Australian Government
Attorney-General's Department

Legal Services and
Native Title Division

06/21873

15 January 2007

Ms Jackie Morris
Acting Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Morris

Inquiry into the Native Title Amendment Bill 2006

I refer to your letter of 13 December 2006 inviting a submission from the Attorney-General's Department to the inquiry by the Standing Committee on Legal and Constitutional Affairs into the Native Title Amendment Bill 2006. I am pleased to enclose a submission, which this Department has prepared jointly with the Department of Families, Community Services and Indigenous Affairs.

The material concerning Native Title Representative Bodies and Prescribed Bodies Corporate (sections 4 and 5 of the attached submission) was prepared by the Department of Families, Community Services and Indigenous Affairs. This is because the provisions of the *Native Title Act 1993* relating to such bodies fall within the portfolio responsibilities of the Minister for Families, Community Services and Indigenous Affairs. If you wish to discuss those aspects of the submission relating specifically to Native Title Representative Bodies or Prescribed Bodies Corporate, please contact:

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The remainder of the material within the submission has been prepared by relevant areas within the Attorney-General's Department.

We look forward to providing the Committee with further information and assistance throughout the course of the inquiry. If you wish to discuss any aspect of our submission or the inquiry, please do not hesitate to contact me.

Yours sincerely

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Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the Native Title Amendment Bill 2006

Submission from the Attorney-General's Department and the Department of Families, Community Services and Indigenous Affairs

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1 INTRODUCTION

1.1 The Native Title Amendment Bill 2006 (the Bill) includes a series of proposed amendments to the *Native Title Act 1993* directed at:

- improving the effectiveness of representative Aboriginal and Torres Strait Islander bodies
- ensuring the Federal Court and National Native Title Tribunal (NNTT) work together to more effectively manage and resolve native title claims
- improving the effectiveness of NNTT mediation
- facilitating improved behaviour of parties to native title claims
- increasing flexibility for Prescribed Bodies Corporate (PBCs), the bodies established to manage native title once it is recognised, and
- extending the scope of the respondent funding scheme to cover agreements under the right to negotiate process.

1.2 The reforms in the Bill form an important part of the Government's plan for practical reform to improve the performance of the native title system and encourage agreement-making in preference to litigation. This submission outlines the background to the reform package, and includes details on the specific elements of the package (of which the Bill is only a part). The attachments to this submission include details of the consultation processes involved in development of the reform package, as well as key reference documents relating to the reforms.

2 BACKGROUND

Package of reforms to improve performance in the native title system

2.1 On 7 September 2005, the Attorney-General, the Hon Philip Ruddock MP, announced a proposed package of reforms to improve the performance of all elements of the native title system. The Attorney-General stated 'The increasing number of native title determinations and agreements demonstrate the system is working, but the current framework is still too costly and time consuming'.

2.2 The native title system is inherently complex, involving a broad range of institutions and stakeholders, and a number of different processes for the recognition and protection of native title rights. The package of reforms recognises the inter-connected nature of the system and aims to improve all key elements to ensure they may contribute to effective and efficient outcomes. The reforms were developed as a package to ensure that, in addressing any one aspect, a bottleneck is not created elsewhere in the system.

2.3 As the Attorney-General has previously stated, the reforms are not about challenging the fundamental principles of native title or 'winding back' native title rights. The reforms seek to make the necessary structural changes to the system to achieve better and more efficient outcomes,

while not disturbing the framework tested by the Courts and within which parties are accustomed to working.

2.4 The six elements of reform comprise:

- A review of the institutional framework for resolving claims. The independent review, conducted by Mr Graham Hiley QC and Dr Ken Levy, examined the role of the NNTT and the Federal Court. The consultants were tasked with advising the Government on measures for more efficient management of claims within the existing framework of the Native Title Act.

- Implementing measures to improve the effectiveness of Native Title Representative Bodies (NTRBs). A number of legislative amendments are proposed to enhance NTRB effectiveness and ensure they operate in a responsive and accountable manner.

- Measures to encourage the effective functioning of PBCs. These measures were developed following an examination of current structures and processes of PBCs, coordinated by an inter-agency Steering Committee. The Committee was tasked with identifying the basic function and resource needs of PBCs, ensuring those needs are aligned with existing funding sources, and assessing the appropriateness of the existing statutory governance model for PBCs.

- Changes to the existing arrangements for the provision of financial assistance to non-government respondents in native title claims. This includes the making of new Guidelines by the Attorney-General which are applied in authorising assistance to non-claimants under the respondent financial assistance scheme.

- Introduction of a series of technical amendments to the Native Title Act, primarily aimed at improving existing processes for native title litigation and negotiation. This measure is intended to address procedural issues identified by stakeholders in their dealings with the Native Title Act.

- Measures to promote and encourage more transparency and communication between all parties involved in native title claims. This element acknowledges, in particular, the critical role that can be played by State and Territory governments in seeking to resolve native title issues, but seeks to promote recognition by all parties of the value of transparency in obtaining timely and enduring outcomes.

Consultation on reforms

2.5 The reforms have been advanced through a consultative and participatory process. Extensive consultation informed the preparation of the Claims Resolution Review, the examination of PBCs and the review of the respondent funding guidelines. The process for the development of technical amendments has involved the public circulation of two discussion papers, and has been strongly informed by proposals from stakeholders across the system. Key stakeholders have also been consulted on the proposals to ensure NTRBs operate effectively. Details of the consultations undertaken in relation to each of the reform elements are included at **Attachment A** to this submission.

Native title system overview

2.6 The native title system has evolved considerably over the 14 years following the decision of the High Court in the *Mabo* case.[1] There has been significant progress in a number of important respects. Decisions of the High Court have clarified fundamental aspects of the Native Title Act. The number of determinations of native title continues to increase, mostly by consent, and the number of native title agreements (both Indigenous Land Use Agreements (ILUAs) and other agreements) has increased steadily since they were introduced as part of the amendments under the *Native Title Amendment Act 1998*.

2.7 Since 1998, the number of new applications lodged each year has dropped significantly with only 55 new applications filed in 2005 in contrast to 218 applications filed in 1998. However, the current disposition rates suggest the workload generated by native title determinations is unlikely to decrease in the near future.

2.8 As at 31 December 2006, 95 native title determinations had been made, of which 73 related to claimant applications, 21 to non-claimant applications and 1 to a compensation application. A total of 55 determinations were made by consent, 20 were litigated and a further 20 determinations were unopposed. A statistical overview of the native title system as at 30 June 2006 is at **Attachment B** to this submission.

2.9 There have been over 1700 native title claims filed since the Native Title Act commenced in January 1994. Of those, approximately 590 remain current. The remaining claims (some 1100) have either been resolved, discontinued, withdrawn of combined. The longest recorded period for resolution through a native title determination from the time of filing a claim is 11 years, and the shortest recorded time is 14 months.

Australian Government funding

2.10 As indicated above, the resolution of native title issues is very time consuming, with some matters taking up to ten years to resolve, involving lengthy litigation and a very high financial impost. The Australian Government funds most of the activity in the native title system, including the NNTT, Federal Court, native title parties through NTRBs, non-native title parties through the respondent funding scheme, and the Commonwealth's own participation in specific native title cases where it has an interest.

Total funding for the native title system in 2006–07 is approximately $129.18m.

Funds allocation in 2006-07

Federal Court of Australia	$9.76 million (7.6%)
NNTT	$32.66 million (25.3%)
Department of Families Community Services and Indigenous Affairs (FaCSIA)	$58.48 million (45.3%)
Attorney-General's Department (AGD)	$28.28 million (21.9%)
(Native Title Unit)	$5.88 million (4.6%)
(Indigenous Justice and Legal Assistance Division)	$22.4 million (17.4%)
Total	$129.18 million

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

2.11 The 2005–06 Budget committed an additional $72.9m over four years to the native title system. The additional funding is intended to complement other structural measures to improve the overall performance of the native title system.

Additional funding allocated over 2005-06 to 2008-09

	2005–06		2006–07		2007–08		2008–09		Total	
	$m	**%**	**$m**	**%**	**$m**	**%**	**$m**	**%**	**$m**	**%**
AGD departmental	1.7	*9.5*	1.7	*9.4*	1.7	*9.3*	2.2	*11.7*	**7.3**	***10.0***
AGD administered	1.5	*8.4*	1.5	*8.3*	1.5	*8.3*	1.6	*8.5*	**6.1**	***8.4***
Federal Court	3.0	*16.8*	3.1	*17.1*	3.1	*17*	3.1	*16.5*	**12.3**	***16.9***
NNTT	7.9	*44.1*	7.9	*43.6*	7.9	*43.4*	7.9	*42.0*	**31.6**	***43.3***
FaCSIA	3.8	*21.2*	3.8	*21.0*	4.0	*22*	4.0	*21.3*	**15.6**	***21.4***
Total	**17.9**		**18.0**		**18.2**		**18.8**		**72.9**	

2.12 State and Territory governments fund their own participation in native title matters and occasionally provide assistance to other parties. Other parties that wish to use land in some circumstances also fund certain activities, particularly in order to achieve outcomes that enable the development of land affected by native title.

3 NATIVE TITLE CLAIMS RESOLUTION REVIEW

3.1 The Native Title Claims Resolution Review was established in 2005 by the Attorney-General, the Hon Philip Ruddock MP, to consider the process by which native title applications are resolved. The Review examined the roles of the Federal Court and the NNTT and considered measures for the more effective management of claims within the existing framework of the Native Title Act.

3.2 Two independent consultants were appointed to conduct the Review. Mr Graham Hiley QC is a Queen's Counsel with extensive experience in native title and Aboriginal land rights law. Dr Ken Levy was a part-time member of the Administrative Appeals Tribunal at the time of the Review and was previously the Director-General of the Queensland Department of Justice.

3.3 The consultants were overseen by a Steering Committee comprising a member of the NNTT, the Registrar of the Federal Court, an officer of the Attorney-General's Department and an officer of the Department of Families, Community Services and Indigenous Affairs (FaCSIA).

Australian Government response to the Review

3.4 The consultants provided their report to the Attorney-General on 31 March 2006. A copy of the report is at **Attachment C.** The report made 24 recommendations and outlined a number of options for institutional reform.

3.5 The Attorney-General released the report of the Review along with the Australian Government's response to the Review on 21 August 2006. A copy of the Government response is at **Attachment D**. As outlined in the response, the Government accepted most of the recommendations made by the consultants and accepted one of the options for institutional reform outlined by the consultants.

Recommendations implemented by the Native Title Amendment Bill 2006

3.6 For ease of reference, a table setting out the recommendations implemented by the Bill is at **Attachment E**. This table notes the item and section numbers implementing each recommendation and provides a brief description of the effect of the proposed amendments.

3.7 The amendments in Schedule 2 of the Bill aim to address the key impediments to the effective and efficient resolution of claims highlighted in the consultants' report. First, it includes measures to promote greater communication and coordination between the Federal Court and the NNTT. The legislative measures focus on improving communication in relation to particular cases while administrative changes by the NNTT and the Federal Court will facilitate improved coordination on an institutional level.

3.8 The NNTT's ability to assist the Federal Court on specific matters will be strengthened by giving the NNTT a right to appear before the Federal Court and to make submissions in relation to specific claims. The amendments will broaden the NNTT's existing reporting functions to allow it to prepare work plans or mediation reports about a particular State, Territory or region. The NNTT will then be able to provide the Federal Court with information about the competing priorities of the major parties to claims in a particular area. The new provisions will require the Federal Court to consider all reports provided by the NNTT when making orders in particular matters.

3.9 Second, amendments will prevent duplication of functions between the Federal Court and the NNTT. The Review found it is currently possible for native title matters to be in mediation before both the NNTT and the Federal Court at the same time. This can create confusion and have significant resource implications for parties. The Review recommended mediation should not be carried out by both bodies at once. The Government accepted this recommendation and provisions have been included in the Bill to exclude simultaneous mediation of a given claim by both institutions.

3.10 The Government also adopted one of the options for institutional reform set out in the Review – enhancing the NNTT's role in mediating claims. Mediation has been a key function of the NNTT since its establishment in 1994. The amendments will strengthen the presumption that mediation should take place in the NNTT. However, the Court will still be able to mediate where a matter has been withdrawn from NNTT mediation or an order is made that there be no NNTT mediation.

3.11 In vesting the NNTT with the primary responsibility for mediating native title matters, it is important to ensure Tribunal mediation is as effective and efficient as possible. The Review found that a major factor inhibiting the effectiveness of NNTT mediation was the lack of statutory powers for the body. Based on the Review recommendation, the Bill includes amendments conferring enhanced powers on the NNTT, including powers to direct parties to attend mediation conferences and to produce certain documents.

3.12 Where parties agree to participate, the NNTT will also be able to provide assessments of connection material or to conduct an inquiry into matters relating to specific claims. While the

outcomes of these types of reviews and inquiries will not be binding, it is hoped that recommendations and findings made by the NNTT may provide guidance for parties and assist them in reaching a negotiated outcome.

