *Committee Hansard*, 30 January 2007, p. 9.

28 *Committee Hansard*, 30 January 2007, p. 27.

29 *Committee Hansard*, 30 January 2007, p. 26.

30 *Committee Hansard*, 30 January 2007, p. 28.

31 *Submission 10*, pp 11-13.

Aboriginal Corporation (Carpentaria Land Council) was concerned that no criteria were specified for the Minister in making a decision as to the length of time for which a body is to be recognised. The Carpentaria Land Council also argued that 'one year's recognition will never be a sufficient period for the purposes of setting meaningful goals and allocating resources.'[33]

3.25 The submission from the Attorney-General's Department and FaCSIA assured the committee that, under the proposed system for periodic recognition:

> Those with a history of achieving strong outcomes and maintaining sound administration and governance could expect a maximum or near-maximum term, and to be re-recognised at the end of their terms.[34]

3.26 A representative of FaCSIA reiterated this during the committee's hearing:

> We would not expect that, if an NTRB were satisfactorily performing its functions—and that means representing the interests of the claimants and the native title holders in its region—it would have anything to be worried about. We are not seeking to undermine the native title rep body system.[35]

3.27 The representative also reassured the committee that, in making recognition decisions, the Minister would be mindful of ensuring that there is ongoing stability and continuity in the system.[36]

3.28 The representative from FaCSIA further informed the committee that, in future, funding will be tied to the recognition period:

> Currently NTRBs are only funded on a year-to-year basis. In future core funding will be delivered in three-year blocks corresponding to the recognition terms. [37]

3.29 Nevertheless, the representative from FaCSIA told the committee that a one-year term might be appropriate in some situations.[38] The representative explained the current system, where NTRBs are recognised indefinitely, caused difficulties:

> …in being able to have a regular review of performance, to give feedback and, if necessary, blow the whistle without going into the potentially litigious realms of a derecognition process...[39]

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32 See, for example, Carpentaria Land Council, *Submission 13*, pp 2-4; Chalk and Fitzgerald Lawyers and Consultants, *Recommendations in relation to the Native Title Amendment Bill 2006*, Tabled Document, 30 January 2007, p. 1.

33 *Submission 13*, p. 3.

34 *Submission 1*, p. 52.

35 *Committee Hansard*, 30 January 2007, p. 62.

36 *Committee Hansard*, 30 January 2007, p. 63.

37 *Committee Hansard*, 30 January 2007, p. 52; see also p. 62.

38 *Committee Hansard*, 30 January 2007, p. 58.

3.30 The committee notes that the PJC welcomed these proposed reforms:

> The Committee welcomes the proposed changes that seek to impose a time limit on the recognised status of NTRBs. The Committee believes that this will ensure a focus on outcomes.[40]

Committee view

3.31 The committee acknowledges concerns raised in relation to the proposed recognition of NTRBs for fixed terms. In particular, the committee acknowledges evidence that this may cause considerable uncertainty for both NTRBs and third parties dealing with those NTRBs. The committee further notes concerns that the re-recognition process could result in an additional burden on the already stretched resources of NTRBs. At the same time, the committee recognises the need to regularly review the performance of NTRBs in a streamlined and efficient manner.

3.32 The committee welcomes the evidence from FaCSIA that, in future, NTRB funding will be tied to the recognition period. However, the committee considers that evidence that the proposed minimum recognition period of one year is too short is persuasive. The committee considers that the minimum recognition period should be increased from one year to two years, noting that, in certain circumstances, it will be possible for the Minister to withdraw recognition from an NTRB earlier where necessary. Further, the committee notes that the process for the Minister to withdraw recognition from an NTRB will be simplified and streamlined under the amendments proposed by the Bill.

Criteria for recognition of NTRBs and variation of NTRB areas

3.33 Submissions also raised issues in relation to the proposed changes to the criteria for recognition of NTRBs, and the criteria for the Minister's decision to vary, reduce or extend a body's representative area.

3.34 As outlined in Chapter 2, the Bill proposes to remove two criteria that the Minister is presently required to consider before recognising or withdrawing recognition from representative bodies.[41] These are:

- whether the body does or will satisfactorily represent native title holders and persons who may hold native title in its area; and
- whether the body does or will consult effectively with Aboriginal peoples and Torres Strait Islanders living in its area.

3.35 The Bill proposes similar changes to the criteria for the Minister's decision to vary, reduce or extend a body's representative area.[42]

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39 *Committee Hansard*, 30 January 2007, p. 63.

40 PJC Report, p. 27.

41 Items 13 and 24 of Schedule 1.

3.36 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.[43]

3.37 Several submissions expressed concern about these proposed changes. The NNTC submitted in relation to these amendments that:

> …the proposed removal of the Minister's needing to be satisfied about these matters for actual recognition as a representative body constitutes a clear downgrading of the importance of these matters. Also, it remains unclear as to how 'representation' will continue to be interpreted.[44]

3.38 The NNTC concluded that:

> The ability of the Minister to determine which eligible body will be successful will, if the Bill is passed, be entirely discretionary. These changes, over time, are likely to significantly change the nature of NTRBs from 'representative' bodies to bodies that merely 'represent' native title claimants (such as legal practices). [45]

3.39 Similarly, Mr Anthony McAvoy, representing Queensland South Native Title Services, was concerned that this amendment was:

> …directed towards allowing service bodies to take over the role that representative bodies now fulfil. It allows the providers of native title services to be less connected to the people that they represent, in my view. …Without being required to have that representativeness, I believe that it would potentially be far more difficult for a service body to represent the interests of the traditional owners across the region effectively.[46]

3.40 The Aboriginal and Torres Strait Islander Social Justice Commissioner also raised a related concern about the review rights of NTRBs. The Commissioner pointed out that under the Bill, decisions relating to the recognition and withdrawal of recognition will be 'legislative instruments', and thus will no longer be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*. The Commissioner was concerned that, by subjecting such decisions to parliamentary disallowance, the proposed amendment would:

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42 Items 18-20 of Schedule 1.

43 Explanatory Memorandum, p. [6]; see also proposed subsection 203AI(1) and items 24 and 27 of Schedule 1; Attorney-General's Department and FaCSIA, *Submission 1*, p. 9; FaCSIA, *Submission 1A*, p. 1.

44 *Submission 9*, p. 5.

45 *Submission 9*, p. 6; see also the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 10*, pp 14-15.

46 *Committee Hansard*, 30 January 2007, p. 27.

> …politicise recognition decisions, making them vulnerable to inappropriate public comment and potential political disruption in what should be a principled and predictable administrative process.[47]

3.41 The Western Australian Government's Office of Native Tile was concerned that these amendments 'appear to be aimed at reducing the representative role of NTRBs.' It commented that 'the need for and objective of these proposed amendments is not clear', and suggested the Commonwealth should provide further information about the rationale for these amendments.[48]

3.42 In their submission, the Attorney-General's Department and FaCSIA did provide some rationale for the amended criteria:

> The criteria for recognition, withdrawal of recognition and changes to boundaries are currently cumbersome and time-consuming, and require proofs which are difficult to measure with any certainty, making decisions easily susceptible to legal challenges and consequent delays in service delivery.[49]

3.43 In response to concerns that the amendments move towards a system of 'representing rather than representation', a representative of FaCSIA told the committee that:

> With respect, that confuses the system of the [Native Title Act], which has always been about representation in terms of delivering outcomes for applicants and native title holders. That remains unchanged and, in fact, a number of provisions in the Act which refer specifically to representation remain in the act. They include section 203AB(2) which provides that NTRBs must maintain organisational structures and initial processes that promote satisfactory representation and consultation; 203BB provides that NTRBs have to represent claimants or facilitate their representation, and, similarly, 203BC provides that an NTRB must consult with relevant bodies or persons…All that is changing is that the function in relation to representation has been moved as a stand-alone criterion.[50]

Committee view

3.44 The committee notes concerns raised in relation to the proposed changes to the criteria for recognition of NTRBs and variation of NTRB area. However, the committee considers that the changed criteria are appropriate. In particular, the committee notes that the Minister will still need to be satisfied that a body

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47 *Submission 10*, p. 18; see also Parliamentary Library, "Native Title Amendment Bill 2006", *Bills Digest No. 77 2006-07*, 6 February 2007, p. 5.

48 *Submission 3*, p. 2.

49 *Submission 1*, p. 9.

50 *Committee Hansard*, 30 January 2007, pp 53-53.

satisfactorily performs, or would be able to satisfactorily perform, representative body functions.

Withdrawal of recognition of NTRBs

3.45 As outlined in Chapter 2, the Bill also proposes to amend section 203AH of the Native Title Act to simplify the grounds for withdrawal of recognition.[51] The Attorney-General's Department and FaCSIA explained that under these amendments:

> …the Minister will need to be satisfied that the NTRB is not satisfactorily performing its functions, or that there are serious or repeated irregularities in its financial affairs. The time period for the NTRB to respond to a withdrawal notice will be reduced from 90 to 60 days. These two changes will help avoid the gaps in service provision experienced previously.[52]

3.46 However, the NNTC described these changes as 'draconian and unnecessary':

> The removal of the provision for the Minister to be satisfied, prior to de-recognition, that relevant deficiencies are unlikely to be remedied introduces a summary or 'sudden death' aspect to de-recognition.[53]

3.47 The NNTC was also concerned with the reduction of the response period for a notice of intention to withdraw recognition from 90 days to 60 days. The NNTC considered this reduction to be 'unrealistic'. The NNTC argued that this proposal would impose more pressure on organisations that are 'under-funded and over-worked.'[54]

3.48 The Attorney-General's Department and FaCSIA told the committee that, to date, one NTRB had been formally de-recognised and the de-recognition process took 18 months:

> On the last occasion that recognition was withdrawn from a clearly dysfunctional NTRB, the process took eighteen months, during which time there was little service to claimants.[55]

3.49 A representative from FaCSIA further told the committee that this process had drawn their attention to the difficulties in the interpretation of the current section 203AH, under which:

> …the Minister has to be satisfied that there is no prospect—no prospect at all—that there is any chance that the NTRB can change. It puts, with respect, an almost impossible burden on the Minister as the decision

51 See especially items 24 and 25 of Schedule 1.

52 *Submission 1*, p. 9.

53 *Submission 9*, p. 6.

54 *Submission 9*, p. 6.

55 *Submission 1*, p. 9; see also FaCSIA, *Committee Hansard*, 30 January 2007, p 58.

> maker…So that is why the government decided to simplify the grounds under which recognition can be withdrawn in future…[56]

Committee view

3.50 The committee notes that the PJC considered these proposed reforms, including the changed criteria and reduced timeframes for response. The PJC welcomed the changes, concluding that they:

> …are justified given the need for the Commonwealth to respond within an adequate timeframe to organisations that are failing to fulfil their statutory functions.[57]

3.51 The committee agrees with the PJC that the proposed changes in the Bill to the process for withdrawal of recognition of NTRBs are justified.

Recognition of non-Indigenous corporations

3.52 As outlined in Chapter 2, item 5 of Schedule 1 proposes to amend section 201B of the Native Title Act to broaden the definition of 'eligible body' (that is, a body that can be recognised as a representative body) to include bodies incorporated under the *Corporations Act 2001*.