3.13 Finally, a number of the proposed amendments are intended to facilitate improved participation from parties involved in native title processes. For example, all parties and their representatives will be required to act in good faith in relation to mediation before the NNTT. To supplement this legislative requirement, a code of conduct will be prepared to act as a guide for parties and their representatives. The Attorney-General's Department will be preparing a draft code of conduct in conjunction with key stakeholders in the native title system.

3.14 There will be a greater onus on claimants to ensure their claims are progressed. Amendments in the Bill will enable the Federal Court to dismiss, in certain circumstances, claims which fail the merits component of the registration test.

3.15 The Federal Court will also be required to dismiss, in certain circumstances, claims made following a future act notice over all or part of the claim area where the procedural rights attached to that future act notice has been exhausted and the claimants have failed to produce evidence or take steps to resolve the application where directed by the Federal Court or within a reasonable time.

3.16 The ability of non-government parties to *automatically* become a party to native title proceedings will be limited. In addition, amendments will enable the Federal Court to make a determination over part of a claim area where some, but not all parties to the proceedings, consent to the determination being made.

4 NATIVE TITLE REPRESENTATIVE BODIES

4.1 The Native Title Act makes provision for eligible bodies to be recognised by the Minister as NTRBs to undertake various functions in relation to native title, of which the most significant are facilitation and assistance functions. These functions include assisting native title claimants to lodge and progress native title applications, and to negotiate future acts and indigenous land use agreements. NTRBs are funded by the Australian Government to perform their functions in relation to a designated area. There are currently fourteen NTRBs.

4.2 The level of NTRB proficiency in performing these functions is a key factor in the effectiveness of the native title system. Experience over time indicates varying levels of proficiency, with a number of examples of very poor administration and governance and a resulting failure to achieve significant outcomes for native title claimants. There have also been a number of examples of financial malpractice. FaCSIA notes an improved level of commitment and engagement on the part of NTRBs in recent times, and the amendments in the Bill will contribute further to a more effective, efficient and accountable NTRB system. The amendments are being complemented by non-legislative measures aimed at building the capacity of NTRBs to deliver services.

4.3 The amendments replace the current system of indefinite recognition with fixed term arrangements. The terms will be between one and six years. NTRBs experiencing significant administrative, financial or governance difficulties will receive terms at the lower end, and if they fail to lift their performance during their initial terms, it will be open to the Minister to invite

different organisations to be recognised once those terms expire. 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. It is expected that under the fixed term arrangements, NTRBs will be more focussed on outcomes and will work harder at finalising claims and agreements. The arrangements will also allow the Minister to be more responsive to the needs of native title claimants.

4.4 Some years ago, there was a process of recognition of NTRBs, following the passage of the 1998 amendments to the NTA. The application process was complex and protracted, and some NTRBs have expressed misgivings that these amendments will repeat that experience. To avoid disruption to services this time, there will be a transitional period where each current NTRB will automatically receive an invitation from the Minister for a term of recognition of between one and six years. There will be no complicated paperwork involved for NTRBs. They will merely be asked to accept or reject the invitation. Should any NTRB choose not to take up its invitation, its recognition will cease on 30 June 2007. While refusals are not expected, contingency planning will be undertaken to minimise any interruptions to service delivery if they occur.

4.5 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. 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. Under the 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. The capacity to satisfactorily perform its functions will become the sole criterion for decisions on recognition of NTRBs and changes to boundaries. The 60 day time frame will also be applied consistently throughout Part 11 of the NTA.

4.6 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.

4.7 The Bill also broadens the range of organisations eligible to become NTRBs by making companies incorporated under the *Corporations Act 2001* eligible bodies. This could also have been achieved by making regulations under the Act as it stands. Most current NTRBs are incorporated under the *Aboriginal Councils and Associations Act 1975* (which will be replaced by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* when that Act commences on 1 July 2007). While the sole criterion, as indicated above, 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.

4.8 NTRBs are currently required to produce three year strategic plans for the approval of the Minister. In the dynamic native title environment where NTRBs have to respond to changing

priorities, these 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. 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.

4.9 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 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.

4.10 As indicated earlier, NTRBs have a chequered performance history. FaCSIA is complementing the above legislative measures by funding significant capacity building activity. If an NTRB does not perform, claimants will be unable to access adequate professional assistance from the NTRB to protect their rights and interests. There are also negative consequences for States and Territories and for industry if NTRBs are not adequately assisting clients to resolve claims or negotiate agreements. 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. Regular forums and workshops are conducted for NTRB CEOs, CFOs, senior professional staff, and field officers.

5 PRESCRIBED BODIES CORPORATE

5.1 On 27 October 2006, the Attorney-General and the Minister for Families, Community Services and Indigenous Affairs released a report examining the structures and processes of PBCs. A copy of the report is at **Attachment F**.

5.2 The report was developed by a Steering Committee comprised of officers from the Attorney-General's Department, the then Office of Indigenous Policy Coordination in the Department of Families, Community Services and Indigenous Affairs (formerly DIMIA) and the Office of the Registrar of Aboriginal Corporations.

5.3 The Australian Government has accepted all of the report's 15 recommendations.

Outline of the report's recommendations

5.4 The report's recommendations collectively offer a realistic and flexible means of addressing PBC effectiveness and include measures that will achieve the following broad outcomes:

- improve the ability of PBCs to access and utilise existing sources of assistance, including from NTRBs
- improve the flexibility of the PBC governance regime to accommodate the specific interests and circumstances of the native title holders
- better align existing sources of potential assistance with PBC needs, and
- encourage State and Territory government involvement in addressing PBC needs.

5.5 A key finding in the report is that PBCs' needs will differ greatly, depending on factors such as their location and the level of future act activity that is likely to occur. Another key finding in the report, reflected in many of the recommendations, is the need for more coordinated effort in pulling together resources that already exist and which PBCs can utilise.

5.6 The primary form of Australian Government assistance available to PBCs is provided through NTRBs. NTRBs are funded under the Native Title Program administered by FaCSIA to provide professional services to native title claimants and holders under the Native Title Act.

5.7 The Australian Government is taking steps to clarify that (consistent with their funding agreements) NTRBs can already use their Native Title Program funding to perform their statutory functions in respect of PBCs *at any time*. Importantly, this includes assisting PBCs in consultations, mediations, negotiations and proceedings relating to future acts and ILUAs. NTRBs will be required to give appropriate priority to performing these functions when preparing future operational plans and to report against them to FaCSIA. NTRBs will also be able to use their Native Title Program funding to assist PBCs with their day to day operations where approved by FaCSIA. The net effect of these measures will be to improve NTRB support for PBCs.

5.8 Other initiatives will see the Office of the Registrar of Aboriginal Corporations providing more support to PBCs, particularly in relation to governance functions. Australian and State and Territory Government departments and agencies also provide a range of programs that PBCs may potentially access to build capacity, obtain training, develop partnerships or progress specific projects. FaCSIA has commissioned the Australian Institute of Aboriginal and Torres Strait Islander Studies to prepare information packages for PBCs detailing such programs.

5.9 A further initiative will authorise PBCs to charge future act proponents for costs incurred in performing their native title functions. This measure will regularise a practice that is already occurring and which has seen future act proponents contributing to PBC costs for negotiations. It recognises that land users who stand to benefit from access to native title land should be prepared to contribute to PBC costs in responding to their requests. It is envisaged that with wider assistance from NTRBs, PBCs would only seek costs from future act proponents when NTRBs could not assist within the proponent's desired timeframes. As a safeguard, an appropriate authority will be able to consider complaints that costs requested by PBCs are unreasonable.

5.10 The report's recommendations also include measures to encourage State and Territory governments to focus on PBC needs when negotiating future act agreements and consent

determinations, and to actively promote a better understanding of PBC needs. State and Territory governments have primary responsibility for day-to-day management of land and, together with future act proponents, will usually benefit from land development. It is therefore appropriate that States and Territories also contribute to the costs of PBCs with whom they negotiate. The Australian Government acknowledges productive involvement by State and Territory governments to date in meeting PBC needs, for example, by contributing to the start up costs of PBCs.

5.11 Another initiative will allow people other than native title holders to be members of a PBC where the native title holders want this to happen. This could allow members of a community who are not traditional owners to be involved in PBC decision making, and expand the range of skills and experience available to PBC. A number of the report's recommendations are also designed to improve PBC decision making by making the processes which PBCs are required to follow under the Native Title (Prescribed Bodies Corporate) Regulations 1999 more flexible. Other recommendations are aimed at creating economies of scale by allowing existing PBCs to be determined as PBCs for subsequent native title determinations, and by considering whether State and Territory land rights corporations could act as PBCs.

Recommendations implemented by the Native Title Amendment Bill 2006

5.12 The following two recommendations will be implemented by the Native Title Amendment Bill.

Recommendation 5

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 and waters.

The report considered 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. 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.

Recommendation 7

The PBC regime should be amended to enable an existing PBC 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.

The report considered that this measure would encourage economies of scale by allowing PBC infrastructure and resources to be utilised by more than one group of native title holders. Item 3 of Schedule 3 partially implements this measure, with amendments to the PBC Regulations also being required.

5.13 The remaining recommendations will be implemented administratively, or through amendments to the Native Title (Prescribed Bodies Corporate) Regulations 1999.

6 REVIEW OF THE RESPONDENT FUNDING SCHEME

6.1 The reform package includes changes to the native title respondent funding program to strengthen the focus on resolution of native title issues through agreement making, in preference to litigation.

6.2 The Native Title Respondent Funding Scheme Guidelines have been revised to encourage agreement-making and limit assistance for court proceedings where the interest of a respondent is already protected.

6.3 Additionally, the Bill includes a measure to expand section 183 to enable financial assistance to be provided in a wider range of circumstances to respondents participating in the right to negotiate process.

Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993 (Guidelines)

6.4 A copy of the new Guidelines, which commenced operation on 1 January 2007, is at **Attachment G**. The Guidelines incorporate a number of features that will further encourage agreement making in preference to litigation including:

- authorising assistance in stages of six to 12 months, or shorter timeframes, to facilitate improved and more transparent planning by funded parties focused on achieving outcomes (sections 36-38)

- varying or terminating assistance if a grant recipient fails to act reasonably by not endeavouring to reach a reasonable agreement with a claimant (sections 43-46)

- limiting the circumstances in which financial assistance for court proceedings is provided (section 19)

- strengthening reporting requirements imposed on grant recipients to include strategies to resolve issues in dispute (sections 81-83), and

- assisting in the drafting and development of an agreement or ILUA through access to agreements and ILUAs funded under the scheme, in which the Commonwealth retains a licence to use, adapt and exploit (sections 96-98).

6.5 The Guidelines strengthen the focus of the scheme on building capacity in the native title system, by reinforcing the importance of the role played by group representatives acting on behalf of individual respondents. This is achieved by providing remuneration of Native Title Officer/s, supplying means to better direct legal representatives, and ensuring that assistance is not provided to an individual in a matter where the appropriate group representative is already being funded.

Native Title Amendment Bill 2006

6.6 Consistent with refocussing the respondent funding scheme on encouraging agreement making, the Bill includes a measure to enable financial assistance to be provided in a wider range of

circumstances to respondents participating in the right to negotiate process. Financial assistance will be available for peak organisations to participate in the negotiation of template agreements relating to the application of the right to negotiate process and the 'expedited' procedure for mining related acts.

6.7 Some States in conjunction with mining peak bodies and NTRBs have developed template agreements that facilitate and simplify procedures under the right to negotiate process.[2] A mining licence applicant can essentially sign on to the template agreement, removing the need for separate negotiations between the applicant, the State and native title parties. Peak bodies representing small mining interests have sought financial assistance from the Department to participate in the negotiation or review of such agreements. However, such negotiations currently fall outside of the scope of subsection 183(1).

6.8 Accordingly, it is proposed to expand section 183 of the Native Title Act to enable financial assistance to be provided to develop pro forma agreements (or review existing agreements) relating to the application of the section 31 negotiation procedure and section 32 'expedited' procedure for mining related acts. Under the proposal, assistance could be approved for legal and other peak body costs associated with the initial development of the pro forma agreement or any review of the pro forma.

7 TECHNICAL AMENDMENTS TO THE NATIVE TITLE ACT

7.1 The technical amendment element of the reform package focuses on identifying amendments of a minor or technical nature that would improve or clarify processes, or remove impediments from the system, without unduly impacting on rights established under the Act. It is designed to address predominantly procedural issues identified by stakeholders in their dealings with the Act.

7.2 This aspect of the reforms has been conducted in two stages. In November last year, the Attorney-General released a discussion paper comprising sixteen possible amendment measures (**Attachment H**). All stakeholders were invited to comment on the proposals and to suggest other amendments of a minor and technical nature. Nineteen written submissions from a range of stakeholders were received in response to that invitation, incorporating a large number of additional suggestions. On 22 November 2006, the Attorney-General released a second discussion paper comprising approximately fifty possible amendment measures (**Attachment I**). The Attorney-General's Department is currently examining submissions received in response to the second paper.