3.53 The Aboriginal and Torres Strait Islander Social Justice Commissioner felt that non-Indigenous corporations should not be eligible bodies. The Commissioner suggested that no justification for this amendment had been advanced, and that the amendment 'is inconsistent with the notion that representative bodies represent the exclusively Indigenous interests of native title claimants'. At the same time, the Commissioner argued that this amendment was unnecessary, 'since non-Indigenous corporations may already perform the functions of representative bodies under s203FE of the Act'. [58]

3.54 The NNTC was also opposed to these amendments. The NNTC was particularly concerned that, unlike Aboriginal Corporations, such companies would not be required to have any special constitutional requirements to be eligible – and in particular, specific objects relating to the performance of representative body functions. Further, the NNTC believed that such companies should be required to show they satisfactorily represent native title claimants and consult with Indigenous people in their area.[59]

3.55 The submission from the Attorney-General's Department and FaCSIA pointed out that under these amendments:

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56 *Committee Hansard*, 30 January 2007, p. 62.

57 PJC Report, p. 25; see also p. 27.

58 *Submission 11*, pp 20-21.

59 *Submission 9*, pp 5-6.

> While the sole criterion…will be the capacity to satisfactorily perform NTRB functions, the Act also has provisions about how those functions are to be performed, and these include provisions about representation and consultation that could tend to favour local indigenous organisations.[60]

Committee view

3.56 The committee notes that the PJC Report also considered the issue of recognising organisations incorporated under the *Corporations Act 2001*. The PJC cautiously welcomed this proposal, noting that:

> …the Commonwealth needs to closely monitor and evaluate the effectiveness of services provided by these providers — both those currently operating and those that may emerge in the future.[61]

3.57 The committee endorses the comments made by the PJC in relation to the broadening of the bodies that can be recognised as an 'eligible body'.

Variation in the geographical areas administered by NTRBs

3.58 Many submissions were also concerned about the proposed changes in relation to the variation of NTRB areas. The proposed changes to the criteria for Ministerial decision-making have already been considered earlier in this chapter. However, other issues were also raised in relation to these proposals.

3.59 Dr James Weiner supported aspects of these amendments, believing they could lead to:

> … positive outcomes on a number of claims in Queensland for example that currently straddle the jurisdictions of two NTRBs….[L]arge, regionally coherent potential native title claim groups may be disadvantaged due to the inability or difficulty encountered by neighbouring NTRBs to agree on an effective policy of joint management of such claims. In the same vein, any legislation that will make more effective the ability of an NTRB to operate in an adjacent area, as described in s.203BD, will also be to the benefit of these groups straddling two NTRB jurisdictions.[62]

3.60 However, the Aboriginal and Torres Strait Islander Social Justice Commissioner opposed these amendments, suggesting that the criteria of effective consultation and satisfactory representation should be retained, or at the very least, the proposal should be amended to remove the public right to comment on extensions and variations.[63]

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60 *Submission 1*, p. 9.

61 PJC Report, p. 23.

62 *Submission 11*, p. 2.

63 *Submission 11*, p. 18.

3.61 The Western Australian Government's Office of Native Title was also concerned with these amendments, recommending that:

> …the Commonwealth commit to providing appropriate funding to any NTRBs affected by the provisions to ensure they are able to effectively perform their functions in respect of any new areas.[64]

3.62 The NNTC was concerned that an NTRB could be required to administer a larger area at the Minister's discretion. The NNTC observed that:

> The current boundaries of NTRBs have been the result of considerable consultation and negotiation between government, NTRBs and their constituents. Boundaries are not mere matters of administrative convenience, but also represent cultural groupings and are reflected in NTRB membership and other constitutional aspects.[65]

3.63 The NNTC submitted that there could be difficulties in some circumstances:

> For example, where an effective NTRB is required to expand into an area which does not have a current representative body, or where an NTRB is required to take over an area which was previously within another NTRB area, against the wishes of one or more traditional owner groups, it is likely to cause conflict and administrative dislocation.[66]

3.64 The NNTC suggested that an eligible body could be *invited* to take up the area, which it felt would 'ensure that only bodies that felt comfortable to represent the people of the area would end up doing so'.[67]

3.65 The NNTC again raised concerns about proposed changes to the time to respond to notices of Ministerial decisions to alter NTRB areas. It submitted that the reduction in the required response time from 90 days to 60 days was 'unrealistic':

> Considerable consultation would be required by an NTRB with its constituents and other representative bodies in order to properly respond to such a notice.[68]

3.66 In relation to this issue, the committee notes that the PJC recommended that:

> …the Commonwealth address the issue of native title claims that overlap the boundaries of different representative bodies to avoid uncertainty for claimants. (Recommendation 4)[69]

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64 *Submission 3*, pp 2-3.

65 *Submission 9*, p. 7.

66 *Submission 9*, p. 7.

67 *Submission 9*, p. 7.

68 *Submission 9*, p. 7.

69 PJC Report, p. 25.

3.67 The submission from the Attorney-General's Department and FaCSIA justified these proposals as follows:

> From time to time it may be necessary or desirable to alter the boundaries of an NTRB, for example where a group of claimants feel more affinity with a neighbouring NTRB. Currently adjoining NTRBs could apply for their boundaries to be varied in this circumstance, but the Minister could not initiate the variation even if he receives strong representations from claimants. The amendments will allow him to do so, but there will be a requirement for consultation with the affected NTRBs and the public before any variation is finalised. Similarly, NTRBs will be able to apply to the Minister to extend their boundaries into an adjoining unrepresented area, something that can currently only be initiated by the Minister.[70]

Committee view

3.68 The committee notes concerns about the amendments in relation to the variation of representative body areas. However, the committee considers that these amendments are justified in order to provide a more flexible regime for varying the boundaries of NTRBs in appropriate circumstances.

Accountability requirements

3.69 As noted in Chapter 2, Schedule 1 proposes to remove the requirements for NTRBs to prepare strategic plans and annual reports, although NTRBs will still be required to keep accounting records.[71]

3.70 The Aboriginal and Torres Strait Islander Social Justice Commissioner was concerned about the abolition of approved statutory plans. The Commissioner believed that statutory plans provide 'a sound basis on which to base decisions about resource allocation', and are an important criterion for making recognition decisions. The Commissioner did acknowledge, however, that the repeal of the strategic planning provisions would not prevent representative bodies from undertaking such planning.[72]

3.71 The Carpentaria Land Council was also opposed to this amendment, arguing that 'medium to long term strategic planning is essential for an NTRB to be effective'.[73] The Carpentaria Land Council also felt that an approved strategic plan provided an 'appropriate and reliable benchmark' for the Minister in considering whether an NTRB is satisfactorily performing its statutory functions (which is in turn relevant to the Minister's decision to recognise a body as an NTRB).[74]

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70 *Submission 1*, p. 9.

71 See especially items 29-33.

72 *Submission 10*, p. 15.

73 *Submission 13*, p. 4.

74 *Submission 13*, p. 5.

3.72 Mr Andrew Chalk, of Chalk and Fitzgerald Lawyers and Consultants, emphasised the importance of strategic plans as public documents, noting that such public plans provide an objective standard against which to assess NTRBs.[75] Mr Chalk concluded that a public strategic plan is:

> …not simply red tape; it has a fundamental role in ensuring the good governance and a strategic governance of the organisation and its limited resources.[76]

3.73 The committee notes that the PJC considered accountability requirements in its report and recommended that:

> …the OIPC [Office of Indigenous Policy Coordination], in consultation with representative bodies, review the current compliance and accountability requirements placed on NTRBs with a view to reducing unnecessary duplication of reporting and streamlining reporting procedures. (Recommendation 16)[77]

3.74 However, the PJC cautioned that the accountability requirements should be streamlined 'without compromising the essential accountability requirements of representative bodies.'[78]

3.75 The Attorney-General's Department and FaCSIA submitted that:

> In the dynamic native title environment where NTRBs have to respond to changing priorities, these [strategic] plans have tended to be couched in such general terms that they are neither informative nor useful. It has therefore been decided to remove this requirement from NTRBs. This does not mean they will not need to plan carefully – under funding conditions, they are required to prepare detailed annual operational plans, including estimates of costs and timeframes beyond the immediate 12 months – but it does rationalise the process.[79]

3.76 A representative of FaCSIA further told the committee that:

> …the government strongly supports planning on the part of the NTRBs and the system. That is not the issue; the issue is: does a mechanism for approval of strategic plans by the minister facilitate that process? We have found that it does not. It is essentially a paper warfare exercise.[80]

3.77 In relation to annual reporting requirements, the Departments submitted that:

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75 *Committee Hansard*, 30 January 2007, pp 2-3; see also p. 4.

76 *Committee Hansard*, 30 January 2007, p. 3.

77 PJC Report, p. 62.

78 PJC Report, p. 62.

79 *Submission 1*, pp 9-10.

80 *Committee Hansard*, 30 January 2007, p. 53.

> The current requirement that NTRBs provide the Minister with annual reports for tabling in Parliament will also be removed. This puts an obligation on NTRBs that is not imposed on other Commonwealth-funded non-statutory organisations. The actual reporting requirements will not be diminished, and their reports will still be publicly available, but they will be saved the expense and workload of printing tabling copies. [81]

Committee view

3.78 The committee notes concerns in relation to the proposed changes to the accountability requirements relating to NTRBs. However, the committee acknowledges that NTRBs will still need to need to meet strict accountability requirements, such as providing operational plans and keeping accounting records. The committee is satisfied that the changes to reporting requirements proposed by the Bill will reduce the administrative burden on NTRBs without compromising their accountability. The committee also notes that NTRBs can still produce strategic plans on an administrative basis, rather than as a statutory requirement.

Other issues

Native Title Service Providers

3.79 As outlined in Chapter 2, the Bill proposes to allow Native Title Service Providers, who are funded under section 203FE of the Native Title Act to perform NTRB functions and to operate as representative bodies to the extent that this is appropriate (for example, where a representative body has refused to provide assistance).[82]

3.80 Dr James Weiner considered that these amendments:

> …could seriously undermine the functions of existing NTRBs, as it will encourage disgruntled applicants to seek assistance elsewhere to lodge break-away claims in the knowledge that funding will be provided. It will, in other words, place further fissiparous pressures on claim groups already struggling to maintain collective unity in the face of a variety of native title related demands.[83]

3.81 The Attorney-General's Department and FaCSIA explained the need for this amendment in their submission as follows:

> There are currently native title service providers undertaking native title functions in areas where there is no NTRB, either because the NTRB formerly representing the area had its recognition withdrawn, or sought to be released from recognition. There is an expectation that these organisations can do everything that an NTRB does. However, the NTA

81 *Submission 1*, p. 10.

82 Explanatory Memorandum, p. 7.

83 *Submission 11*, p. 2.

> [Native Title Act] currently does not (or may not) allow them to perform the full range of NTRB functions. Nor does it impose (or clearly impose) the same obligations on third parties as apply to their dealings with NTRBs. In practice, this has not constrained their activities to the extent that outcomes are affected, but it would be useful to clarify that all the same powers and obligations under the Native Title Act apply in relation to them.[84]

3.82 The NNTC expressed concern in relation to the related proposed subsection 203FE(1A).[85] This subsection would provide that the Secretary may only make funding available under subsection 203FE(1) where, in the Secretary's opinion, the function to be funded would not otherwise be performed in an efficient and timely manner. The NNTC argued that:

> It is unfair and discriminatory that Aboriginal claimants in an area where there is an NTSP [Native Title Service Provider] rather than an NTRB do not have a right under the NTA [Native Title Act] to like funding for native title activities.[86]

3.83 However, the committee notes that the Explanatory Memorandum explains that the purpose of proposed subsection 203FE(1A) is to:

> …clarify that persons or bodies should only be funded under subsection 203FE(1) where it is not feasible to recognise a representative body for an area to perform relevant services.[87]

Relationship with other legislation

3.84 The Aboriginal Legal Rights Movement (ALRM) raised another issue not dealt with by the Bill. This issue related to incoherence between the Native Title Act, the *Commonwealth Authorities and Companies Act 1997* (CAC Act), the *Corporate Law Economic Reform Package Act 1999* and the *Associations Incorporation Act 1985* (SA). In particular, the ALRM was concerned with sections 203EA and 203EB of the Native Title Act which refer to the CAC Act, which has been amended by the Corporate Law Economic Reform Package Act. The ALRM submitted that references to the CAC Act in the Native Title Act have caused considerable uncertainty to NTRBs as to the applicable law. Further, according to the ALRM, the Australian Government Solicitor has stated that 'it would be desirable to amend sections 203EA and 203EB at an appropriate time to reflect the scheme of the new CAC Act provisions'.[88]

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84 *Submission 1*, p. 10.