7.3 Following consideration of those submissions, it is anticipated proposals for technical amendments will be included in a second Bill for introduction in the Autumn 2007 sittings.

7.4 The second discussion paper comprises:

- proposals from the November 2005 discussion paper (two of which have been omitted and another two modified as a consequence of consultation)

[2] See, for example, in Victoria, the Pro Forma section.31 Deed for Mining Licences; and in Western Australia, heritage protection agreements to facilitate application of the 'expedited' procedure under s.32.

- a large number of additional suggestions from stakeholders, and

- three measures from the Claims Resolution Review which fell within the scope of the technical amendment reform element.

7.5 Around half of the technical amendment proposals involve amendment to the future act regime. The remaining proposals primarily affect provisions dealing with applications, the registration test and the registers maintained by the Native Title Registrar.

7.6 The impact of individual amendment proposals will vary – ranging from aiding comprehension by inclusion of explanatory notes and correcting errors to streamlining procedures by removing unnecessary procedural burdens. Collectively, the package of technical amendments aims to improve the overall workability of the Native Title Act.

8 TRANSPARENCY

8.1 Improved communication and transparency within the native title system will have flow-on benefits for the system as a whole by leading to faster, more affordable and more effective native title outcomes. The transparency element of the reforms seeks to promote recognition by all parties of the need to maintain open lines of communication and transparent practices to assist in securing fair and timely outcomes. In particular, it focuses on the important role of governments in helping matters progress more expeditiously through the native title system.

8.2 While the Australian Government is responsible for the native title system as a whole, the success of the native title system is also heavily influenced by cooperation, coordination and communication between the Australian Government and the State and Territory governments. In addition to being first respondents to most claims, State and Territory governments have a pivotal role due to their obligations to the wider communities they represent and day-to-day responsibility for land management.

8.3 On 16 September 2005, the Attorney-General convened the first meeting of all State and Territory ministers with native title responsibilities. The 2005 Native Title Ministers' Meeting provided an opportunity for the Australian Government to promote the benefits of positive and transparent behaviours by other jurisdictions. An outcome from the meeting was a renewed commitment for jurisdictions to work together to achieve better outcomes for all stakeholders in the native title system.

8.4 The Attorney-General convened a second Native Title Ministers' Meeting on 15 December 2006. Ministers discussed the progress of the native title reforms and continued dialogue on ways governments can contribute to a more efficient and effective native title system. The meeting acknowledged that all jurisdictions have taken steps to ensure good communication and transparent processes. All Ministers agreed that early information exchange between governments and other parties to increase awareness of government views and native title processes can contribute to the more efficient resolution of native title issues. A copy of the communiqué agreed at that meeting is at **Attachment J** to this submission.

8.5 In addition to the Ministers' Meeting, the Australian Government maintains open relationships with all stakeholders through the Native Title Consultative Forum convened three times a year by the Attorney-General's Department. The Forum is comprised of representatives of

the Australian Government, State and Territory governments, the Federal Court, the National Native Title Tribunal, Native Title Representative Bodies, peak industry bodies and the Human Rights and Equal Opportunity Commission. The Forum gives all stakeholders an opportunity to share experiences and discuss challenges and opportunities for the native title system.

9 LIST OF ATTACHMENTS TO THE SUBMISSION

A Details of consultations undertaken in relation to the reform elements

B Statistical overview of the native title system

C Report of the Native Title Claims Resolution Review

D Government Response to the Native Title Claims Resolution Review

E The Native Title Amendment Bill 2006 and the recommendations of the Native Title Claims Resolution Review

F Report on the Structures and Processes of Prescribed Bodies Corporate

G Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993

H Technical Amendments to the *Native Title Act 1993* – Discussion Paper

I Technical Amendments to the *Native Title Act 1993* – Second Discussion Paper

J Native Title Ministers' Meeting 15 December 2006 - Communiqué

ATTACHMENT A

DETAILS OF CONSULTATIONS UNDERTAKEN IN RELATION TO THE REFORM ELEMENTS

This summary covers consultations conducted up to 31 December 2006 for all elements of the reform package.

Consultations conducted at multilateral forums

The Attorney-General consulted directly with State and Territory Ministers about the reforms at Native Title Ministers' Meetings convened by the Attorney-General on 16 September 2005 and 15 December 2006.

Government officers have also taken opportunities to outline, discuss and receive feedback about the reforms at the following multilateral forums:

- Meetings on 18 October 2005, 23 November 2005 and 22 November 2006 of the Chief Executive Officers of all Native Title Representative Bodies (NTRBs) and Native Title Services (NTSs). Senior officers from the Attorney-General's Department and the Department of Families, Community Services and Indigenous Affairs (FACSIA) attended these meetings and outlined and discussed the key elements of the reform package as they existed at the relevant times. Graham Hiley QC and Dr Ken Levy attended the meeting on 23 November 2005 to discuss the Claims Resolution Review.
- Meetings on 25 November 2005 and 16 June 2006 organised by State and Territory officials with responsibility for native title. Senior officers from the Attorney-General's Department attended the meetings and outlined and discussed the key elements of the reform package. Briefings were also provided to State and Territory officials at meetings on 30 June 2006 and 10 November 2006 in preparation for the December 2006 Native Title Ministers' Meeting.
- Meetings on 2 December 2005, 7 April 2006, 25 August 2006 and 24 November 2006 of the Native Title Consultative Forum (NTCF). The NTCF is convened three times yearly by the Attorney-General's Department and comprises representatives of the Australian Government, State and Territory governments, the Federal Court, the National Native Title Tribunal (NNTT), NTRBs, local government, the Human Rights and Equal Opportunity Commission and peak industry bodies.
- The Annual Native Title Conference convened by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Native Title Research Unit and the Northern Land Council in Darwin on 26 May 2006. The conference was attended by officers from the Attorney-General's Department and FACSIA, and representatives of both Departments participated in a panel to discuss the reforms. A wide range of stakeholders attended that forum.
- Meetings of the Queensland Native Title Liaison Committee in Brisbane, convened by the National Native Title Tribunal on 13 June 2006 and 7 December 2006. Attendees at this meeting included representatives from NTRBs, the Queensland Government, peak industry bodies, the Federal Court, the NNTT and officers from the Attorney-General's Department and FACSIA.

- The 13th Annual Conference on Native Title & Cultural Heritage held in Brisbane on 28-30 November 2006. A wide range of stakeholders attended that forum. Senior officers from the Attorney-General's Department outlined and discussed the key elements of the reform package.

- A workshop convened by AIATSIS on 5 December 2006 in Canberra dealing with Prescribed Bodies Corporate (PBCs). Attendees at the workshop included representatives from NTRBs and PBCs. Officers from the Attorney-General's Department and FACSIA outlined the reforms, with particular attention to the examination of PBCs.

Bilateral meetings and written consultation

Government officers conducted extensive consultations directly with key stakeholders through bilateral meetings and teleconferences. The Government has prepared publicly available documents concerning the reforms, which it has provided directly to stakeholders and/or published on designated websites[1]. Comments were invited from stakeholders and the public on key aspects of the reforms.

Respondent funding

In relation to the proposed revision of the Guidelines for the respondent funding program, the consultation period commenced on 23 November 2005 and continued until 10 February 2006. Consultation was extensive. The consultation draft of the guidelines has been available on line at the Department's web site address since its release. The consultation draft was provided to peak bodies representing fishing, mining, local government and pastoral interests, legal practitioners and relevant Government agencies. These parties are listed at **Appendix A**. Officers also met with a number of peak bodies and legal representatives to explain and discuss, and seek comment on, the draft Guidelines. Parties consulted up to, and including, 23 June 2006 are listed at **Appendix B**. Parties who provided written submissions are listed at **Appendix C.**

Submissions received from stakeholders were considered carefully by the Legal Assistance Branch and as a result of these comments a number of changes were made to the consultation draft. Copies of the new Guidelines were forwarded to stakeholders and senior officers of the Legal Assistance Branch met with stakeholders in each State to explain the changes in the new Guidelines. The stakeholders consulted are listed at **Appendix D.** The Attorney-General has written to State and Territory Ministers providing copies of the new Guidelines. Operation of the new Guidelines will commence on 1 January 2007.

Native Title Representative Bodies

The Government announced details of the reforms to improve the effectiveness of NTRBs on 23 November 2005. The package was outlined to the Chief Executive Officers of all NTRBs and NTSs that day. On 25 November 2005, the then Minister for Immigration, Multicultural and Indigenous Affairs wrote to State and Territory

[1] Attorney-Generals Department - http://www.ag.gov.au/nativetitlesystemreform
FACSIA - http://www.oipc.gov.au/NTRB_Reforms

ministers seeking their cooperation in a consultation process with the Australian Government coordinated by FaCSIA. On 20 January 2006, FACSIA wrote to the National Farmers' Federation (NFF), Minerals Council of Australia (MCA) and HREOC and invited their views. FaCSIA conducted a teleconference on 14 March 2006 with State and Territory officials, updated Chief Executive Officers of NTRBs on 15 March 2006 and 22 November 2006 and briefed NTRB project officers at a workshop on 3 April 2006, and briefed NTRB senior professional officers on 20 September 2006. FaCSIA also wrote to State and Territory officials, the NFF and the MCA on 7 December 2006 about additional amendments, and invited comments. Information was also posted on the Office of Indigenous Policy Coordination website, and a brochure was produced for NTRBs to distribute to their clients. A phone number, mail and email addresses are given on the website and brochure for forwarding comments from any interested parties.

Prescribed Bodies Corporate

The Attorney-General's Department coordinated Australian Government consultations with stakeholders as part of the examination of PBCs. The consultations were guided by a Steering Committee, comprised of officers from the Attorney-General's Department, FACSIA and the Office of the Registrar of Aboriginal Corporations. Officers from the Attorney-General's Department and FACSIA met with a number of PBCs and NTRBs during October and November 2005, listed at **Appendix E**. The Attorney-General's Department also held a teleconference on 15 February 2006 with the Mer Gedkum Le Corporation (a PBC).

Issues papers were provided, with requests for comment, to all NTRBs and NTSs and contactable PBCs, State and Territory governments, relevant Australian Government agencies and Departments, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the National Native Title Tribunal, the Australian Institute of Aboriginal and Torres Strait Islander Studies and peak industry bodies. The recipients are listed at **Appendix F**. In December 2005 correspondence was also sent to relevant Australian Government departments and agencies seeking information on resources or services which may be available to PBCs. A list of these departments and agencies is at **Appendix G.**

A total of 26 written submissions were received in response to the issues papers from NTRBs, one PBC, State and Territory governments, peak industry bodies and Australian Government agencies. A list of those stakeholders who made written submissions is at **Appendix H**.

Claims Resolution Review

The claims resolution review was conducted by independent consultants (Graham Hiley QC and Ken Levy) and overseen by a steering committee composed of the Registrar of the Federal Court, a member of the National Native Title Tribunal and senior officers from the Attorney-General's Department and FACSIA. The Attorney-General's Department provided secretariat support to the Review.

The consultants engaged in extensive direct consultations with representatives of State and Territory governments, NTRBs and peak industry bodies as well as individual legal practitioners. The various meetings conducted are listed at **Appendix I**.

The Government encouraged public submissions from key native title stakeholders, State and Territory governments and respondent bodies, including industry and pastoralist representatives, before 1 December 2005. In total, 36 submissions were received. A list of those stakeholders who made written submissions is at **Appendix J.**

Technical Amendments

Consultations regarding possible technical amendments to the Native Title Act have been primarily conducted through the release of discussion papers. On 22 November 2005 the Attorney-General released a discussion paper on possible technical amendments to the Native Title Act ('the first discussion paper').

The first discussion paper was provided to a large number of stakeholders, listed at **Appendix K** and has also been available on line at the Attorney-General's Department's website since its release. All interested parties were invited to submit comments on the paper by 31 January 2006 and to make suggestions for other possible technical amendments**.** 19 written responses to the first discussion paper were received. Possible technical amendments were also discussed in many of the meetings with NTRBs and other bodies listed in **Appendix E** (at which issues regarding PBCs were also discussed).

A second discussion paper was released by the Attorney-General on 22 November 2006 with comments due by 22 December 2006. The second discussion paper was sent to a large number of stakeholders, listed at **Appendix L**.

Other bilateral meetings

Officers from the Attorney-General's Department have discussed the reform package and consultation processes in bilateral meetings with:

- the Aboriginal and Torres Strait Islander Social Justice Commissioner (on 27 September 2005, 17 November 2005 and 15 March 2006)
- Minerals Council of Australia (on 24 October 2005 and 7 November 2006), and
- officials from the Victorian State Government (on 13 November 2006).