85 Item 43 of Schedule 1.

86 *Submission 9*, p. 7.

87 p. 18.

88 *Submission 6*, p. 7; see also Mr Christopher Charles, *Committee Hansard*, 30 January 2007, pp 23-25.

3.85 Mr Christopher Charles, General Counsel for the ALRM, stressed to the committee that sections 203EA and 203EB of the Native Title Act should be amended to clarify the situation:

> …it is an important issue because we cannot have a situation, in my submission, where the Commonwealth knows, through the advice of its Government Solicitor, that this law is uncertain and difficult to operate. That is an unsatisfactory situation for the Commonwealth and for the rep bodies. In my submission it is absolutely vital that this committee makes a recommendation of some sort to deal with 203EA and 203EB, whether by way of repeal or by way of amendment to apply one law or the other. But something has to be done; it simply cannot be left.[89]

3.86 In response to the committee's questions on this issue, the Attorney-General's Department drew the committee's attention to the fact that this issue was noted in the second discussion paper on technical amendments to the Native Title Act.[90] The Attorney-General's Department told the committee that:

> We anticipate proposals for technical amendments will be included in a Bill to be introduced in the Autumn 2007 sitting of Parliament.[91]

3.87 The committee notes the issues raised by the ALRM, and welcomes the evidence to the committee that the Government proposes to introduce amendments to clarify the operation of sections 203EA and 203EB.

Prescribed Bodies Corporate (Schedule 3)

3.88 Schedule 3 of the Bill concerns the functioning of Prescribed Bodies Corporate (PBCs). In particular, Schedule 3 implements recommendations 5 and 7 from the report on *Structures and Processes of Prescribed Bodies Corporate* (the PBC Report).[92]

3.89 A number of submissions were concerned that significant aspects of the proposed PBC reforms would be left to the PBC Regulations.[93] The Western Australian Government's Office of Native Title called for the proposed amendments to the PBC Regulations to be released for public consultation so that they could be considered in conjunction with the Bill.[94]

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89 *Committee Hansard*, 30 January 2007, p. 25.

90 See Attorney-General's Department and FaCSIA, *Submission* 1, Attachment I.

91 *Submission 16*, p. 1; see also FaCSIA, *Committee Hansard*, 30 January 2007, pp 59 and 61.

92 See *Submission 1*, Attachment F.

93 For example, Office of Native Title: Western Australia Government, *Submission 3*, p. 4; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 10*, pp 38-45.

94 *Submission 3*, p. 4.

3.90 Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner was concerned that Schedule 3 should not be considered in isolation from other proposed amendments to the Native Title Act and PBC Regulations.[95] For example, the Commissioner submitted that, although Item 2 of Schedule 3[96] could be characterised as a 'technical amendment':

> When considered together with the proposed regulatory changes, it becomes clear that the proposed amendment anticipates substantial changes to PBC functions that limit native title holders' rights in relation to future acts.[97]

3.91 The Commissioner therefore recommended that Item 2 of Schedule 3 should be deferred until all proposed changes to the Native Title Act relevant to PBCs, and proposed amendments to the PBC Regulations, can be considered together.[98]

3.92 The submission from the Attorney-General's Department and FaCSIA in relation to Item 2 of Schedule 3 explained that the PBC Report found that:

> …existing requirements for PBCs to consult with and obtain the consent of common law native title holders before making decisions to surrender native title, or before doing or agreeing to do any other act affecting native title, imposed a very significant burden on PBCs. It accordingly recommended that compulsory consultation should only apply to decisions to surrender native title. Item 2 of Schedule 3 will amend the Native Title Act to allow the PBC Regulations to make provision to this effect.[99]

3.93 Their submission further pointed out that:

> It will remain open to members to require their PBC to consult with the common law native title holders about additional decisions under the PBC's rules if this is considered desirable.[100]

3.94 Other submissions did not have concerns with the provisions of Schedule 3, but took the opportunity to raise the issue of lack of funding and resourcing for PBCs.[101] For example, Ms Anne-Sophie Deleflie of the MCA told the committee that:

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95 *Submission 10*, p. 38.

96 As outlined in chapter 2, Item 2 of Schedule 3 removes the requirement in paragraph 58(e) of the Act for PBCs to consult with common law holders on all agreements and decisions affecting native title.

97 *Submission 10*, p. 39.

98 *Submission 10*, p. 45.

99 *Submission 1*, p. 12; see also Explanatory Memorandum, p. 73; and PBC Report, Recommendation 5.

100 *Submission 1*, p. 12; see also Explanatory Memorandum, p. 73.

> …the lack of appropriate funding for PBCs, again, financially, in terms of capacity, is emerging for the minerals industry as a critical business issue.[102]

3.95 Ms Deleflie continued:

> …the MCA supports amendments to the Native Title Act that relax the statutory requirements on PBCs, as this may reduce the resource needs of PBCs, but cautions that support should be provided to native title holders who decide their PBCs should still consult with native title holders on decisions that materially affect the exercise of their native title rights and interests, and urges the government to reconsider the resources available to PBCs to ensure that they are functioning and effective organisations.[103]

3.96 Similarly, the Aboriginal and Torres Strait Islander Social Justice Commissioner observed that:

> …lack of resources, rather than any problem inherent in the functions of PBCs themselves, is the primary concern expressed by native title holders and others in relation to the operation of PBCs.[104]

3.97 The lack of adequate resourcing of PBCs was also highlighted during the PJC's inquiry into NTRBs. The PJC considered that:

> PBCs need to be adequately funded and resourced so that they can fulfil their important role in the native title system. Currently, many PBCs are unable to function effectively because of a lack of financial assistance from the Commonwealth.[105]

3.98 The PJC recommended that:

- the Commonwealth examine appropriate means for resourcing the core responsibilities of Prescribed Bodies Corporate; and
- the Commonwealth, state and territory governments widely publicise the availability to Prescribed Bodies Corporate of different funding sources, particularly in relation to the PBCs' land management functions.[106]

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101 MCA, *Submission* 4, pp [4-5]; NNTC, *Submission* 9, pp 3, 14-15; Dr James Weiner, *Submission* 11, p. 3; see also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 10*, pp 38-39; Mr Philip Vincent, *Committee Hansard*, 30 January 2007, p. 12.

102 *Committee Hansard*, 30 January 2007, p. 36.

103 *Committee Hansard*, 30 January 2007, p. 36.

104 *Submission 10*, p. 38.

105 PJC Report, p. 80.

106 PJC Report, p. 80, Recommendations 18 and 19.

3.99 The Attorney-General's Department and FaCSIA submitted that a number of measures are being implemented to improve the resources and support available to PBCs. A representative of FaCSIA further told the committee that:

> The government has decided in principle that, in certain circumstances, prescribed bodies corporate will be funded. We are working on the circumstances.[107]

Committee view

3.100 The committee notes concerns raised in relation to Schedule 3, and in particular, the importance of adequate funding and resourcing of PBCs. The committee endorses the comments made in relation to this issue by the PJC in its report on NTRBs, and notes that the Government has accepted the PJC recommendations.[108]

3.101 The committee welcomes the Government's decision in principle to fund PBCs in certain circumstances. The committee notes that the Government is working to determine the circumstances under which funding will be granted. The committee recommends that these funding arrangements be finalised as a high priority.

107 *Committee Hansard*, 30 January 2007, p. 66.

108 Government Response to the Report by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account on the Operation of Native Title Representative Bodies, pp 11-12, tabled 15 February 2007.

CHAPTER 4

THE CLAIMS RESOLUTION PROCESS

Introduction

4.1 The Claims Resolution Review ('the Review') is an important part of the strategy announced by the Attorney-General in 2005. The terms of reference for the Review included a requirement to:

> …examine the role of the National Native Title Tribunal (NNTT) and the Federal Court of Australia (the 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 Native Title Act 1993.[1]

4.2 In their report, Mr Graham Hiley QC and Dr Ken Levy observed:

> There is room for improvement in relation to the communication and coordination between the Court and the NNTT in relation to both particular claims and overall approaches to claims management.[2]

4.3 The recommendations of the Review include both legislative and administrative proposals as to how this might be achieved. These are broadly supported by the NNTT, and the President acknowledged that the current scheme 'is in need of improvement'.[3]

4.4 A number of submitters and witnesses held concerns over the initiatives resulting from the Review which have been included in the Bill. These concerns are discussed in this chapter.

Aspects of the Claims Resolution Review included in the Bill

4.5 Schedule 2 of the Bill addresses most of the legislative issues raised by the Review through provisions to clarify the relationship between the NNTT and the Federal Court in the resolution of native title applications and strengthen the powers of the NNTT in relation to mediation.

4.6 From the submissions and the evidence presented at the hearing, several themes emerged as being of concern. These were:

- the appropriate interaction between the mediation functions of the NNTT and the Court;

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1 The Review, p. 11.

2 The Review, p. 3.

3 *Submission 17*, p. 1.

- the perception by some parties that NNTT mediation is unsatisfactory when compared to the processes of the Court;
- the proposed powers of the NNTT to compel the attendance of witnesses and the production of documents;
- the proposed requirements for parties to 'act in good faith' in the course of mediation; and
- the proposal for the NNTT to conduct certain inquiries.

Concurrent mediation by the Federal Court and NNTT

4.7 Proposed paragraph 86B(6)(a) of the Bill removes the possibility of the Court and the NNTT conducting mediation at the same time in relation to the same matter. Similarly, paragraph 86B(6)(b) of the Bill would prevent the Court requiring the parties to attend a conference with a Registrar while NNTT mediation is on foot. The proposed amendments will mean that where the NNTT process has been ineffective, the Court may then conduct mediation.

4.8 The Registrar of the Federal Court expressed reservations about the operation of proposed subsection 86B(6)(b). His submission said:

> …the changes may unnecessarily limit the capacity of the Court to manage applications pending before it. Native title applications are filed in the Court and are, until a determination is made, a proceeding in the Court and therefore subject to its control in the exercise of the judicial power of the Commonwealth. An incident of this power is the power to supervise progress of the proceeding. The Bill proposes to prevent the Court from doing so as it appears to 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.[4]

4.9 The Registrar also observed that there is the possibility that the 'proposal to exclude simultaneous mediations in the Court and the NNTT may be limited to mediations attracting the protections of section 53B of the Federal Court Act, which were the subject of the Review recommendations, and that only such mediations (by the Court) should be precluded during the course of NNTT mediation'.[5]

4.10 The committee asked the Attorney-General's Department to comment upon the Registrar's submission. The Department explained that proposed subsection 86B(6) will not interfere with the operation of the Federal Court Rules which allow case management by the Court to continue whilst mediation occurs. The Department continued:

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4 *Submission 8,* p. 6.

5 *Submission 8,* p. 8.

> The provision is instead intended to preclude the Court from referring a matter to mediation…or from making orders for parties to attend conferences before a Court Registrar with a view to satisfying the Registrar that all reasonable steps to achieve a negotiated outcome of the proceeding have been taken'. [6]

4.11 The committee notes this advice from the Department suggests that proposed subsection 86B(6) is not as limiting of the Federal Court's discretion as the Registrar believes.

4.12 The committee also notes the comments made in the Review concerning communication between the Court and the NNTT. The Review said:

> We are aware that the dual management of claims by both the Court and NNTT can cause frustration and confusion amongst parties. For example, parties may be frustrated because Court orders for the provision of certain material may divert resources and prevent the parties from actively engaging in NNTT mediation. We believe that it is important for the Court and NNTT to coordinate their efforts as far as possible to ensure that parties are able to focus their limited resources on resolving the key issues in a particular matter.[7]

Committee view

4.13 The committee agrees that improved communication and better integration of the management of matters between the Court and the NNTT would resolve many of the difficulties surrounding the resolution of native title matters. The committee considers that the proposal to prevent concurrent mediation by the Court and the NNTT will contribute to this. To this end, the committee supports the amendments in proposed subsection 86B(6).

Effectiveness of NNTT Mediation

4.14 In relation to the proposals in the Bill to strengthen the role of the NNTT in mediation, witnesses raised more general issues about the effectiveness of the NNTT in conducting mediation. The comments of Mr Ron Levy, Principal Legal Officer, Northern Land Council, were characteristic of this view:

> Our experience of the tribunal is that, compared to not only the court but also private mediators we have used, it just simply does not do anywhere near as good a job. That is with the greatest respect to the president and the other members, all of whom I know, respect and like. I believe that they are endeavouring to do the best job they can. But all of our experience is that they do not deliver the goods. In those circumstances, we would have thought that the correct course, rather than vesting exclusive jurisdiction in

6 *Submission 16*, p. 2.

7 The Review, p. 24.

> the tribunal regarding mediation, would be to expose them to the winds of competition.[8]

4.15 Mr Andrew Chalk, Partner, Chalk and Fitzgerald Lawyers and Consultants, told the committee:

> I do not think the NNTT has been effective in its mediation function, as a general rule. The experience in native title is not that different from the experience in any other area of dispute, and that is that without the threat of the Court taking the matter into its hands and reaching a determination it may not be in the interests of any party.
>
> …It should be for the Federal Court to program matters through to a point where at least the written evidence is there for the other parties to see. If mediation occurs then we would suggest that there should be a window after that evidence is on where the mediation can then occur—via the NNTT, no problem, but where it is a narrow window so the parties have to put their evidence on and it is managed through the Court. It is not a cheap process, but it is certainly a lot cheaper than spending years and years in mediation.[9]

4.16 Similarly, Mr John Stewart AM, of the National Farmers' Federation, told the committee that 'history shows that the Native Title Tribunal does not have a good track record in resolving mediation issues'.[10]

4.17 The Review observed that 'mediation seems to be at the centre of many of the complaints about the ineffectiveness of the system'. The Review continued:

> Although all mediations were originally conducted by the NNTT (both before the 1998 amendments and since then upon referral under section 86B), there has been a trend in recent times for Federal Court judges to order mediation under the Federal Court Rules, notwithstanding that a matter is still being mediated by the NNTT. It is apparent that some judges are frustrated with the NNTT mediation process and feel that a matter, or part of a matter (such as overlapping claims), can be more readily resolved by a Court-appointed mediator, usually a registrar… [11]

4.18 Mr Philip Vincent, counsel for the NNTC told the committee that the NNTT has a place in mediation, but increasing the quality of the NNTT's mediation skills would contribute to achieving greater efficiency and better outcomes for parties. He continued:

> The Native Title Tribunal can continue happily mediating but, with respect, I suggest that it get its house in order by getting proper skills in mediation and understanding what it is all about …

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8 *Committee Hansard,* 30 January 2007, p. 45

9 *Committee Hansard,* 30 January 2007, p. 3.

10 *Committee Hansard*, 30 January 2007, p. 18.

11 The Review, p. 20.

> …Any bona fide, good-faith lawyer would say, 'Well, we can't get anywhere with the NNTT, and it may be because it doesn't have the skills; it doesn't have the gravitas. The Court is willing, and it has shown itself to be rather more expeditious…[12]

4.19 In their submission the MCA recommended that the internal capacity of the NNTT to conduct mediation be increased (within the existing resources) to ensure the competence of the NNTT for its increased role in mediation.[13]

4.20 Part of the NNTT's perceived limitations in mediation were attributed to the training of mediators within the NNTT. The President of the NNTT, Mr Graeme Neate, explained to the committee that, most, if not all, NNTT members have completed basic courses such as LEADR,[14] and a number of them have continued to update those skills. The NNTT also developed its own week-long mediation training course with external consultants.[15] Further, Mr Neate told the committee that the members had a range of skills:

> Either they were a legally qualified person with a certain length of experience or they had, in the opinion of the Governor-General, special knowledge in relation to Aboriginal and Torres Strait Islander societies, land management dispute resolution or any other class of matters considered by the Governor-General to have substantial relevance to the duty of members. The duties of members ranged beyond mediation, including arbitration matters and so on.[16]

4.21 In its submission, the NNTT cited the Report on the effectiveness of the NNTT by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account,[17] to refute criticism of the mediation capabilities of the NNTT.[18] That report observed that the NNTT manages to balance competing interests and although there is a perceptible level of frustration with the process, this was rarely attributable to the manner in which the NNTT performs its functions.[19]

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12 *Committee Hansard,* 30 January 2007, p. 14.

13 *Submission 4,* p. 4.

14 LEADR is an Australasian organisation which promotes Alternative Dispute Resolution or ADR. LEADR also provides training in ADR.

15 *Committee Hansard*, 30 January 2007, p. 57.

16 *Committee Hansard,* 30 January 2007, p. 57.

17 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Effectiveness of the National Native Title Tribunal,* December 2003.

18 *Submission 17,* p. 3.

19 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Effectiveness of the National Native Title Tribunal,* December 2003, paragraphs 6.18 and 3.42.

4.22 The NNTT submission also notes that the NNTT engages in creative approaches to mediation which may not necessarily meet the requirements of those who would like to see the role of the NNTT as 'cracking heads together.'[20]

4.23 For some witnesses it was the appropriateness of the training undertaken, rather than the quantity of it that was of concern. Mr McAvoy, counsel to Queensland South Native Title Services, told the committee that:

> …any mediator who comes through the normal mediation training processes or who undertakes a [LEADR] course or some other form of mediation or arbitration course, who has the appropriate qualifications, and who has been involved in mediation in the Courts and commercial arbitration, is going to have problems coming from that background and going into the environment of very political Aboriginal community negotiations because there are levels of nuance and sophistication in these negotiation processes that they are simply not going to be equipped to deal with. ... I am sure that all members of the NNTT would be assisted from ongoing training.[21]

4.24 In response to this criticism, the President of the NNTT explained that a nuanced approach to training is already occurring in the NNTT. He said:

> …a whole range of other cultural and other factors means that we have to concentrate on those things which are specific to the form of practice that we are engaged in. We have taken active steps in recent years to have tailored training for that purpose.[22]

4.25 Overall, the view persists that in some way Court administered mediation is more efficient than NNTT administered mediation. The President of the NNTT suggested that 'the issues that have been raised by a number of witnesses seem to go beyond mere training and mediation to what seems to be a core issue and that is how much clout the NNTT can bring to the mediation process'.[23] The President quoted the Review at paragraph 4.33:

> Some parties see NNTT mediation as being a 'soft' process and consider that timely and effective outcomes are more likely to be achieved through Federal Court mediation. However, there appears to be no reason to assume that another body with the same constraints as those which presently exist in relation to NNTT mediation could have been more effective than the NNTT. [24]

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20 *Submission 17*, p. 6.

21 *Committee Hansard,* 30 January 2007, p. 32.

22 *Committee Hansard,* 30 January 2007, p. 53.

23 *Committee Hansard,* 30 January 2007, p. 54.

24 *Committee Hansard,* 30 January 2007, p. 54; the Review, p. 21.

Committee view

4.26 The committee notes the concern about the capacity of the NNTT to undertake mediation. There is a lack of confidence in the process on the part of some parties, both in terms of the time taken and the efficiency of the process. The concerns centre on the effectiveness of NNTT mediation when compared with Federal Court administered mediation, and the qualifications of the mediators in the NNTT.

4.27 Much of the criticism of the NNTT has come from legal practitioners who may have expectations of the NNTT based on their experience of the Federal Court. As the President of the NNTT pointed out, the NNTT is a different environment from the Court, and the criticism does not take into account the nature of the NNTT's statutory responsibilities. The President also notes that there is no national accreditation scheme for mediators, and there is no generally available training in mediating native title applications unlike general mediation skills.[25] The committee welcomes the advice from the NNTT that it is currently developing a scheme for professional development and appraisal of members.[26]

4.28 The committee understands the perspective of practitioners who are aiming to have matters resolved quickly, and therefore with less cost, and who find the Court environment better placed to achieve this when compared to the NNTT. However, the NNTT is not a court, and must deal with matters according to its statutory remit.

4.29 Nevertheless, the committee considers there should be a more focussed approach by the NNTT to mediation, especially given that the amendments in the Bill propose to strengthen the powers of the NNTT in relation to mediation. This could be achieved by enlarging the mediation training provided to members. In the committee's view, the two weeks' training referred to at the hearing,[27] even for people who bring extensive dispute resolution experience to the NNTT, seems inadequate in a specialised area of dispute resolution.

Additional NNTT mediation powers

4.30 The Review also recommended (recommendation 2) that the NNTT be provided with statutory powers to compel parties to attend mediation conferences and to produce certain documents for a mediation within a nominated period or by a nominated date. Items 45 and 47 of Schedule 2 implement this recommendation. Failure to comply allows the presiding NNTT member to report the failure to the Court, which may result in sanctions by the Court.

4.31 The committee notes that these powers (often called coercive powers) are usually given to Royal Commissions and similar bodies. In his submission, the

25 *Submission 17*, p. 6.

26 *Submission 17*, p. 6.

27 *Committee Hansard,* 30 January 2007, p. 57.

Registrar of the Federal Court raised four issues about these powers of compulsion, and expressed concerns about the constitutionality of the proposed amendments. In summary, the four issues were:

- The powers are likely to be exercised by people whose primary function is mediation. They may be less equipped to formulate orders which are readily enforceable.
- The governmental functions of state and territory governments are likely to be affected. A government's participation is informed by its own policies and practices, and directions by the NNTT could raise legal or possibly constitutional issues, by compromising its ability to act in accordance with its policies; this, in turn could lead to second order litigation and further delays.
- Administrative directions by the NNTT (which are formulated by persons not necessarily qualified to do so) will require an effective enforcement regime which will ultimately rely on the Court. This is likely to add to delays and costs.
- The proposal raises constitutional issues. The power to give directions in the NNTT is an administrative order, not a judicial one, and could be subject to judicial review under either section 39B of the *Judiciary Act 1903* or the *Administrative Decisions (Judicial Review Act) 1977*. [28]

4.32 The NNTC submitted that these powers are incompatible with a mediation function. The NNTC added:

> The power in the NNTT to compel production of legally privileged material, in compulsive process will hinder the ability of parties to properly and confidently prepare their cases and to advise their clients and is a basic breach of rights.[29]

4.33 The Carpentaria Land Council was also opposed to the proposal for similar reasons. In recommending the proposal be abandoned, their submission said:

> The power to compel the production of documents is appropriate to a forum that is concerned with ascertaining and making findings in relation to facts in issue. The NNTT is not and should not be so concerned. The proposal to empower the NNTT to compel the production of documents for the purpose of a mediation conference is misconceived and inappropriate.[30]

4.34 The submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner also considered that conferring coercive powers on the NNTT is incompatible with the mediation function. The Commissioner suggested that if the amendments were to be enacted, that they should:

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28 *Submission 8*, pp 6-7. See also Mr Ron Levy, Northern Land Council, *Committee Hansard*, 30 January 2007, p. 45; *Submission 14*, p. 4.