Appendix A: Respondent funding reform –
Parties to whom the consultation draft of the proposed guidelines for the respondent funding program, with requests for comments, was provided

- Department of the Prime Minister & Cabinet
- Office of Indigenous Policy Coordination
- National Native Title Tribunal
- Federal Court
- All State and Territory Governments
- AgForce
- Amalgamated Prospectors & Leaseholders Association
- Association of Mining Exploration Companies Inc
- Mr Fergus Austin
- Australian Canegrowers Council Ltd
- Australian Seafood Industry Council
- B & P Surveys
- Badman Environmental
- Ms Margot-Anne Barefoot
- Blake Dawson Waldron
- Mr Robert Blowes
- Boltons Lawyers
- Bottoms English Lawyers
- Ms Helen Bowskill
- Brazier Motti Pty Ltd
- Mr John Burless
- Ms Susan Burton Phillips
- Cahills Barristers and Solicitors
- Capricorn Mapping and Mining Title Services
- Ms Deanna Cartledge
- Chalk & Fitzgerald, Lawyers & Consultants
- Christensen Legal
- CJ Cooper & Associates
- Mr Geoff Clark
- Ms Suzette Coates

- Cook Shire Council
- Corrs Chambers Westgarth
- Cottrell Cameron & Steen Surveys Pty Ltd
- Ms Rosemary Craddock
- Cridlands Lawyers
- Cullen & Couper Pty Ltd
- D & G Lawyers
- De Silva Hebron
- Deacons Lawyers
- Dibbs Barker Gosling
- Mr Adrian Duffy
- Dwyer Durack Lawyers
- Mr Trevor Egan (W S Group)
- Elrington Boardman Allport
- Encompass Research
- Ethnographix Australia
- LA Evans
- Exploremin Pty Ltd
- Mr George Farkas
- Ms Zoe Farmer
- Farrellys Lawyers
- Finlaysons Lawyers
- Mr Jack Flanagan
- Mr Peter Flanagan SC
- Frenkel Partners
- Mr Michael Gaden
- Gadens Lawyers
- Mr John Greenwood QC
- Golder Associates
- Mr Carey Goodall
- Gore & Associates
- Mr James Curtis-Smith Hargraves
- Mr Graham Hiley QC
- Mr Vance Hughston SC

- Hunt & Humphry
- Jackson McDonald
- Mr Tim Jacobs
- Mr Andrew Jones
- Ms Tina Jowett
- Just Outcomes (Aust) Pty Ltd
- Mr Stephen Keim
- Kelly & Co
- Mr Noel Kennedy
- Mr Peter Kilduff
- King & Company Solicitors
- Mr Hinko Kostanjevec
- Ms Patricia Lane
- Mr Michael Liddy
- Local Government Association of Queensland
- Local Government Association of South Australia
- M H Lodewyk Pty Ltd
- M W Consult Pty Ltd
- MacDonnells Solicitors
- Mr J W S MacKenzie
- Mallesons Stephen Jacques
- Mr William Markwell
- Mathews & Dangar
- McLeod & Co
- Ms Lucy McMillan
- Michael Neal Lawyers
- Miller Harris Lawyers
- Minerals Council of Australia
- Mr Garrie Moloney
- Mony de Kerloy
- Mr Richard Morgan
- Mullins Handcock Lawyers
- Nall Payne Solicitors
- Native Title Solutions

- Mr Anthony Neal SC
- New South Wales Farmers' Association
- New South Wales Seafood Industry Council
- Norman Waterhouse Lawyers
- North Queensland Miners Association
- Northern Cattlemen's Association Inc
- Northern Territory Seafood Council
- Mr Damien O'Brien
- Mr Ben O'Loughlin
- O'Reilly and Stevens
- Mr Luke Passfield
- Pastoralists and Graziers Association of Western Australia
- Dr Melissa Perry QC
- Piper Alderman Lawyers
- Power & Bennett
- Mr Peter Poynton
- Mr Andrew Preston
- Project and Development Management (Qld) Pty Ltd
- PW Skewes & Dempster
- QASCO Surveys Pty Ltd
- Queensland Lapidary and Allied Crafts Clubs Association
- Queensland Seafood Industry Association Inc
- Mr Peter Quinlan
- Mr Paul Richards
- Rigby Cooke Lawyers
- Roberts Nehmer McKee Lawyers
- Mr Dennis Rose QC
- Rowe Lawyers
- Mr Michael Rynne
- Sarasan Pty Ltd
- Mr Paul Smith
- Mr Justin Serong
- Mr Phillip Sheridan
- Mr Markus Spazzapan

- Suthers Taylor Lawyers
- Suzanna Sheed & Associates
- Ms Carolyn Tan
- Terry Fisher and Co
- The Bruce and Stewart Commercial Practice
- The Rowland Company
- South Australian Chamber of Mines and Energy
- South Australian Farmers' Federation
- South Australian Fishing Industry Council
- Mr J Grant Thompson
- Thynne and Macartney
- Toowoomba City Council
- Mr Peter Walker
- Mr Paul Walsh
- Ward Keller Lawyers
- Mr John Waters QC
- Ms Kate Waters
- Ms Raelene Webb QC
- Western Australian Fishing Industry Council
- Western Australian Local Government Association
- Mr Simon Whiley
- Mr Robert Whitington QC
- Mr Ernst Willheim
- Ms Nancy Williams
- Williams Graham & Carman Solicitors
- Williams Love & Nicol Lawyers
- Mr Kim Wilson
- Withnall Maley and Co
- Mr Michael Wright QC
- WT McMillan & Co
- WW & SM McLachlan Consultancy
- V G Peters & Co
- Victorian Farmers' Federation (VFF)

Appendix B: Respondent funding reform – parties met with on consultation draft Guidelines

Government officers have met with representatives of the parties listed below to discuss the proposed guidelines for the respondent funding program:

- Blake Dawson Waldron (Perth) (28 November 2005)
- Bottoms English (Cairns) (28 November 2005)
- Hunt & Humphrey Project Lawyers (Perth) (28 November 2005)
- MacDonnells Solicitors (Cairns) (28 November 2005)
- North Queensland Miners Association (28 November 2005)
- Western Australian Fishing Industry Council (28 November 2005)
- Great Eastern Country Zone (29 November 2005)
- Cornerstone Legal (Perth) (29 November 2005)
- David Kempton (29 November 2005)
- Michael Neal Lawyers (29 November 2005)
- Minter Ellison (Perth) (29 November 2005)
- Suthers Taylor Lawyers (Townsville) (29 November 2005)
- Western Australian Pastoralists and Graziers Association (29 November 2005)
- Helen Bowskill (30 November 2005)
- D & G Lawyers (Townsville) (30 November 2005)
- Local Government Association of South Australia (30 November 2005)
- Mellor Olsson Solicitors (Adelaide) (30 November 2005)
- Paul Smith (30 November 2005)
- AgForce (1 December 2005)
- Finlaysons Lawyers (Adelaide) (1 December 2005)
- Gadens Lawyers (Brisbane) (1 December 2005)
- Gore & Associates (Brisbane) (1 December 2005)
- Graham Hiley QC (1 December 2005)
- Local Government Association of Queensland (1 December 2005)
- Bill Markwell (Brisbane) (1 December 2005)
- Queensland Seafood Industry Association (1 December 2005)
- Rosemary Craddock Barrister and Solicitor (Adelaide) (1 December 2005)
- South Australian Chamber of Minerals & Energy (1 December 2005)
- South Australian Fishing Industry Council (1 December 2005)

- Williams Love & Nicol Lawyers (Canberra) (1 December 2005)
- Zoe Farmer (Brisbane) (2 December 2005)
- McDonnell Solicitors (2 December 2005)
- Queensland Lapidary and Allied Crafts Club Association (2 December 2005)
- Minerals Council of Australia (5 December 2005)
- Victorian Local Governance Association (5 December 2005)
- Victorian Farmers' Federation (5 December 2005)
- Victorian Association of Forest Industries (5 December 2005)
- Federal Court, Native Title Registrar (Victoria) and Deputy Registrar (Northern Territory) (6 December 2005)
- Rigby Cook (Melbourne) (6 December 2005)
- Just Outcomes (Aust) Pty Ltd (Melbourne) (6 December 2005)
- Frenkels Partners (Melbourne) (6 December 2005)
- Grant Thompson (Shepparton) (6 December 2005)
- Rowan Skinner (Melbourne) (6 December 2005)
- Suzannah Sheed & Associates (7 December 2005)
- Amateur Fishermens' Association of the Northern Territory (13 December 2005)
- Maleys Barristers & Solicitors (Darwin) (13 December 2005)
- Office of Indigenous Policy, Department of Chief Minister (Northern Territory) (13 December 2005)
- Northern Territory Cattlemen's Association (Darwin) (14 December 2005)
- Cridlands Lawyers (Darwin) (14 December 2005)
- Ward Keller (Darwin) (14 December 2005)
- Northern Territory Seafood Council (Darwin) (14 December 2005)
- NSW Farmers' Association (19 December 2005)
- Bruce Stewart Dimarco (19 December 2005)
- Director, Native Title, NSW Department of Lands (19 December 2005)

Attachment C: Respondent Funding Reform - written submissions received on consultation draft guidelines

- Bottoms English Lawyers
- Ron Brunton Anthropologist
- Minerals Council of Australia
- The Association of Mining & Exploration Companies Inc
- Office of Indigenous Policy Coordination
- Cape York Land Council
- Hon Eric Ripper MLA, Deputy Premier WA
- Queensland Lapidary and Allied Craft Clubs Association Inc
- Amalgamated Prospectors and Leaseholders Association of Western Australia Inc
- Western Australian Fishing Industry Council
- Crown Solicitor's Office - South Australia
- MacDonnells Solicitors
- Local Government Association of Queensland Inc
- National Native Title Tribunal (NNTT) Registrar
- Minter Ellison Lawyers Adelaide
- Blake Dawson Waldron Lawyers Perth
- Aboriginal and Torres Strait Islander Social Justice Commissioner
- Rosemary Craddock, Solicitor
- Just Outcomes (Aust) Pty Ltd (Ms G Denisenko), solicitor
- Pastoralists and Graziers Association
- National Farmers' Federation
- Hon Rob Hulls MP – Attorney-General, Victoria
- Hon Henry Palaszczuk MP

Appendix D: Respondent funding reform – parties met with to discuss the revised Guidelines (following preliminary consultation)

South Australia Stakeholders

Friday 8 December 2006

- South Australian Fishing Industry Council
- South Australian Farmers Federation
- South Australian Seafood Council
- South Australian Chamber of Mines and Energy
- Local Government of South Australia
- Rosemary Craddock
- Mellor Olsson
- Finlayson's Legal
- Bolton's Lawyers

Queensland Stakeholders

Monday 11 December 2006

- AgForce
- Thynne and Mcartney
- Local Government Association Queensland
- MacDonnells Law

Tuesday 12 December 2006

- Queensland Seafood Industry Association
- Peter Gore and Associates
- Bill Markwell

Western Australia Stakeholders

Monday 18 December 2006

- Pastoralists and Graziers Association
- Hunt and Humphry
- Blake Dawson Waldron

Tuesday 19 December 2006

- Western Australian Fishing Industry Council
- Cornerstone Legal
- McLeods Lawyers
- Minter Ellison Lawyers

NSW Stakeholders

Monday 18 December 2006

- Bruce Stewart Dimarco

Victorian Stakeholders

Thursday 21 December 2006

- J. G. Thompson
- Suzanna Sheed
- Rigby Cooke

- Just Outcomes

Northern Territory Stakeholders

Wednesday 20 December 2006

- Amateur Fisherman's Association Northern Territory
- Cridlands Lawyers

Thursday 21 December 2006

- Northern Territory Seafood Council

ACT Stakeholders

Wednesday 20 December 2006

- Williams Love and Nicol

Appendix E: measures to encourage effective functioning of PBCs

Government officers held discussions with representatives of the parties listed below about measures to encourage the effective functioning of PBCs. Technical amendments were also considered in many of these discussions.

PBCs

- Lhere Artepe Aboriginal Corporation (26 October 2005)
- Gumulgal (Torres Strait Islanders) Corporation (14 November 2005)
- Magani Lagaugal (Torres Strait Islanders) Corporation (14 November 2005)
- Mura Badulgal (Torres Strait Islanders) Corporation (14 November 2005)
- Mualgal (Torres Strait Islanders) Corporation (14 November 2005)
- Mer Gedkum Le Corporation (15 February 2006 by teleconference)

NTRBs

- Central Land Council (26 October 2005)
- Ngaanyatjarra Council (9 November 2005)
- Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (9 November 2005)
- South West Aboriginal Land & Sea Council (10 November 2005)
- Kimberley Land Council (11 November 2005)
- Torres Strait Regional Authority (14 November 2005)
- Cape York Land Council (15 November 2005)
- Carpentaria Land Council Aboriginal Corporation (15 November 2005)
- North Queensland Land Council Native Title Representative Body Aboriginal Corporation (15 November 2005)
- Aboriginal Legal Rights Movement Inc (1 December 2005)

State and Territory governments

- Western Australian government (10 November 2005)
- New South Wales Government (6 December 2005)
- Australian Capital Territory Government (7 December 2005)
- Northern Territory Government (23 January 2006)

Other parties

- Chamber of Minerals and Energy, Western Australia (10 November 2005)
- Indigenous Land Corporation (11 January 2006)

Appendix F: measures to encourage effective functioning of PBCs – parties to which issues papers were provided

Issues papers concerning measures to encourage effective functioning of PBCs, with request for comment, were provided to the following parties:

Prescribed Bodies Corporate

- Bar-Barrum Aboriginal Corporation
- Dauanalgaw (Torres Strait Islanders) Corporation
- Dunghutti Elders Council (Aboriginal Corporation) (NSW NTS)
- Erubam Le Traditional Land and Sea Owners (Torres Strait Islanders) Corporation
- Gebaralgal (Torres Strait Islanders) Corporation
- Gumulgal (Torres Strait Islanders) Corporation
- Hopevale Congress Aboriginal Corporation
- Jidi Jidi Aboriginal Corporation
- Kaiwalagal Aboriginal Corporation
- Karajarri Traditional Lands Association (Aboriginal Corporation) (KLC)
- Kulkalgal (Torres Strait Islanders) Corporation
- Kunin (Native Title) Aboriginal Corporation
- Lhere Artepe Aboriginal Corporation
- Magani Lagaugal (Torres Strait Islanders) Corporation
- Malu Ki'ai (Torres Strait Islanders) Corporation
- Masigalgal (Torres Strait Islanders) Corporation
- Mer Gedkem Le (Torres Strait Islanders) Corporation
- Mualgal (Torres Strait Islanders) Corporation
- Mura Badulgal (Torres Strait Islanders) Corporation
- Ngan Aak Kunch Aboriginal Corporation
- Pila Nguru Aboriginal Corporation
- Porumalgal (Torres Strait Islanders) Corporation
- Saibai Mura Buway (Torres Strait Islanders) Corporation
- Tjamu Tjamu Aboriginal Corporation
- Tjurabalan Native Title Land Aboriginal Corporation
- Walmbaar Aboriginal Corporation
- Western Desert Lands Aboriginal Corporation (Jam ukurnu-Yapalikunu)

- Western Yalanji Aboriginal Corporation
- Yarnangu Ngaanyatjarraku Parna (Aboriginal Corporation)
- Yindjibarndi Aboriginal Corporation (for the Yindjibarndi People)

Other parties

- All NTRBs and NTSs
- All state and territory governments
- National Native Title Tribunal
- Social Justice Commissioner (Human Rights and Equal Opportunities Commission)
- Australian Local Government Association
- Australian Institute for Aboriginal and Torres Strait Islander Studies
- Cape York Institute for Policy and Leadership
- National Indigenous Council (note: this paper was sent on 6 December 2005)
- Australian Seafood Industry Council
- Chamber of Minerals and Energy, Western Australia
- Combined Small Scale Miners Association of Australia
- Minerals Council of Australia
- National Farmers' Federation (Native Title Taskforce)
- Pastoralists and Graziers Association of Western Australia

Appendix G: PBCs – measures to encourage effective functioning of PBCs – organisations to whom the Attorney-General's Department wrote to seeking information on resources or services which may be available to PBCs

- Federal Court of Australia
- Indigenous Land Corporation
- Indigenous Business Australia
- Department of Industry, Tourism and Resources
- Department of Environment and Heritage
- Department of Family and Community Services
- Department of Employment and Workplace Relations
- Department of the Prime Minister and Cabinet
- Department of Finance and Administration
- Department of Agriculture, Fisheries and Forestry
- Department of Transport and Regional Services
- Department of Education, Science and Training
- Department of Communications, Information Technology and the Arts (DoCITA)

Appendix H: PBCs – measures to encourage effective functioning of PBCs – organisations who provided written submissions in response to issues papers

Native Title Representative Bodies

- Central Land Council
- Goldfields Land and Sea Council
- Kimberley Land Council
- Native Title Services Victoria
- Northern Land Council
- Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation

Prescribed Bodies Corporate

- Mer Gedkum Le (Torres Strait Islanders) Corporation

State and Territory Governments

- Victoria
- Queensland
- South Australia
- Western Australia
- Northern Territory

Industry Bodies

- National Farmers' Federation
- Pastoralists and Graziers Association of Western Australia
- Rio Tinto

Australian Government agencies

- Aboriginal and Torres Strait Islander Social Justice Commissioner
- Department of Agriculture, Fisheries and Forestry
- Department of Communications, Information Technology and the Arts
- Department of Employment and Workplace Relations
- Department of Environment and Heritage
- Department of Finance and Administration
- Department of Industry, Tourism and Resources
- Department of the Prime Minister and Cabinet
- Department of Transport and Regional Services

- Indigenous Land Corporation
- National Native Title Tribunal

Appendix I: Claims resolution review –

In person consultations undertaken by the review consultants

Queensland

Department of Natural Resources and Mines – 4 November 2005
Crown Solicitor's Office – 4 November 2005
Ebsworth and Ebsworth – 4 November 2005
Andrew Preston - 4 November 2005
Tony Dalton – 4 November 2005
Gore and Associates – 4 November 2005
Queensland Seafood Industry Association – 4 November 2005
Federal Court – 15 November 2005, 8 December 2005
Macdonnells – 15 November 2005
Local Government Association of Queensland – 15 November 2005
Central Queensland Land Council – 15 November 2005
National Native Title Tribunal – 15 and 21 November 2005
Queensland Native Title Liaison Committee – 16 November 2005
North Queensland Land Council – 16 November 2005
Marita Stinton – 16 November 2005
Chris Athanasiou – 16 November 2005
Carpentaria Land Council – 16 November 2005
Cape York Land Council – 18 November 2005
Gurang Land Council - 1 December 2005
Torres Strait Regional Authority - 1 December 2005
Bob Munn – 8 December 2005
BHP – 8 December 2005

Western Australia

Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation – 9 November 2005
Department of Premier and Cabinet, Office of Native Title – 9 November 2005
Hunt and Humphry – 9 November 2005
Goldfields Land Council – 9 November 2005
South West Aboriginal Land and Sea Council – 9 November 2005
National Native Title Tribunal – 9 and 10 November 2005
Philip Vincent – 10 November 2005
State Solicitor's Office – 10 November 2005

Kimberley Land Council – 18 November 2005
Ngaanyatjarra Land Council – 1 December 2005

Northern Territory
Northern Land Council – 7 November 2005
Central Land Council – 7 November 2005
Northern Territory Solicitor-General – Tom Pauling QC – 7 November 2005
Department of Justice – 7 November 2005
Chief Minister's Department – 7 November 2005
Cridlands – 7 November 2005
Northern Territory Seafood Council – 7 November 2005
Northern Territory Cattleman's Association – 7 November 2005
Federal Court – 8 November 2005

Victoria
Department of Justice – 11 November 2005
Federal Court – 11 November 2005
Native Title Services Victoria – 11 November 2005
Tom Keely – 11 November 2005

New South Wales
Department of Lands – 17 November 2005
Crown Solicitor's Office – 17 November 2005
Federal Court – 17 November 2005

South Australia
Crown Solicitor's Office – 8 December 2005

Australian Capital Territory
NTRB Chief Executive Officers – 23 November 2005
Australian Government Solicitor – 24 November 2005
Minerals Council of Australia – 24 November 2005

Appendix J: Claims resolution review –
Individuals and organisations who provided written submissions

- Robert Blowes
- Combined Small-Scale Miners Associations of Australia
- B A Keon-Cohen
- Allens Arthur Robinson
- National Native Title Tribunal
- Aboriginal Legal Rights Movement
- Australian Government Solicitor
- South West Land and Sea Council
- Legal Services - Solicitor for the Northern Territory
- New South Wales Department of Lands
- Arnold Bloch Leibler
- Pastoralists and Graziers Association of Western Australia
- Intergovernmental Committee on Survey and Mapping
- Native Title Services Victoria
- Goldfields Land and Sea Council
- Rio Tinto
- Local Government Association of Queensland
- National Farmers Federation
- Kimberley Land Council
- Telstra Corporation Limited
- Gurang Land Council
- Australian Institute for Aboriginal and Torres Strait Islander Studies
- Minerals Council of Australia
- Justice Mansfield
- Western Australian Fishing Industry Council
- South Australian Government
- Justice French
- Warwick Soden
- Daniel Lavery
- Carpentaria Land Council Aboriginal Corporation
- Torres Strait Regional Authority

- Law Council of Australia
- Rosemary Craddock
- Deputy Premier, Western Australia
- MacDonnells / Ergon Energy
- Aboriginal and Torres Strait Islander Social Justice Commissioner

Appendix K: Technical amendments – parties to whom first discussion paper was provided

The first discussion paper was directly provided to the following parties:

- all State and Territory governments
- all NTRBs and NTSs and the National NTRB and NTS Forum
- Federal Court of Australia
- National Native Title Tribunal
- Australian Local Government Association
- Aboriginal and Torres Strait Islander Social Justice Commissioner (Human Rights and Equal Opportunities Commission)
- Australian Institute for Aboriginal and Torres Strait Islander Studies
- National Indigenous Council
- Australian Petroleum Production & Exploration Association
- Minerals Council of Australia
- Minerals Exploration Action Agenda Land Access Subcommittee
- National Farmers' Federation
- Pastoralists and Graziers Association of Western Australia
- Queensland Small Miners Association
- Western Australian Fisheries Industry Council
- various interested legal practitioners
- an interested member of the public

Appendix L: Technical amendments – parties to whom second discussion paper was provided

The second discussion paper was directly provided to the following parties:

- all State and Territory governments
- all NTRBs and NTSs
- Aboriginal and Torres Strait Islander Social Justice Commissioner (Human Rights and Equal Opportunities Commission)
- Alcan South Pacific Pty Ltd
- Alcoa World Alumina Australia
- Australian Institute for Aboriginal and Torres Strait Islander Studies
- Australian Local Government Association
- Australian Petroleum Production & Exploration Association
- Badu Island Council
- Bar-Barrum Aboriginal Corporation
- Barengi Gadjin Land Council Aboriginal Corporation
- Blake Dawson Waldron, solicitors
- BHP Billiton
- Chamber of Minerals and Energy Western Australia
- Combined Small-Scale Miners' Associations of Australia
- Consolidated Rutile Ltd
- Dauanalgaw (Torres Strait Islanders) Corporation
- Dunghutti Elders Council (Aboriginal Corporation)
- Eastern Yugambeh Corporation
- Ergon Energy Corporation Ltd
- Erubam Le Traditional Land And Sea Owners (Torres Strait Islanders) Corporation
- Federal Court of Australia
- Gebaralgal (Torres Strait Islanders) Corporation
- Gumulgal (Torres Strait Islanders) Corporation
- Hopevale Congress Aboriginal Corporation
- Iluka Resources
- Indigenous Land Corporation
- Jidi Jidi Aboriginal Corporation

- Kaiwalagal Aboriginal Corporation
- Karajarri Traditional Lands Association
- Mr B Keon-Cohen QC
- Kulkalgal (Torres Strait Islanders) Corporation
- Kunin (Native Title) Aboriginal Corporation
- Law Council of Australia
- Lhere Artepe Aboriginal Corporation
- Local Government Association of Queensland Inc
- Magani Lagaugal (Torres Strait Islanders) Corporation
- Malu Ki'ai (Torres Strait Islanders) Corporation
- Masigalgal (Torres Strait Islanders) Corporation
- Mer Gedkem Le (Torres Strait Islanders) Corporation
- Minerals Council of Australia
- Minerals Exploration Action Agenda Land Access Subcommittee
- Miriuwung and Gajerrong #1 (Native Title Prescribed Body Corporate) Aboriginal Corporation
- Mualgal (Torres Strait Islanders) Corporation
- Mura Badulgal (Torres Strait Islanders) Corporation
- National Farmers' Federation
- National Indigenous Council
- National Native Title Tribunal
- New South Wales Minerals Council
- Newcrest Mining Ltd
- Ngaanyatjarra Council
- Ngan Aak Kunch Aboriginal Corporation
- Ngarluma Aboriginal Corporation
- Norman Waterhouse, solicitors
- Pastoralists and Graziers Association of Western Australia
- Pila Nguru Aboriginal Corporation
- Porumalgal (Torres Strait Islanders) Corporation
- Queensland Resources Council
- Rio Tinto Ltd
- Saibai Mura Buway (Torres Strait Islanders) Corporation
- Telstra Corporation Ltd

- The Association of Mining and Exploration Companies (Inc)
- Tjamu Tjamu Aboriginal Corporation
- Walmbaar Aboriginal Corporation
- Western Australian Fisheries Industry Council
- Western Desert Lands Aboriginal Corporation
- Western Yalanji Aboriginal Corporation
- Xstrata Copper
- Yarnangu Ngaanyatjarraku Parna (Aboriginal Corporation)

ATTACHMENT B

STATISTICAL OVERVIEW OF THE NATIVE TITLE SYSTEM

Current position of the native title system

Since 1998, the number of new applications lodged each year has dropped significantly, with only 55 new applications filed in 2005. Despite the drop in the number of applications being lodged, the current disposition rate suggests that the workload generated by native title determinations is unlikely to decrease in the near future.