29 *Submission 9,* p. 9.

30 *Submission 13,* p. 7.

- include rights to object to the orders on the grounds of confidentiality, privilege and prejudice; and
- be the subject of guidelines as to their exercise.[31]

4.35 The Attorney-General's Department was asked to comment upon the possibility that the proposal to grant coercive powers of the NNTT may be unconstitutional. The Department accepted the Federal Court Registrar's view that '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'.[32]

4.36 However, the Department argued that:

> Instead, proposed subsection 86D(3) provides a mechanism for the Court to enforce a direction given by the member presiding over a mediation conference. …In the event of breach of the Court order it is this order that would be enforced. It would not be the situation of a judicial body enforcing an order made by an administrative body.[33]

4.37 The Department noted that:

> …under the existing provisions of the Native Title Act Tribunal members are able to make certain directions regarding the conduct of mediation conferences, including directions to exclude or limit parties to the native title determination application from attending conferences (see section 136B) and directions governing the disclosure of information given at conferences (see section 136F). We are not aware of any constitutional concerns having been raised in relation to these provisions, which were enacted in 1998, nor of any collateral litigation in respect of these provisions.[34]

4.38 The Department considered that because any direction would ultimately be enforced by the Court, this would address the concerns about the incompatibility of the direction provisions with the mediation role of the NNTT.[35]

4.39 In its supplementary submission, the Department indicated that the Court's concern about the competence of NNTT members to make directions is unfounded. The Department noted examples in other legislation of non-judicial members making directions and these may or may not be upheld if challenged. The NNTT, according to the Department, may draw on drafting assistance from internal legal staff. Further, the

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31 *Submission 10*, p. 27.

32 *Submission 16,* p. 1.

33 *Submission 16*, p. 1.

34 *Submission 16*, p. 2.

35 *Submission 16,* p. 2.

amendments envisage a closer working relationship between the Court and the NNTT in the management of native title legislation, and by inference, in working out what is and is not acceptable in the drafting of directions.[36]

4.40 Further, the Department advised that any problem with NNTT directions experienced by the state and territory governments in the exercise of their governmental functions may be put to the Court, 'if the matter subsequently comes before the Court to consider itself making an order'.[37]

Committee view

4.41 The committee accepts the evidence of the Attorney-General's Department that no constitutional issue arises in respect of the grant of coercive powers to the NNTT. However, the committee is concerned by the potential for delays to proceedings while the directions of the NNTT are enforced through the Court, and the possibility of privileged material being the subject of a direction by the NNTT.

4.42 The committee recommends that the provisions should be modified in three ways:

- first, by amending proposed subsection 136B(1A) and proposed section 136CA to include rights for parties to object to directions on the grounds of confidentiality, privilege and prejudice;
- second, by the development of guidelines as to the exercise of these coercive powers; and
- third, that the Court and the NNTT develop a protocol which will allow non-compliance with the directions of the NNTT as to documents and appearance of parties to be dealt with as a matter of priority by the Court.

Obligation to mediate in good faith

4.43 Recommendation 4 of the Review proposed that consideration be given to imposing an obligation on parties to act in good faith in relation to native title mediations and to developing a code of conduct for parties involved in native title mediations.[38] This recommendation is given effect by proposed subsection 136B(4) and proposed sections 136GA and 136GB. The combined effect of these provisions is that all parties and their representatives are required to act in good faith in relation to mediation before the NNTT.

4.44 The Explanatory Memorandum explains that failure to negotiate in good faith can result in the matter being reported to Commonwealth, state or territory ministers,

36 *Submission 16,* p. 2.

37 *Submission 16,* p. 2.

38 The Review, pp 6 and 23.

the Secretary of Commonwealth departments who fund participants in native title proceedings, legal professional bodies, and the Court, as appropriate.[39]

4.45 The Attorney-General's Department stated that it had received, from the NNTT, a number of examples of behaviour which warranted the inclusion of a 'good faith' provision. These included:

- abusive and threatening behaviour;
- personal violence during a mediation conference;
- persistent non-compliance with agreed actions, leading to stalling of the process;
- persistent last minute non-attendance at meetings;
- publicly releasing confidential material in contravention of agreement reached about nondisclosure in relation to the mediation process; and
- adopting a negotiation position contrary to the instructions of clients.[40]

4.46 The proposal for an obligation to act in good faith was supported by the Aboriginal and Torres Strait Islander Social Justice Commissioner, who noted:

> These amendments are in my view an appropriate measure aimed at addressing any perception there may be that mediation by the NNTT need not be taken seriously.[41]

4.47 However the Commissioner raised concerns as to the enforceability of such an obligation:

> A presiding member of the NNTT will not find it easy to identify a party's behaviour as a breach of the requirement to act in good faith and to report accordingly. He or she may find it easier to report on behaviour that is, in his or her opinion, unnecessarily hindering or delaying the progress of mediation.[42]

4.48 Mr McAvoy, counsel for Queensland South Native Title Services, supported the proposal but considered that any attempt to define the term 'in good faith', would 'bog the whole process down in an administrative nightmare'.[43]

4.49 The proposal was opposed by the NNTC.[44] In evidence, Mr Philip Vincent, counsel for the NNTC, responded to a question about what constitutes bad faith:

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39 p. 32.

40 *Submission 16,* p. 5.

41 *Submission 10*, p. 27.

42 *Submission 10*, p. 27; see also *Submission 13,* p. 8.

43 *Committee Hansard*, 30 January 2007, p. 30.

44 *Submission 9,* p. 9.

> This is one of the problems; it could be in the mind of the beholder. At the moment, the few guidelines on good faith that have emerged in the Native Title Tribunal relate to being there and answering letters. That is really not enough if you are going to get people to negotiate meaningfully. It is a matter not of directing that they have good faith but of enthusing them into the negotiation process on the basis that their rights are going to be fairly accommodated and the outcome is something which they can respect and honour … I personally believe that it … is a state of mind. … You can only act on a person's state of mind by encouragement, enthusiasm and getting them to change it through personal persuasion.[45]

4.50 Mr Ron Levy, Principal Legal Officer of the Northern Land Council saw the good faith provision as:

> …just a recipe for litigation, especially when it is almost impossible to prove people have not acted in good faith. All the case law is that it is impossible. …Many of the NNTT members are not lawyers, and I think they will make mistakes—mostly honest mistakes. I think this will all lead to litigation and uncertainty and people wasting their time. What we really want is people to reach agreement or to have the matter prosecuted to a conclusion.[46]

4.51 The definition of 'in good faith' was also discussed with representatives of the MCA who supported the amendment while noting that it is 'important for there to be very clear expectations, protocols, guidelines, right at the outset.'[47]

4.52 The NNTT's submission supported the proposal. The submission notes that an obligation to act in good faith will provide 'an incentive to improve behaviour and to focus the attention of the parties and their representatives on the seriousness of the mediation process and the need to approach mediation in a professional manner and with a spirit of good will'.[48]

4.53 However, the NNTT acknowledged that the imposition on parties of an obligation to act in good faith is not a complete solution:

> …there are instances where some parties will refuse to mediate on the basis that there are points of law requiring clarification or that the claim itself is fundamentally flawed. It is not a failure to act in good faith to refuse to mediate if there is a legitimate basis for doing so. However, the party refusing to mediate should explain their position.[49]

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45 *Committee Hansard,* 30 January 2007, p. 15.

46 *Committee Hansard,* 30 January 2007, p. 46.

47 *Committee Hansard,* 30 January 2007, p. 39.

48 *Submission 17,* p. 22.

49 *Submission 17*, p. 22.

4.54 The NNTT also pointed out that these amendments are not without precedent: the Native Title Act currently contains good faith provisions: for example in relation to previous non exclusive possession acts (subparagraph 23F(3)(c)(ii)). Further, there are requirements to mediate in good faith in other Australian legislation.[50]

4.55 A representative of the Attorney-General's Department indicated that it is developing a code of conduct to support the good faith provision; the code once developed will then be distributed for comment. The code will not be prescriptive, nor will it have the status of a regulation.[51]

Committee view

4.56 The committee welcomes the Attorney-General's Department's advice that the 'good faith' provisions are intended to be supported by a code of conduct. The consultation on the content of the code with interested parties may go some way to alleviating the concerns about what constitutes acting 'in good faith'.

4.57 The committee considers that the code should be developed without delay, to ensure that parties before the NNTT are very clear about their obligations in mediation. The committee does not consider that there is anything to be gained by defining 'in good faith' further in the legislation, and agrees with the witnesses who saw any attempt at doing so as having the potential to slow the native title process unnecessarily.

Review function of the NNTT

4.58 The Bill inserts a new Division 4AA into the Native Title Act which allows the NNTT to conduct a review of documents to establish whether a native title claim group holds native title rights and interests. The Division also allows the NNTT to inquire into an issue or matter relevant to the determination of native title.

4.59 A review may only occur in the course of mediation by the NNTT and participation will be voluntary. The coercive powers of the NNTT will not apply.

4.60 The NNTC opposed this proposal on the grounds that it abrogates the 'without prejudice' nature of mediation proceedings.[52] Mr Philip Vincent, counsel to the NNTC, told the committee:

> With the review process, it is said that it is subject to the normal confidentiality provisions, but the fact is that the reviewer has the power simply to send off the report to the Court. So I cannot see how he can send

50 *Submission 17*, pp 22-24. One example given by the NNTT was the good faith obligation contained in subsections 34A(5) and 34B(4) of the *Administrative Appeals Act 1975* (Cth) in relation to alternative dispute resolution ordered under that Act: *Submission 17*, p. 24.

51 *Committee Hansard*, 30 January 2007, p. 59.

52 *Submission 9*, p. 10.

> off a report to the Court about the result of a voluntary review, which presumably is a finding as to whether there is likely to be native title or not or whether a party has rights and interests in the land, and which should be taken into account. It is said to be for the purpose of mediation, to help the parties to see the strengths and weaknesses of their own position. If the NNTT has the power simply to send that off to the Court, it will immediately compromise the position of the judge. It would be as if the evidence were then before him.[53]

4.61 The Aboriginal and Torres Strait Islander Social Justice Commissioner also opposed the insertion of Division 4AA. In principle, his objections centred around the fact that reports may be presented to the Federal Court and non-participating parties, without the consent of the participating parties. In addition, the Commissioner noted:

> The proposed review and inquiry provisions…threaten to create even greater confusion by enlarging the role of the NNTT to include quasi-judicial investigations into the factual and legal issues at the heart of a native title claim, the determination of which is, appropriately, currently the sole domain of the Federal Court.[54]

4.62 Mr Ron Levy of the Northern Land Council observed that:

> The proposal that the NNTT duplicate the Court's function by conducting parallel inquiries as to the existence of native title is inherently inefficient – it will divert resources, engender legal challenge and not assist or enhance the Court's judicial function.[55]

4.63 The Attorney-General's Department told the committee that these reviews and inquiries, 'are only two more tools and it is certainly not envisaged that they would be deployed as a matter of course in claims'.[56]

Committee view

4.64 The committee notes that the Attorney-General's Department does not envisage that these measures will be used as a matter of course. However, the fact remains that these measures will be available and they appear to duplicate the Court's function. Further, it is not clear to what extent the availability of these reviews will contribute towards the expeditious resolution of native title matters.