Table 1—Native title applications pending at 30 June 2006[1]

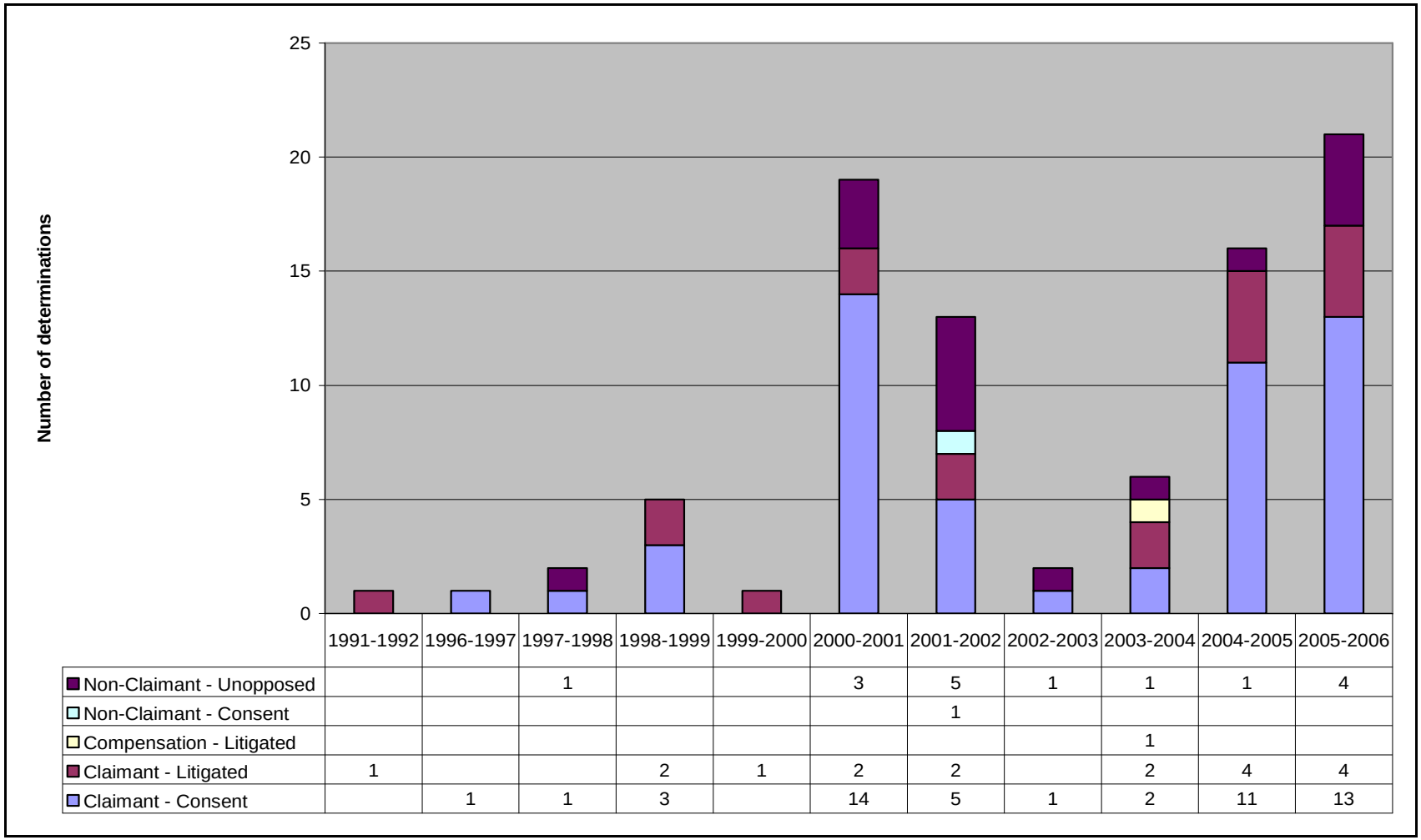
	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total	Total (%)
Claimant (on RNTC)	-	28	163	138	21	-	14	83	447	74.0%
Claimant (not on RNTC)	1	11	24	26	2	-	4	38	106	17.5%
Non-claimant	-	35	-	2	-	-	-	2	39	6.5%
Compensation	-	1	4	3	-	-	1	3	12	2.0%
Total	**1**	**75**	**191**	**169**	**23**	**-**	**19**	**126**	**604**	
Total (%)	**0.2%**	**12.4%**	**31.6%**	**28.0%**	**3.8%**	**-**	**3.1%**	**20.9%**		**100%**

Determinations of native title

As at 30 June 2006, there were 604 applications seeking native title determinations in the native title system. 87 determinations of native title have been made, of which 60 recognise that native title exists. Of the 87 determinations, 51 were made by consent.

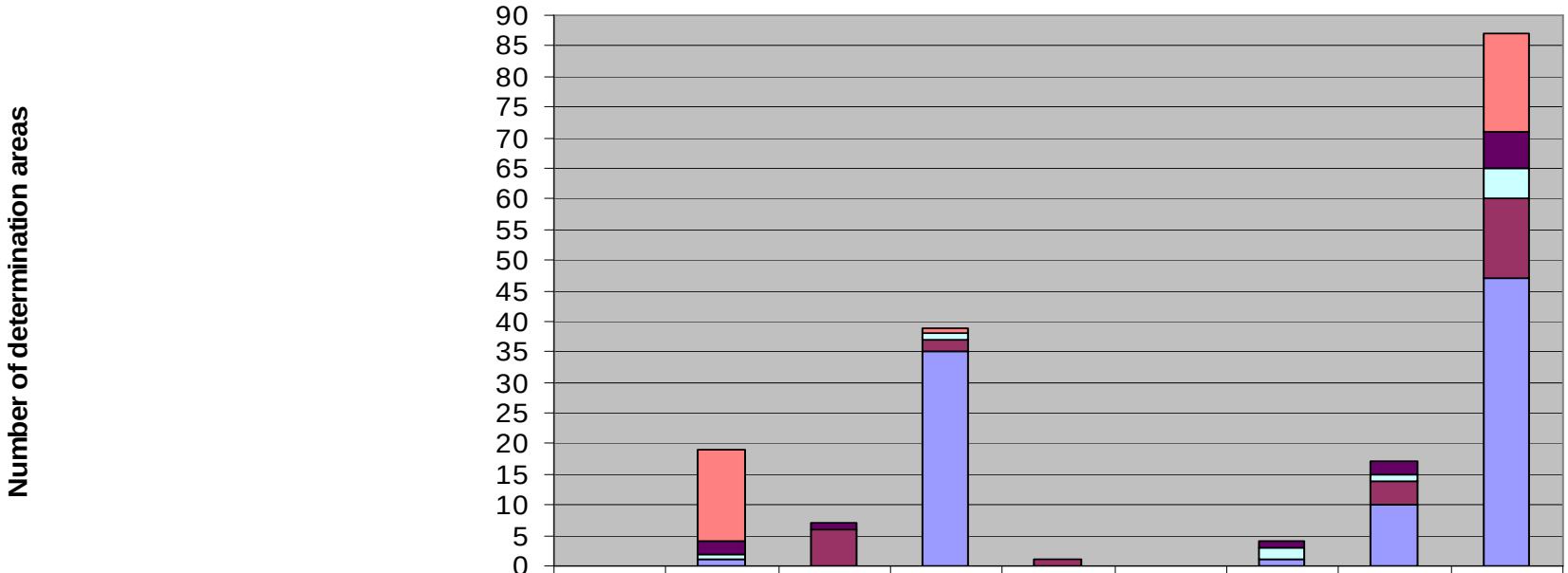
[1] Notes on Table 1 - Of the 447 claimant applications on the Register of Native Title Claims (RNTC), eight (8) were the subject of a determination of native title but remained on the RNTC pending determination of a Prescribed Body Corporate (so are therefore not fully resolved). Of the 106 applications not on the RNTC, 87 failed the registration test and 19 were yet to be tested. Of those 19 yet to be tested, zero (0) were combination applications.

Figure 1—Determinations of native title by financial year (registered as at 30 June 2006)



	1991-1992	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006
Non-Claimant - Unopposed			1			3	5	1	1	1	4
Non-Claimant - Consent							1				
Compensation - Litigated									1		
Claimant - Litigated	1			2	1	2	2		2	4	4
Claimant - Consent		1	1	3		14	5	1	2	11	13

Figure 2 —Outcomes of all registered determinations as at 30 June 2006



	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Total	0	19	7	39	1	0	4	17	87
Unopposed: Native title does not exist	0	15	0	1	0	0	0	0	16
Litigated: Native title does not exist	0	2	1	0	0	0	1	2	6
Consent: Native title does not exist	0	1	0	1	0	0	2	1	5
Litigated: Native title exists	0	0	6	2	1	0	0	4	13
Consent: Native title exists	0	1	0	35	0	0	1	10	47

Agreement-making

ILUAs have proven to be a popular option and facilitate a range of developments generating concrete benefits for Indigenous communities. As at 30 June 2006, there were 250 ILUAs on the Register kept by the National Native Title Tribunal.

Table 2—Registered ILUAs by State and Territory and subject matter (as at 30 June 2006)

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total	Total (%)
Exploration	-	1	14	29	1	-	1	-	**46**	**18.4%**
Mining	-	1	5	22	3	-	10	4	**45**	**18.0%**
Pipeline	-	-	-	4	-	-	3	-	**7**	**2.8%**
Development	-	1	33	8	2	-	5	-	**49**	**19.6%**
Infrastructure	-	1	2	47	-	-	-	1	**51**	**20.4%**
Extinguishment	-	-	1	4	-	-	3	-	**8**	**3.2%**
Access	-	-	1	10	2	-	-	-	**13**	**5.2%**
Government (tenure resolution)	-	-	2	5	-	-	-	-	**7**	**2.8%**
Community Living Area	-	-	18	1	-	-	-	-	**19**	**7.6%**
Petroleum/Gas	-	-	2	1	-	-	-	-	**3**	**1.2%**
Co-management	-	-	-	-	1	-	-	-	**1**	**0. 4%**
Fishing	-	1	-	-	-	-	-	-	**1**	**0.4%**
Total	**-**	**5**	**78**	**131**	**9**	**-**	**22**	**5**	**250**	
Total (%)	**0.0%**	**2.0%**	**31.2%**	**52.4%**	**3. 6%**	**0.0%**	**8.8%**	**2.0%**		**100%**

In addition to ILUAs, there are also many future act agreements, native title agreements and non-native title agreements being negotiated to resolve native title issues.

Table 3a—Overview of agreement-making (1 July 1994–30 June 2005)

	National Native Title Tribunal involvement		No National Native Title Tribunal involvement		Total	
	Number of cases	**Percent of cases**	**Number of cases**	**Percent of cases**	**Number of cases**	**Percent of cases**
Future Act Agreement (mining)	290	5.0%	4079	70.1%	4369	75.1%
Future Act Agreement (non-mining)	28	0.5%	74	1.3%	102	1.8%
Native Title Agreement or agreement leading to same	1098	18.9%	97	1.7%	1195	20.5%
Non-native title agreement	117	2.0%	37	0.6%	154	2.7%
Total	**1533**	**26.3%**	**4287**	**73.7%**	**5820**	**100%**

Data post 1 July 2005—see next page.

Table 3b—Overview of agreement-making (1 July 2005–30 June 2006)

	National Native Title Tribunal involvement		No National Native Title Tribunal involvement		Total	
	Number of cases	**Percent of cases**	**Number of cases**	**Percent of cases**	**Number of cases**	**Percent of cases**
2.1a—Fully concluded ILUA and use and access agreement negotiation	19	1.2%	1	0.1%	20	1.2%
2.1b—Milestone agreements in ILUA negotiation outside native title application mediation	37	2.2%	1	0.1%	38	2.3%
2.1c—Milestone agreements in ILUA negotiation within native title application mediation	132	8.0%	1	0.1%	133	8.1%
2.2a—Agreements that fully resolve native title applications	9	0.5%	2	0.1%	11	0.6%
2.2b—Agreement on issues, leading towards the resolution of native title applications	177	10.7%	4	0.2%	181	10.9%
2.2c—Process/framework agreement	237	14.4%	5	0.3%	242	14.7%
2.3a—Agreements that fully resolve future act applications	83	5.0%	881	53.4%	964	58.4%
2.3b—Milestones in future act mediations	62	3. 8%	0	0.0%	62	3.8%
Total	**756**	**45.8%**	**895**	**54.2%**	**1651**	**100%**

Notes on Tables 3a and 3b
The Tribunal amended its Outcome and Outputs framework in 2005–06 and some modifications were made to the classifications of agreements. Accordingly, the above table is in two parts—pre and post **1 July 2005**.