4.65 The committee recommends that the Attorney-General's Department should monitor the use and operation of the review provisions in proposed Division 4AA and report to the Parliament on the effectiveness of the provisions after two years of operation.

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53 *Committee Hansard,* 30 January 2007, p. 16; see also *Submission 9*, p. 10.

54 *Submission 10*, p. 30.

55 *Submission 14*, p. 3.

56 *Committee Hansard* , 30 January 2007, p. 51.

Other amendments

4.66 In a submission to the inquiry, Telstra took exception to the proposed amendments to subsection 84(5) and section 87A of the Native Title Act.

4.67 The proposed change to subsection 84(5) requires the Court to be satisfied that the joinder of a respondent at the end of the notification period under section 66 is in the 'interests of justice'.[57]

4.68 Telstra considers the amendment unnecessary on the basis that the Court already has a discretion to refuse joinder and exercises it.[58] Telstra also indicates that the proposal introduces an element of uncertainty because of the lack of definition of the interests of justice, and submits that there be no change or, alternatively, that the minimum requirements for joinder within the notification period be that a person has 'an interest in land or waters that may be affected by the determination.'[59]

4.69 The significance of the amendment compared to the current practice is explained in the Bills Digest:

> The amendments limit the range of people to whom the Registrar will give notice of proceedings and stipulate a slightly more restrictive range of those who are automatically a party to proceedings (the amendment requires an 'interest in relation to land or waters' whereas previously it was simply an 'interest'). The Court retains a capacity to join parties if it is satisfied a person's interests may be affected by the proceedings, and adds it is in the 'interests of justice' to do so. [60]

4.70 The proposed amendment to section 87A would allow part of a native title claim proceeding to be settled by a consent determination. The proposed section limits the requirements for consent to only those respondent parties who hold a publicly registered proprietary interest in relation to land or waters in any part of the determination area.

4.71 The submission from Telstra points out that those with unregistered interests or non-proprietary interests are not required to be involved in such agreements.[61] Telstra's concern arises from the fact that many of its facilities may be installed in areas in which its interests are not included in any public register.

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57 *Submission 15*, p. 2.

58 *Submission 15*, p. 4.

59 *Submission 15*, p. 5.

60 Parliamentary Library, "Native Title Amendment Bill 2006", *Bills Digest No. 77 2006-07*, 6 February 2007, p. 12.

61 *Submission 15*, p. 6.

4.72 The Bills Digest notes that this amendment addresses the need to 'encourage more efficient resolution of native title matters'.[62]

Committee view

4.73 The committee acknowledges that Telstra has a significant interest in matters affecting native title. Telstra is the beneficiary of unregistered interests which contribute to the efficiency of communications across Australia, and any significant impediment to its ability to do so should be examined, and where necessary, rectified.

4.74 It appears to the committee that there is a small risk that the requirements that joinder be 'in the interests of justice' will create some uncertainty. However, the committee considers that the provision strikes an appropriate balance between streamlining the claims process and ensuring that those who have a substantive interest have the opportunity to join the proceedings.

4.75 The committee notes that proposed section 87A is intended to encourage the efficient resolution of native title matters. However, the committee is concerned as to the nature of the unregistered interests and non-proprietary interests which may be affected by the provision. It can be argued that the entitlement of any such party would be very limited, but at the same time it is important that a communications body is at least notified of any proposal affecting its interests ─ registered or unregistered.

4.76 The amendments to section 87A suggested by Telstra should be examined by the Attorney-General's Department and, if appropriate, considered for inclusion in the further amendments to the Native Title Act proposed for later this year.

62 Parliamentary Library, "Native Title Amendment Bill 2006", *Bills Digest No. 77 2006-07*, 6 February 2007, p. 13.

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.

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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.

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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

MINORITY REPORT BY THE AUSTRALIAN LABOR PARTY AND THE AUSTRALIAN GREENS

1.1 Labor and Greens Senators consider that the provisions in the Bill regarding NTRBs and the expanded powers of the NNTT are fundamentally flawed and that the majority report's recommendations do not go nearly far enough in relation to these areas.

1.2 The Native Title Representative Bodies (NTRBs) provisions in Schedule 1 have only been available for comment for two months which fell over the Christmas period. The majority of evidence received by the inquiry presented substantial criticism and concerns with respect to these provisions and the provisions in Schedule 2 which expand the powers of the National Native Title Tribunal (NNTT).

Native Title Representative Bodies

Periodic recognition

1.3 Schedule 1 of the Bill proposes to introduce periodic terms from one to six years for the recognition of NTRBs. Labor and the Greens are concerned that this will undermine their independence as representative bodies for a number of reasons.

1.4 As the government is aware, native title applications frequently take over six years to resolve.[1] Recognition of NTRBs for terms of between one and six years will destabilise the long-term negotiations between NTRBs and third parties which are required to resolve native title matters. As the Minerals Council of Australia noted:

> The improved powers for de-recognition of native title rep bodies and the redrawing of native title rep bodies will only provide the appearance of change without necessarily addressing the core resource and capacity constraints to improved performance. This will not provide the level of certainty and stability required of the native title system but, rather, could destabilise the native title system, incur significant delays and further stretch already limited resources... It is for these same reasons that the MCA recommends that the proposed fixed terms of periodic recognition of native title rep bodies should be for a minimum of three to six years rather than the proposed terms of one to six years.[2]

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1 The *Native Title Claims Resolution Review* found that, of 356 current native title claims, 138 were more than 6 years old. See 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), Table 3 on p. 17.

2 *Committee Hansard*, p. 36.

1.5 In its submission, the Carpentaria Land Council expressed the view that subjecting NTRBs to periodic reviews regarding recognition and funding is:

> …both irrational and bureaucratically wasteful. It can also only serve to heighten the atmosphere of existential uncertainty in which NTRBs are required to operate.[3]

1.6 Further, periodic terms will inhibit strategic business planning by NTRBs. For example, it will increase infrastructure costs for NTRBS by limiting their capacity to enter long-term lease or hire agreements. In addition, it will make it much harder for NTRBs to attract and retain quality staff.

1.7 A number of witnesses also pointed out that periodic term recognition would require NTRBs to divert resources from their role as a representative body to the re-recognition process. The National Native Title Council observed that:

> NTRBs are over-worked and under-funded. As mentioned above, the re-recognition process is extremely time-consuming and this process will divert NTRBs from their core functions. [4]

1.8 Similarly, Mr Andrew Chalk, Partner, Chalk and Fitzgerald Lawyers and Consultants said:

> It is ironic that the explanatory memorandum speaks of cutting red tape by abandoning the strategic plans but imposes a very high burden on rep bodies in terms of constantly having to go back and reapply to be able to do their job…. The issue which I think the proposal is trying to address is how [to] deal with rep bodies that are not performing…[T]here are much better ways of doing that than simply subjecting all rep bodies to this ongoing process of recognition.[5]

1.9 Finally, witnesses also raised concerns that the re-recognition process conferred too much discretionary power on the Minister for Families, Community Services and Indigenous Affairs (the Minister). The Aboriginal and Torres Strait Islander Social Justice Commissioner detailed these concerns:

> …before a decision is made about whether to recognise a body as a representative body, there must be an invitation to apply for recognition (s.203A)…at the same time that it is proposed that bodies be recognised as representative bodies for no more than 6 years, there is no related amendment proposed that will require the Minister, with or without exceptions, to invite representative bodies to apply for further periods of recognition.
>
> Indeed, if the Bill is enacted, there will be no provision in the Act that requires the Minister to issue any invitations for recognition beyond the

3 *Submission 13*, p. 3.

4 *Submission 9*, p. 4.

5 *Committee Hansard*, 30 January 2007, p. 3.

> transition period…This leaves representative bodies in a very precarious state and further erodes representative bodies' independence from the Commonwealth government.[6]

1.10 Labor and Greens Senators support the government's move to make NTRB funding agreements longer than one year but do not support putting these bodies through periodic 're-recognition'.

1.11 The requirement for periodic re-recognition is unnecessary given that the Minister already has the power to withdraw recognition from a poorly performing NTRB. The periodic re-recognition provisions in the Bill are cumbersome and contrary to the principles of capacity building.

1.12 The majority report recognises the impact of these amendments on long term planning by NTRBs. However, Recommendation 1 of the majority report which would increase the minimum period of recognition from one to two years is weak and inadequate. If the government proceeds with the proposal for periodic recognition of NTRBs then at the very least section 203A of the Bill should be amended to require the Minister to invite a representative body to apply for a further period of recognition within a reasonable time prior to its current recognition period expiring.

Withdrawal of recognition

1.13 Labor and Greens Senators are also concerned that the Bill makes it easier for the Minister to withdraw recognition of an NTRB. Currently, subsection 203AH(3) of the Native Title Act requires the Minister to give an NTRB 90 days notice that he or she is considering withdrawing recognition of the NTRB. During this period, the NTRB may make submissions in relation to whether recognition should be withdrawn. The Bill reduces this notification period to 60 days (Item 25). While we note that the shortening of the notice period is done in the name of efficiency, the practical effect is that there is very little time for an NTRB to consult its constituents about an issue which significantly affects their interests.

1.14 Furthermore, Item 24 of the Bill removes two of the criteria which the Minister must consider before withdrawing an NTRB's recognition. These are:

- that the body is not satisfactorily representing native title holders or persons who may hold native title in its area; or
- that the body is not consulting effectively with Aboriginal peoples and Torres Strait Islanders living in its area.

1.15 These will be replaced by consideration of whether:

- the NTRB is satisfactorily performing its functions; or
- there are serious or repeated irregularities in the body's financial affairs.

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6 *Submission 11*, pp 11-12.

1.16 The fundamental role of NTRBs is consulting with and representing the interests of native title applicants. Some submissions questioned the impact that removing these critera from the Minister's consideration would have on the role of NTRBs. For example, the Western Australian Government submitted:

> The need for and objective of these proposed amendments is not clear…
>
> Under the proposed amendments NTRBs would still be required under the [Native Title Act] to perform their functions in a manner that maintains structures and processes that promote the satisfactory representation of, and effective consultation with, relevant native title claimants and holders and Indigenous peoples. However, apart from consultation required in respect of NTRB's facilitation and assistance functions, there would be no requirement that satisfactory representation actually occur. Further, if satisfactory representation does not occur, NTRB recognition could no longer be withdrawn on those grounds.[7]

1.17 The removal of these criteria from any consideration to withdraw the recognition of an NTRB represents a fundamental shift in characterisation of the core functions of an NTRB. Labor and Greens Senators are concerned that in changing the criteria which a Minister must take into account in considering the withdrawal of recognition from an NTRB, the government is effectively undermining the core role of NTRBs as representative organisations and not mere service providers.

1.18 The amendment also means that the Minister will no longer need to be satisfied that an NTRB, which would otherwise meet the criteria for withdrawal of recognition, is unlikely to take steps to remedy this situation within a reasonable period.

1.19 The submission from the National Native Title Council points out that these changes will destabilise NTRBs:

> …this 'sudden death' provision is contrary to contemporary standards where people's rights and livelihoods are in issue. In the context of Aboriginal organisations, where governance is a matter of continuing mentoring and growth, deficiencies in operations can be remedied through guidance and assistance or, in relation to some matters, through a change of committee.[8]

1.20 Labor and Greens Senators agree with the National Native Title Council that these changes are 'draconian and unnecessary'.[9]

Ministerial changes to boundaries

1.21 Labor and Greens Senators are also concerned about the proposals in the Bill to allow the Minister to extend or vary NTRB areas on his or her own initiative and

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7 *Submission 3*, p. 2.

8 *Submission 9*, p. 6.

9 *Submission 9*, p. 6.

without the agreement of affected NTRBs. The Minister is again required to give only 60 days notification to an NTRB of a proposal to extend or vary its area.

1.22 Of particular concern is that in allowing for the extension or variation of NTRB areas without the consent of affected NTRBs, the Bill will provide a further means by which the fundamental representative and consultative functions of NTRBs are undermined.

1.23 Labor and the Greens do not consider that the government has provided a convincing justification for this power to change an NTRB's territorial boundaries without its consent.

Mainstreaming of native title services

1.24 The Bill proposes to allow a broader range of bodies to be recognised as NTRBs as well as permitting native title service providers to perform all of the functions of NTRBs. Labor and Greens Senators are concerned that the long term objective of the government appears to be to permit open tender for the provision of native title services by non-indigenous bodies. For example, in its submission to the Parliamentary Joint Committee on Native Title and the Torres Strait Islander Land Account inquiry into NTRBs (the PJC Inquiry), the Office of Indigenous Policy Coordination (OIPC) extensively canvassed the advantages of native title service providers as a flexible alternative to NTRBs.[10] One possibility suggested by the OIPC was:

> …placing representative body recognition on a term basis, perhaps five years, after which the native title services for an area would be advertised for tender…[11]

1.25 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 NTRBs as representative organisations. Accordingly, the Labor and Greens Senators oppose any proposal which would see native title services mainstreamed.

Tabling of annual reports

1.26 Labor and Greens Senators consider that eliminating the requirement for NTRBs to table their annual reports in Parliament removes the opportunity for parliamentary oversight. Further, the removal of the requirement to table annual reports does not involve any significant reduction in the administrative burden on NTRBs as there will still be requirements for NTRBs to collect and report similar information.

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10 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account: Inquiry into Native Title Representative Bodies, 2006, *Submission 1a*, pp 14-19.

11 Inquiry into Native Title Representative Bodies, 2006, *Submission 1a*, p. 34.

Recommendations of the PJC Inquiry into Native Title Representative Bodies

1.27 Labor and the Greens note the recommendations of the PJC Inquiry and the government response to this report tabled in the House of Representatives on 15 February 2007. A list of the recommendations appears at the end of this report.

1.28 The government has only partially implemented the recommendations of the PJC Inquiry, particularly as they relate to NTRB funding. For example, Recommendation 5 of the PJC Report said:

> 3.74 The Committee recommends that the Commonwealth immediately review the adequacy of the level of funding provided by the OIPC to NTRBs for capacity building activities including management and staff development, and information technology.[12]

1.29 The government response accepts this recommendation 'in part', and argues that 'there is significant capacity building activity being undertaken within current funding levels'.[13] The government's response concluded that:

> There is therefore no requirement for an immediate funding review. On completion the current projects will be evaluated and at that stage OIPC will review the adequacy of funding.[14]

1.30 Labor and Greens Senators note that a number of submissions to this inquiry expressed concern at the level of NTRB funding.[15] For example, the National Native Title Council's submission observed that:

> Representative bodies themselves, industry representatives, and some State governments have consistently made submissions to various bodies, including to Federal Parliamentary committees and government, that what is needed to make them even more effective is adequate funding. Realistic funding has never been provided to NTRBs to fulfil their functions under the [Native Title Act].[16]

1.31 Labor and the Greens do not consider the government's response to the PJC inquiry to be adequate, and call on the government to reconsider its partial implementation of recommendations 5, 6, 13 and 16 of the PJC Inquiry and agree to implement them in their entirety. Labor and Greens Senators also recommend the

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12 *Report of the Inquiry into Native Title Representative Bodies, 2006,* p. 44

13 *Government Response to the Report by the Parliamentary Joint Committee on Native Title and the Torres Strait Islander Land Account on the Operation of Native Title Representative Bodies* (March 2006), p. 3.

14 *Government Response to the Report by the Parliamentary Joint Committee on Native Title and the Torres Strait Islander Land Account on the Operation of Native Title Representative Bodies* (March 2006), p. 3.

15 *Submissions 4, 9, 10, 13;* see also submissions to the Parliamentary Joint Committee's Inquiry into Native Title Representative Bodies.

16 *Submission 9,* p. 2.

government reconsider their refusal to accept Recommendations 2 and 8 of the PJC Inquiry.

Expanded Powers for the National Native Title Tribunal

1.32 Schedule 2 of the Bill significantly expands the powers of the NNTT. The Bill proposes to give the NNTT the power to:

- make reports to ministers, funding bodies, legal professional bodies or the Federal Court on a failure by a party to act in good faith in mediation;
- issue directions to parties to attend mediation conferences or produce documents; and
- conduct native title application inquiries and reviews regarding a native title claimant group's connection to the area claimed.

1.33 In addition, the Federal Court will be precluded from conducting mediation in relation to native title applications at the same time as the NNTT.

1.34 During the inquiry, significant concerns were expressed about the expansion of the NNTT's powers, particularly as most stakeholders do not have confidence in the NNTT's capacity or expertise to conduct effective mediation.

1.35 Evidence received by the committee from NTRBs unanimously rejected the expansion of the NNTT's mediation function, citing past statistics and experience.[17] For example, Mr Ron Levy, Principal Legal Officer, Northern Land Council said that 'all of our experience is that [the NNTT] do[es] not deliver the goods'.[18] Similarly, the National Native Title Council stated that:

> A consistent theme in our previous submissions has been that the NNTC opposes giving exclusive powers to the [NNTT] to mediate claims rather than the Federal Court. This is based on the fact that the NNTT has simply not shown in the past that it has the expertise to effectively mediate.[19]

1.36 The Minerals Council of Australia gave qualified support to the proposals to expand the NNTT's power:

> Given the Government's intention to provide the NNTT with greater powers in the mediation of native title claims, the MCA considers that there is a need to ensure that within the NNTT's existing resources, greater emphasis is given to building capacity to ensure competency in undertaking any expanded role.[20]

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17 *Submission 9,* p. 3; *Submission 13,* pp 7-11*; Submission 14,* pp 2-3.

18 *Committee Hansard,* 30 January 2007, p. 45.

19 *Submission 9,* p. 3.

20 *Submission 4,* p. 4.

1.37 The evidence obtained by the committee is consistent with a study undertaken by Griffith University which found that the most fruitful agreements were negotiated outside the NNTT.[21] In addition, the *Native Title Claims Resolution Review* (the Review) noted that, as of January 2006, 76 per cent of mediation in the NNTT had been going on for more than three years and that just under 48 per cent of mediation had been going on for more than five years.[22]

1.38 There is also significant concern over the proposals in the Bill for the NNTT to be given powers to report its belief that a party, or a party's legal representative, has not acted in good faith. As Mr Levy pointed out to the committee:

> …any such report will likely (if not invariably) be the subject of judicial review by aggrieved parties or representatives seeking to defend their reputation from reports made by administrative officials under protection of privilege.
>
> This concern is fortified when considered against the background of Commonwealth funding arrangements…It may be expected that an adverse report as to lack of good faith will be relied on by the Commonwealth to withdraw funding [from applicants or respondents]. The result will be that the Commonwealth, in reliance on reports by Commonwealth appointed public officers performing administrative functions…may through withdrawal or alteration of funding arrangements substantially influence the course of litigation before the Court.[23]

1.39 In addition, Labor and Greens Senators are concerned that the Bill does not make it clear that participation in reviews by the NNTT as to whether a native title claimant group holds native title rights and interests is voluntary. Similarly, it is not clear that participation in native title application inquiries conducted by the NNTT is voluntary. The EM states:

> [p]articipation in the reviews will be entirely voluntary and there will be no power to compel parties to attend or to produce documents for the purpose of a review…
>
> Participation in a native title application inquiry will be entirely voluntary.[24]

1.40 Proposed subsection 136GC(6) is drafted to ensure that a party is not under an obligation to provide documents or information to a member conducting a review. Otherwise, the voluntary nature of participation in these reviews and inquiries is not reflected in any explicit provisions in the Bill.

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21 Ciaran O'Faircheallaigh and Rhonda Kelly: *Review of native title agreement making practices in relation to mining in Australia*, HREOC, 2001.

22 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), p. 16.

23 *Submission 14*, p. 5.

24 p. 31.

1.41 Fundamentally, the granting of these expanded powers to the NNTT conflates the NNTT's role as a mediator with determinative, quasi-judicial functions. The Office of the Registrar of the Federal Court submitted that these powers involved:

> [a] confusion of the mediation role of the NNTT with other functions of a determinative nature, particularly the power to make coercive directions.[25]

1.42 Similarly, the Northern Land Council made the following comments:

> …the proposal that the Court's mediation and case management function be curtailed in favour of the Tribunal is extraordinary, cannot be justified, and is a fundamental policy error.[26]

1.43 Labor and the Greens consider that the proposed expansion of the NNTT's powers will make the native title system slower, more bureaucratic, and more litigious. Further, like a majority of stakeholders, Labor and Greens Senators are not convinced that the NNTT is capable of exercising these expanded powers effectively, or properly. Labor and Greens Senators are concerned that the NNTT is not guided by the same standards of impartiality and independence as the courts. While Recommendations 3 to 7 of the majority report offer some piecemeal improvements to the proposals in Schedule 2 of the Bill, they do not fix a fundamentally flawed scheme.

Additional powers to strike out claims

1.44 Proposed section 94C will require the Federal Court to order that a claimant application be dismissed where certain criteria are met including that:

- the application was made in response to a notice under section 29 of the Native Title Act;
- there has been a determination that the future act may or may not be done; and
- the applicant has not produced connection material or sought to advance the substantive resolution of the application.

1.45 Similarly, under proposed subsections 190D(6) and (7), applications may be dismissed by the Court where they fail the merits aspect of the registration test applied by the Native Title Registrar.

1.46 The Aboriginal and Torres Strait Islander Social Justice Commissioner considered that these proposals may be discriminatory and stated that:

> There is no justification in principle for these new provisions. Nor has any argument been advanced as to why the Court's existing discretions are not sufficient for the management of native title applications…The proposed amendments adopt a 'presumptive' approach to the dismissal of certain

25 *Submission 8*, p. 5.

26 *Submission 14*, p. 2.

> native title applications which effectively places the onus on the applicant to 'show cause' as to why the application should not be dismissed.[27]

1.47 Labor and Greens Senators agree with the Social Justice Commissioner that these proposed provisions are unfair to native title claimants, and may be unlawfully discriminatory on the basis of race.[28]

Prescribed Bodies Corporate

1.48 Labor and Greens Senators support the majority report's recommendation in relation to PBC funding (Recommendation 2). However, it is disappointing that the government did not take this opportunity to legislate a regime that ensures PBCs receive adequate funding to perform their functions under the Native Title Act.

Recommendation 1

1.49 Labor and Greens Senators recommend that Schedules 1 and 2 of the Bill should not be passed because they undermine the capacity and independence of NTRBs and potentially make the native title system slower and more bureaucratic.