The Tribunal reports outputs relating only to agreements that are mediated by the Tribunal, although it collects certain other information relating to agreements. Tables 3a and 3b identify such agreements (not mediated by the Tribunal) brought to the Tribunal's attention. In addition to the agreements recorded by the Tribunal, there would be numerous agreements of which the Tribunal has no knowledge.

Native Title Claims Resolution Review

Graham Hiley RFD QC **Dr Ken Levy RFD**

31 March 2006

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LIST OF ACRONYMS

ADR	Alternative Dispute Resolution
AGD	Attorney-General's Department
ALRA	*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
ENE	Early Neutral Evaluation
IJLAD	Indigenous Justice and Legal Assistance Division, Attorney-General's Department
ILUA	Indigenous Land Use Agreement
NNTT	National Native Title Tribunal
NTA	*Native Title Act 1993* (Cth)
NTRB	Native Title Representative Body
NTU	Native Title Unit, Attorney-General's Department
PBC	Prescribed Body Corporate
OIPC	Office of Indigenous Policy Coordination, formally of the Department of Immigration and Multicultural and Indigenous Affairs but as of 27 January 2006, falls within the Department of Families, Community Services and Indigenous Affairs.

EXECUTIVE SUMMARY

1. This Report has been prepared for the Attorney-General in response to the Terms of Reference for the 'Review of the claims resolution process in the native title system'. The Report focuses on the process by which native title applications are resolved and examines the role and practices of the National Native Title Tribunal (NNTT) and the Federal Court of Australia. The purpose of the Report is to identify ways to improve the efficiency and effectiveness of the claims resolution process.

Chapter 1

2. Chapter 1 outlines the package of six inter-related reforms to the native title system announced by the Attorney-General on 7 September 2005. The package of reforms proposes changes to all key aspects of the native title system. This Review is one element of that package of reforms and aims to consider the role and practices of the Federal Court and NNTT.

Chapter 2

3. Chapter 2 sets out the Terms of Reference for this Review. It provides an overview of our interpretation of the Terms of Reference and summarises our discussion with the Attorney-General about the scope of the Terms of Reference. Chapter 2 also explains our interaction with the Steering Committee during the course of the Review.

Chapter 3

4. Chapter 3 outlines the consultation strategy for the Review. We consulted with a wide range of relevant organisations and individuals through personal meetings and telephone conferences. Written submissions were invited and received from a broad range of interested persons and groups. Chapter 3 also identifies other reference material that we drew upon in formulating our analysis and reaching our conclusions.

Chapter 4

5. Chapter 4 contains our analysis of important aspects of the existing native title system and identifies potential areas for improvement. Chapter 4 contains recommendations aimed at improving the efficiency and effectiveness of parts of the claims resolution process, some of which relate to the practices of the Federal Court and NNTT. Further recommendations are made regarding other participants in the native title system such as State and Territory governments, Native Title Representative Bodies (NTRBs) and third party respondents.

NNTT mediation

6. One of the key concerns raised during the course of the Review was the effectiveness of NNTT mediation. While mediation by the NNTT can be effective in some cases, many parties expressed dissatisfaction with the timeliness of NNTT mediation and the outcomes achieved through the mediation process. We concluded that a major factor inhibiting the effectiveness of NNTT mediation was the lack of statutory powers for the NNTT, which limit its ability to ensure that parties participate productively in the mediation process. We recommend that the *Native Title Act 1993* (Cth) (NTA) be amended to provide additional powers for the NNTT to improve its ability to effectively conduct mediation.

7. A further issue raised with us during the Review was that a matter can currently be referred to Court-annexed mediation while still in mediation with the NNTT. This duplication of mediation can lead to confusion and resource implications for parties. We recommend that mediation should not be carried out by more than one body at the one time. (See paragraphs 4.31 and 4.32 below.)

8. We also consider it would be beneficial for parties to mediation to be obliged to act in good faith and we recommend that the NTA be amended to impose this obligation.

Communication between the Federal Court and NNTT

9. 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. We make recommendations strongly encouraging the Court and the 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. We recommend increasing informal communication between the Court and NNTT, giving the NNTT a right to appear in certain court proceedings and strengthening the ability of the NNTT to report to the Court and obliging the Court to consider those reports.

Overlapping claims and inter-Indigenous and intra-Indigenous disputes

10. Overlapping claims and disputes between Indigenous groups can cause serious delays in negotiations towards resolving native title claims. We have identified several suggestions for dealing with overlapping claims. We also recommend amendments to clarify the authorisation provisions in the NTA.

Uncertainty

11. Another factor preventing parties from reaching negotiated outcomes is uncertainty about the claim and uncertainty about the law. Uncertainty about the claim arises from a lack of clarity in the claim documents about the area and rights claimed and about the identity of the claimants. This uncertainty makes it difficult to identify the correct parties to the claim and the main issues between the parties. We recommend that more details and better particulars be provided by parties at an early stage in proceedings.

12. While many of the main legal principles about native title have now been settled, the law is still being developed in relation to a number of important aspects. We recommend that greater use be made of the provisions in the NTA allowing particular issues of fact and law to be referred to the Court for determination.

Connection evidence and tenure research

13. Connection material is complex and can be costly and time-consuming to prepare. One mechanism to reduce the cost and time required to produce connection material would be to utilise the research services performed by the NNTT. The NNTT member presiding over mediation can request the preparation of a detailed report containing publicly available background material about a particular claim including ethnographic, anthropological and linguistic research. We consider these reports to be an important resource that would assist parties and recommend that they be circulated as widely as possible.

14. In addition to establishing connection, it is necessary to undertake research about the tenure status of the claimed land. Tenure research is required to establish the extent of any extinguishment

and identify the areas over which native title could be determined to exist. We recommend that State and Territory governments and NTRBs give priority to conducting tenure research at an early stage.

15. We also recommend that consideration be given to assisting the NNTT to continue to develop a database of current tenure information for use by all parties. This would assist parties to identify the current tenure status of the claimed land as early as possible.

Reducing the backlog of native title claims

16. It is necessary to consider ways to reduce the backlog of existing native title claimant applications, particularly claims that appear unlikely to proceed to determination. One way to address the backlog is to reduce the number of unregistered claims and claims lodged in response to a future act notice which are primarily aimed at obtaining procedural rights.

17. We recommend that the NTA be amended to require the Court to dismiss future act claims and unregistered claims in certain circumstances.

Third party respondents

18. There is a perception that some third party respondents take a disproportionately active role in a claim, despite having only a relatively minor interest. We recommend that consideration be given to limiting the participation of third parties to the extent of their interest and allowing industry bodies to become parties in certain circumstances. We also recommend that applications to remove parties be dealt with by Federal Court registrars where NNTT mediation discloses that the party does not have an interest in the claim.

Inquiries

19. There are potentially a wide range of matters that could be resolved through an inquiry conducted by the NNTT. Examples would include inquiries directed at resolving inter-Indigenous or intra-Indigenous disputes. We recommend a new inquiry function for the NNTT and that the President of the NNTT be empowered to direct the holding of such an inquiry. We also recommend that the Chief Justice be empowered to request the NNTT to conduct an inquiry into a particular issue or matter. We do not make any recommendations for amendments to section 137 of the NTA.

Other recommendations

20. Chapter 4 makes other recommendations about amendments to the NTA in relation to authorisation, notification and registration of claims. In addition, we recommend that the Court and parties be encouraged to make greater use of limited evidence and preservation hearings.

21. We also recommend that the Court be encouraged to prepare practice notes setting out its preferred methods for managing native title claims.

Options for institutional reform

22. Chapter 5 considers whether it would be desirable to re-assign functions between the Court and the NNTT. We have formed the view that there is a need for some institutional reform to facilitate more effective ways to resolve native title claims.

23. In the course of the Review, we considered a number of options for institutional reform which are set out in Chapter 5. We have reached different conclusions about which option would lead to the greatest improvement to the efficiency and effectiveness of the native title system.

24. Graham Hiley QC recommends that the Court be given greater flexibility in relation to the management of native title claims, particularly by being able to use various means of alternative dispute resolution (ADR), including the ability to decide when it is appropriate to refer a matter or issue to NNTT mediation.

25. Dr Ken Levy recommends that the current provisions in the NTA requiring the Court to refer matters to NNTT mediation be retained but that the Court be prohibited from conducting mediation while the matter remains with the NNTT.

Recommendations

Recommendation 1: That the NTA be amended to provide that, consistent with paragraphs 4.31 and 4.32, mediation should not be carried out by more than one body at the one time.

Recommendation 2: That the NNTT be given the following powers in relation to a matter referred to it by the Federal Court for mediation:

- to direct a party to attend or participate in a mediation conference
- to direct a party to produce documents for the purpose of mediation within a nominated period or by a nominated date
- to conduct a review of material provided by the applicant (or any other party) to establish whether the native title claim group has, by its traditional laws and customs, connection to the land or waters claimed
- to assess whether the material would support a determination of native title, and
- to provide that assessment to a party or parties to the proceeding (subject to an order under section 136F of the NTA).

Recommendation 3: That the NNTT be given a new inquiry function enabling the NNTT to collect evidence and make non-binding recommendations about overlapping claims and other inter-Indigenous and intra-Indigenous issues and about the kinds of matters covered by section 225.

After an application has been referred to the NNTT under section 86B of the NTA, the President of the NNTT should be empowered to, of his/her own motion or at the request of a party to the proceeding, direct that the Tribunal conduct an inquiry in relation to an issue that, if resolved, is likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application.

The President should be empowered to so direct where he/she is satisfied that:

- the applicant and other relevant parties would participate in the inquiry
- the issue is sufficiently important to justify an inquiry, and
- the results of the inquiry are likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application.

Before directing an inquiry (having regard to the fact that each application is a proceeding before the Federal Court), the President should be required to first consult with:

- the Chief Justice of the Federal Court
- the relevant NTRB (or body performing NTRB functions) for the relevant area
- the Commonwealth Minister
- the relevant State or Territory government, and
- the applicant of any affected native title application.

Such inquiries may be directed and conducted in relation to two or more applications where the same issue arises in relation to those applications.

Recommendation 4: That consideration be given to formulating a good faith obligation to be included in the NTA and developing a code of conduct for parties involved in native title mediations.

Recommendation 5: That the Court should convene regular user group meetings and regional call overs involving the NNTT. The NNTT and the Court should actively seek new methods of improving institutional communication.

Recommendation 6: The NTA should be amended to give the NNTT a right to appear before the Court and to provide assistance to the Court.

Recommendation 7: The NTA should be amended to require the Federal Court to take into account any report provided by the NNTT under section 136G of the NTA when considering whether to make an order in relation to an application that has been referred to the NNTT for mediation.

Recommendation 8: That the NNTT's reporting functions be expanded to enable the Court to obtain relevant feedback on a regional basis.

(i) The Court be empowered to request the NNTT to prepare a regional mediation progress report and/or a regional work plan in respect of a State, Territory or region. When so requested the NNTT must prepare such a report.

(ii) The NNTT may prepare a regional mediation progress report and/or a regional work plan in respect of a State, Territory or region to assist the Court in progressing the proceedings in the State, Territory or region.

Recommendation 9: That further consideration be given to how claims can be better particularised at an earlier stage of proceedings in order to assist in the identification of relevant issues. This may require applicants to file evidentiary material earlier, preferably at the time of lodging the application (or within a stipulated time thereafter, for example, where the application is made in response to a future act notice). The Court should consider making orders for pleadings or other kinds of particularisation. Consideration should also be given to amending the requirements of sections 61A and 62 regarding the Form 1.

Recommendation 10: More use should be made of the NNTT's research facilities and, in particular, its ability to produce research reports. In cases where the NNTT is requested to prepare a research report by the member conducting a mediation, the contents of the report should be

disclosed to any party who makes a request. These reports should be supplied following the exercise of a discretion of the presiding member and taking account of any special circumstances.

Recommendation 11: That further consideration be given to assisting the NNTT to continue to develop a database of current tenure material. This database should be publicly accessible to parties and their legal representatives.

Recommendation 12: That amendments be made to avoid the requirement for all amended applications to undergo the registration test again if the application has already passed the registration test. In particular, we recommend the following.

(i) An amended application should not to be subject to the registration test, unless the Court orders otherwise, where a claimant application is amended to:

- reduce the area of land or waters covered by the application
- reduce the list of asserted native title rights and interests, or
- remove the name of a deceased applicant where other applicants remain.

(ii) Where a claimant application is amended to replace a deceased person as applicant, the amended application is not to be subject to the registration test if the Native Title Registrar is satisfied that:

- the amendment has been certified by the relevant representative body, or
- the amended application was accompanied by an affidavit sworn by the new applicant stating that the new applicant is authorised by the other persons in the native title claim group to deal with matters arising in relation to the application and stating the basis on which the new applicant is so authorised (see subsections 64(5) and 190C(4)).

(iii) Where an amendment is made which is not to be subject of the registration test, the Native Title Registrar must amend the Register to reflect that amendment as soon as possible.