Recommendation 2

1.50 Labor and Greens Senators recommend that multi-year funding arrangements should be introduced for NTRBs to promote capacity building and to reduce the administrative burden on NTRBs.

Recommendation 3

1.51 Labor and Greens Senators recommend that the Federal Government increase funding for NTRBs to:

- **improve staff tenure and expertise; and**
- **give NTRBs greater flexibility in determining their funding priorities.**

Recommendation 4

1.52 If Schedules 1 of the Bill is to be passed then Labor and Greens Senators recommend that section 203A of the Bill be amended to require the Minister to invite a representative body to apply for a further period of recognition within a reasonable time prior to its current recognition period expiring.

Recommendation 5

1.53 Labor and Greens Senators recommend that the Federal Government focus on ways it can improve 'upwards accountability', governance and representativeness of NTRBs.

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27 *Submission 10*, p. 34.

28 *Submission 10*, p. 35

Recommendation 6

1.54 Labor and Greens Senators recommend that the Federal Government fully implement the recommendations of the PJC Inquiry that have not been accepted or have only been partially accepted by the government.

Recommendation 7

1.55 Labor and Greens Senators recommend that the Federal Government negotiate with the National Native Title Council and other stakeholders to draft improved reforms to the claims resolution process, which embody a more realistic expectation of the NNTT's capability and role.

Senator Patricia Crossin **Senator Linda Kirk**

Deputy Chair

Senator Joseph Ludwig **Senator Rachel Siewert**

Recommendations of Report of Parliamentary Joint Committee on Native Title and the Torres Strait Islander Land Account from its Inquiry into Native Title Representative Bodies.

Recommendation 1

2.54 The Committee recommends that the OIPC develop comparative data, based on a range of key performance indicators, to assess the relative effectiveness of NTRBs in meeting their statutory obligations and that this data be published annually.

Recommendation 2

2.77 The Committee recommends that the Commonwealth establish an independent advisory panel to advise the Minister on the re-recognition of NTRBs once their recognition period has expired.

Recommendation 3

2.81 The Committee recommends that the Commonwealth provide further details of the proposed transitional arrangements that will apply when the recognition period for NTRBs expires in order to avoid uncertainty for claimants.

Recommendation 4

2.83 The Committee recommends that the Commonwealth address the issue of native title claims that overlap the boundaries of different representative bodies to avoid uncertainty for claimants.

Recommendation 5

3.74 The Committee recommends that the Commonwealth immediately review the adequacy of the level of funding provided by the OIPC to NTRBs for capacity building activities including management and staff development, and information technology.

Recommendation 6

3.75 The Committee recommends that the Commonwealth, in conjunction with industry groups, consider providing additional pooled funding for emergency and unforeseen situations, such as future act matters, litigation or court proceedings; and that the OIPC develop guidelines and procedures that will enable funding to be available in these situations in a timely fashion.

Recommendation 7

3.76 The Committee recommends that the Commonwealth ensures that the level of funding available to the Office of the Registrar of Aboriginal Corporations provides

NTRBs with adequate training and support to meet the requirements of the introduction of the new corporate governance regime under the Corporations (Aboriginal and Torres Strait Islander) Bill 2005.

Recommendation 8

3.77 The Committee recommends that the Commonwealth immediately review the level of operational funding provided to NTRBs to ensure that they are adequately resourced and reasonably able to meet their performance standards and fulfil their statutory functions.

Recommendation 9

3.116 The Committee recommends that the OIPC, in close consultation with NTRBs, develop standardised criteria for use in the recruitment of representative body staff; and that these criteria be used nationally to provide consistency in standards of recruitment.

Recommendation 10

3.117 The Committee recommends that the Commonwealth investigate the feasibility of:

- the secondment of expert government staff to NTRBs;
- the establishment of a centre of excellence to develop the legal capacity of NTRB lawyers and from which NTRBs could draw expertise as required; and
- the provision of scholarships for post-graduate study to further enhance skills in areas of relevance to the work of NTRBs.

Recommendation 11

3.118 The Committee recommends that the Commonwealth implement a national recruitment strategy to address the professional staffing needs of NTRBs and that this strategy:

- promote the status and positive image of work in NTRBs;
- focus on promotion of careers in NTRBs to the professions;
- introduce an ongoing NTRB student placement program; and
- promote the employment of Indigenous people to positions in NTRBs.

Recommendation 12

3.119 The Committee recommends that representative bodies focus on the professional development needs of NTRB professionals and enhance the support structures and programs available to them, including:

- developing a formal induction training program for new recruits;
- establishing ongoing training programs to further enhance skills in particular areas;
- creating a mentoring system; and
- implementing performance evaluation systems to assist in the identification of professional development needs.

Recommendation 13

3.120 The Committee recommends that the OIPC continue to monitor the salary differentials provided to senior professional staff of NTRBs; and introduce a scale of salaries to provide consistency across the system if significant differentials continue to apply.

Recommendation 14

3.121 The Committee recommends that representative bodies investigate the feasibility of implementing a system of 'pooling' of professional staff in situations where an NTRB may lack a full complement of particular professional staff.

Recommendation 15

4.23 The Committee recommends that the OIPC continue to support NTRBs in improving the quality of their strategic planning processes and especially in integrating strategic plans, operational plans and performance based budgeting and reporting.

Recommendation 16

4.24 The Committee recommends that the OIPC, in consultation with representative bodies, review the current compliance and accountability requirements placed on NTRBs with a view to reducing unnecessary duplication of reporting and streamlining reporting procedures.

Recommendation 17

5.61 The Committee recommends that the amended Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993 due to come into effect in June 2006 provide:

- provisions to encourage agreement-making rather than litigation to resolve native title disputes; and
- that eligibility for assistance be subject to means testing along similar lines to those applying for grants of legal aid.

Recommendation 18

5.84 The Committee recommends that the Commonwealth examine appropriate means for resourcing the core responsibilities of Prescribed Bodies Corporate.

Recommendation 19

5.85 The Committee recommends that the Commonwealth, State and Territory Governments widely publicise the availability to Prescribed Bodies Corporate of different funding sources, particularly in relation to the PBCs' land management functions.

ADDITIONAL COMMENTS BY SENATOR ANDREW BARTLETT

1.1 I acknowledge the efforts of the government to improve the inefficiencies in the current system, and the efforts of the Committee to address concerns raised during this Inquiry process.

1.2 However, despite the improvements detailed in the Committee's recommendations, I remain concerned that the proposed amendments not only have the potential to further limit the ability of Indigenous people to have their Native Title rights recognised but will also create greater uncertainty, conflict and confusion by threatening the independence of Native Title Representative Bodies (NTRBs), compromising the mediation process and reducing Ministerial accountability.

1.3 It is worth re-emphasising that a lot of the potential that Native Title presented for Indigenous Australians has already been curtailed by previous legislative decisions of the Parliament. While the residual rights which still remain are important, they are not sufficient on their own to provide true equality, economic opportunity or full reconciliation. Indeed, in some ways the wider Australian community has as much to gain from formal recognition of Native Title and the continuing links to land of the original, traditional inhabitants. Constraining the rights of Indigenous Australians constrains our nation's future and limits our potential.

1.4 I believe the proposed fixed terms for recognition of NTRBs may seriously impede the ability representative bodies to adequately plan for the future, attract and retain qualified and experienced staff and develop productive relationships with industry and government. Whilst the recommended 2 year minimum is better than 1 year, I don't think this goes far enough. The government's changes appear to focus more on taking the heavy stick approach to trying to improve the efficiency of native title representative bodies, rather than tackling the real source of the problem – a lack of capacity caused by chronic under funding.

1.5 The proposed amendment providing ministerial discretion gives too much power to the Minister who could decide to de-recognise a representative body in a manner that is arbitrary, non-transparent and without any accountability. It is inappropriate to continue to increase accountability requirements on Indigenous organisations while reducing them for government Ministers.

1.6 I also retain concerns with proposals that limit representative bodies' procedural rights and the potential for non-Indigenous bodies to recognised as NTRBs. We need more Indigenous involvement in issues and processes that directly affect them, not less.

1.7 The provisions which allow for summary dismissal of certain Native Title applications was strongly criticised by the Aboriginal & Torres Strait Islander Social

Justice Commissioner in his submission. I share that concern and do not believe it has been adequately addressed in the majority Committee report.

1.8 There are already numerous obstacles which are placed in the way of Indigenous people seeking to have the limited rights of Native Title recognised and protected. Some of these proposed amendments will make them even more difficult to overcome, further eroding the confidence of Indigenous people in the Native Title process.

1.9 I believe the legislation needs further amendment beyond the recommendations put forward by the Committee.

Andrew Bartlett

Queensland Democrat Senator

APPENDIX 1

SUBMISSIONS RECEIVED

1	Attorney-General's Department and the Department of Families, Community Services and Indigenous Affairs
2	Australian Petroleum Production & Exploration Association
3	Office of Native Title, Government of Western Australia
4	Minerals Council of Australia
4A	Minerals Council of Australia
5	National Farmers' Federation
6	Aboriginal Legal Rights Movement
7	Western Australian Local Government Association
8	Office of the Registrar, Federal Court of Australia
9	National Native Title Council
9A	National Native Title Council
10	Aboriginal and Torres Strait Islander Social Justice Commissioner
11	Dr James F Weiner
12	Jagera Daran Pty Ltd
13	Carpentaria Land Council Aboriginal Corporation
14	Northern Land Council
15	Telstra Corporation
16	Attorney-General's Department
17	National Native Title Tribunal
18	Department of Families, Community Services and Indigenous Affairs

TABLED DOCUMENTS

Documents tabled at public hearing

Tuesday, 30 January 2007

Chalk & Fitzgerald Lawyers and Consultants

- Recommendations in relation to the Native Title Amendment Bill 2006

National Native Title Council

- Overview of National Native Title Council, 29 January 2007

Northern Land Council

- Federal Court of Australia, Summary of native title case management approach in the Northern Territory, 28 September 2006

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Tuesday 30 January 2007

Chalk & Fitzgerald Lawyers and Consultants

Mr Andrew Chalk, Partner

Mr Dominic Beckett, Solicitor

National Native Title Council

Mr Philip Vincent, Counsel

Ms Bonita Mason, Acting Executive Officer

National Farmers' Federation

Mr John Stewart AM, Chairman, Native Title Taskforce

Aboriginal Legal Rights Movement

Mr Christopher Charles, General Counsel

Queensland South Native Title Services

Mr Anthony McAvoy, Barrister

Association of Mining and Exploration Companies

Mr Ian Loftus, Policy and Public Affairs Manager

Minerals Council of Australia

Ms Frances Hayter, Member, Indigenous Relations Working Group; Director, Environment and Social Policy, Queensland Resources Council

Ms Anne-Sophie Deleflie, Assistant Director, Social Policy

Northern Land Council

Mr Ron Levy, Principal Legal Officer

National Native Title Tribunal

Mr Graeme Neate, President

Mr Christopher Doepel, Registrar

Attorney-General's Department

Mr Iain Anderson, First Assistant Secretary, Legal Services and Native Title Division

Mr Steven Marshall, Assistant Secretary, Claims and Legislation Branch, Native Title Unit

Ms Katherine Jones, Acting First Assistant Secretary, Indigenous Justice and Legal Assistance Division

Department of Families, Community Services and Indigenous Affairs

Mr Greg Roche, Assistant Secretary, Land, Office of Indigenous Policy Coordination