Recommendation 13: That amendments be made to the authorisation provisions in the NTA to remove ambiguities. For example, it seems appropriate to clarify whether:

- lack of authorisation is fatal to a claim
- authorisation that might have been defective can be later ratified or otherwise cured, and
- the registered native title claimants must be unanimous in giving instructions, executing agreements and otherwise, or whether a majority is sufficient, or whether some other rules should apply, for example, rules similar to those in sections 251A and 251B.

Recommendation 14: That the notification requirements in subsection 66(3) of the NTA be amended to provide the Court with greater flexibility in relation to who should be notified and as to when people are to be notified. In particular, we make the following recommendations.

(i) Section 66 should be amended to allow the Court to order notification of potentially affected interested holders at any time which it considers appropriate.

(ii) The President of the NNTT should be empowered to direct the Registrar not to notify an application under subsection 66(3) of the NTA where:

- a claimant application is lodged in response to a notice under section 29 of the NTA and is registration tested within four months of the notification day (see paragraph 30(1)(a) and subsection 190A(2)), and
- it is apparent that the application is primarily for the purpose of securing the right to negotiate.

If subsequently the President is satisfied that the application should be notified, the President should be required to direct the Registrar to notify the application under subsection 66(3).

Recommendation 15: The NTA should 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 NTA
- the future act has occurred, and
- the applicant has not produced connection material or sought to advance the substantive resolution of the application.

The Court should not be required to order a claimant application to be dismissed if there are compelling reasons not to do so.

Recommendation 16: The NTA should be amended to deal with the following claims as follows.

(i) Dealing with unregistered claimant applications: Where a new claimant application does not satisfy all of the conditions of the relevant part of the registration test in section 190B of the NTA (conditions about the merits of the claim), the Federal Court must order that the claim be dismissed unless the Court is satisfied that:

- the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period
- there are good prospects of a negotiated outcome, or
- there are other reasons why the application should not be dismissed.

In deciding whether an application should not be dismissed, the Court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material.

(ii) One year after the proposed amendments to the NTA commence to operate, the Native Title Registrar must apply the registration test to:

- all claimant applications that are not on the Register of Native Title Claims, and
- claimant applications that did not have to undergo the registration test.

The registration test should be re-applied (or applied as the case may be) to determine whether each application would satisfy all of the conditions of the relevant part of the registration test in section 190B of the NTA (conditions about the merits of the claim). If an application would not satisfy all those conditions, the Native Title Registrar must inform the applicant of the reasons why the application would not satisfy the conditions and invite the applicant to amend the application or provide additional information within a nominated period. If the application is not amended or the additional information is not provided, the Native Title Registrar must report to the Federal Court about the current status of the application and the reasons why it is not registered. Where the Court receives such a report from the Native Title Registrar, the Court must order that the claim be dismissed unless the Court is satisfied that:

- the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period
- there are good prospects of a negotiated outcome, or
- there are other reasons why the application should not be dismissed.

In deciding whether an application should not be dismissed, the Court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material.

Recommendation 17: That the NNTT and parties be encouraged to make greater use of the provisions in the NTA and of the Federal Court Rules such as Order 29 rule 2 to refer particular issues of fact and law to the Court for determination.

Recommendation 18: The NNTT should refer to the Federal Court for determination the question of whether a party should be removed if it considers that a party does not have a relevant interest. Such referral should be dealt with by a Court registrar under judge-delegated powers.

Recommendation 19: That consideration be given to amending the 'party' provisions of the NTA (section 84) to allow an industry body to intervene in a representative capacity if one or more of its members is or was otherwise entitled to be a party and wishes the industry body to represent him, her or them. This should be subject to the Court's discretion to refuse permission to intervene as appropriate, to allow intervention on terms, and to later remove the industry body if relevant circumstances change.

Recommendation 20: That consideration be given to limiting the right of participation of a third party (that is, a non-government respondent party) to issues that are relevant to its interests and the way in which they may be affected by the determination sought.

Recommendation 21: That the Court and other relevant participants be encouraged to give greater priority to the holding of limited evidence and preservation hearings, coupled with contemporaneous dispute resolution.

Recommendation 22: That section 137 of the NTA not be amended.

Recommendation 23: That the NTA be amended to empower the Chief Justice to request that the NNTT hold an inquiry of the kind outlined in Recommendation 3, subject to the President's consideration of the availability of resources and the likely workload of the proposed inquiry.

Recommendation 24: That the Court be encouraged to adopt a practice note setting out the Court's preferred method for managing native title claims to ensure all parties have a shared understanding of the process.

1. INTRODUCTION

1.1. This Report responds to the Terms of Reference for the 'Review of the claims resolution process in the native title system' (see paragraph 2.1).

1.2. The Claims Resolution Review (the Review) was established by the Commonwealth Attorney-General, the Honourable Philip Ruddock MP, to report on the effectiveness of the processes for resolving native title claims.

1.3. This Review is one of six inter-related reviews or measures to identify improvements for the native title system, as announced by the Attorney-General on 7 September 2005. These are:

- measures to improve the effectiveness of NTRBs
- reform of the native title non-claimants (respondents) financial assistance program to encourage agreement-making rather than litigation
- the preparation of exposure draft legislation for consultation on possible technical amendments to the NTA designed to improve existing processes for native title litigation and negotiations
- an independent review of native title claims resolution processes to consider how the NNTT and the Federal Court may work more effectively in managing and resolving native title claims
- consultation with relevant stakeholders on measures to encourage the effective functioning of Prescribed Bodies Corporate (PBCs), the bodies established to manage native title once it is recognised, and
- increased dialogue and consultation with the State and Territory governments to promote and encourage more transparent practices in the resolution of native title issues.

1.4. The Claims Resolution Review is the fourth element of the reform package mentioned in paragraph 1.3. The role, responsibilities and general approach of the Consultants in this Review are outlined in the Terms of Reference released by the Attorney-General on 17 October 2005 (see paragraph 2.1).

1.5. At the outset, we wish to acknowledge that we were provided with an excellent and comprehensive brief by the Attorney-General's Department (AGD) of the relevant characteristics of the native title system and a summary of many of the key authorities in the development of the native title system. AGD's efforts in this regard were greatly appreciated.

2. TERMS OF REFERENCE

2.1. The Terms of Reference issued by the Attorney-General are as follows:

'Review of the claims resolution process in the native title system

Terms of Reference

Purpose

The Review will focus on the process by which native title applications are resolved. It will 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 (the Act).

The Review will consider how native title claims can be most efficiently and effectively resolved. The Review will assess how the NNTT and the Court can maximise the potential for native title claims to be resolved in a quicker and less resource-intensive manner, primarily through mediation and agreement-making, and where appropriate with a greater degree of consistency in the manner in which claims are handled.

Objectives

The Review will examine and report on the relationship between the NNTT and the Court and consider:

- *the dispute-resolution functions of the Court and the NNTT under the Act and the effectiveness and efficiency of each body in performing those functions*
- *how the Court and the NNTT processes can be improved in order to encourage agreement-making to resolve native title claims in preference to full litigation of claims, as well as to reduce the amount of time and resources taken to resolve native title matters whether in negotiation or litigation*
- *whether greater consistency of practice, both within and between the Court and the NNTT, is desirable and achievable*
- *whether, and if so the extent to which, there is a duplication of functions between the NNTT and the Court under the Act and in practice*
- *whether there is a need to clarify and/or reassign the functions of the Court and the NNTT to maximise the effectiveness and efficiency of the relationship in order to encourage greater outcomes from the native title system or whether there is any capacity for greater flexibility in the allocation of functions between the two bodies or in the roles they play in particular claims, and*
- *how the gathering of evidence in the native title claim process can best be undertaken, and what roles the NNTT and the Court should play in this process. In looking at this issue, the Review should consider whether and in what circumstances the inquiry power under section 137 of the Act can be used to enable the more effective disposition of claims.*

Methodology

The work of the Review is to be undertaken by one or more independent consultants.

The consultancy is to be advised and overseen by a Steering Committee comprising:

- *a representative of the Attorney-General's Department, who will chair the Committee*
- *a representative of the Office of Indigenous Policy Coordination in the Department of Immigration and Multicultural and Indigenous Affairs*
- *the Registrar of the Federal Court, and*
- *the President or a member of the National Native Title Tribunal.*

Consultation

Relevant bodies and individuals will be consulted and invited to provide submissions.

Reporting

The report will be provided to the Attorney-General by the end of March 2006.'

2.2. The general thrust of this Review, differentiated from the other five elements of the package of reforms to the native title system,[1] is to examine the role and practices of the NNTT and the Federal Court in the current processes for resolving claims and to attempt to identify ways of improving the efficiency and effectiveness of the claims resolution process.

2.3. On 22 November 2005, we met with the Attorney-General to discuss the scope of the Terms of Reference. It is apparent from that meeting that the Attorney-General seeks us to:

- enquire into the processes of the Federal Court and NNTT to identify areas of potential 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.

We were to have regard to the fact that:

- substantive rights are not to be reduced
- any improvements should be achieved within the existing framework of the present NTA as far as practicable, and
- accountability and objective measures are to be highly regarded as part of the system.

2.4. We understand that our main role is to review the existing NNTT and Federal Court processes and to make recommendations as to how they might be modified in order to resolve outstanding claims more quickly and cheaply, preferably by agreement. We proceed on the basis that the main intent is to dispose of claims made under the NTA by way of determinations made under section 225, preferably consent determinations pursuant to section 87.

2.5. This Report focuses on the Terms of Reference. However, we are conscious that any change must ultimately be considered in the context of the other measures in the package of potential

[1] See paragraph 1.3 above.

reforms initiated by the Attorney-General and that, because of its inter-related operation, the native title system will only be as strong as the weakest link in the system.

2.6. Many of the issues and options overlap with areas being considered as part of the other reforms announced by the Attorney-General. We understand that suggestions that relate to other elements of the reform package have been referred to the relevant reviewing body. These are mentioned in this Report for consideration by the Attorney-General in the context of this Review.

2.7. In addition to receiving oral and written submissions during the course of the Review, we have had the benefit of testing ideas, submissions and our own analysis with the Steering Committee. The Steering Committee has played a significant role in providing feedback and focusing and streamlining the final Report. The members of the Steering Committee are listed at Appendix 1.

2.8. We were not able to reach agreement on the inclusion of, and emphasis given to, all of the material in this Report. We each have a preference for different options for institutional reform. We have included explanations of our different perspectives in Chapter 6.

3. APPROACH METHODOLOGY

3.1. Following the public announcement of the Review by the Attorney-General, relevant organisations and individuals were notified of the Review and a website was created.[2] This was established so that stakeholders would have a point of contact if required.

3.2. A Secretariat was established by AGD to support us in the administration and logistic functions associated with the Review. The Secretariat also accompanied us during the course of interviews and provided secretarial support.

3.3. Oral consultations were conducted with a number of people throughout Australia. Specifically, we consulted representatives of State and Territory governments, private legal practitioners, NTRBs, industry groups, the Federal Court (officers and judges) and the NNTT (staff and members). The persons consulted are listed at Appendix 2. Some of those consulted were suggested by one of the Consultants on the basis of his knowledge of native title practitioners.

3.4. We endeavoured to consult with relevant organisations and individuals personally or through telephone meetings. We also initiated contact with some relevant groups where we considered it necessary to obtain a broader range of views. However, time constraints imposed limits on the people with whom we could meet and the time able to be spent in such meetings.

3.5. The public were invited to make written submissions to the Review. A 'Guide to Submissions' was published on the Review website providing details of the key issues that the Review would consider. People making submissions were encouraged to provide supporting details and examples to provide us with objective information and to enable the magnitude of issues and proposals to be assessed in perspective. Those who provided written submissions are listed in Appendix 3.

3.6. The general thrust of the written submissions was similar to the information gathered during the face to face or telephone consultations. However, new and different dimensions of the problems, or the options which might be considered, were received in some of the written submissions. We have taken into account all information received in our analysis and in forming our conclusions and recommendations.

3.7. We have considered the Thurtell Report[3] (and the Court's Response), which examined certain parts of the Court's practices in more detail, and also the Parliamentary Joint Committee's Report on the effectiveness of the NNTT[4] and the Government's Response.

3.8. This Report analyses the key issues identified during the consultations and in the written submissions and suggests a range of options for further consideration. These issues have been the subject of detailed consideration with a view to identifying options which might directly answer the Terms of Reference.

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[2] <http://www.ag.gov.au/claimsresolutionreview>.

[3] J Thurtell, *Review of Practice and Procedure in the Conduct of On Country Hearings in Native Title Cases for the Federal Court of Australia*, March 2004.

[4] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report into the Effectiveness of the National Native Title Tribunal*, December 2003, <http://www.aph.gov.au/senate/committee/ntlf_ctte/completed_inquiries/2002-04/nat_nattitle_trib/index.htm>.

4. CURRENT SYSTEM AND POTENTIAL FOR REFORM

4.1. From the information provided to us, it is apparent that some of the difficulties experienced by practitioners reflect their professional backgrounds and the parts of the native title system in which they work. However, there are some system deficiencies which, regardless of individual or institutional leaning, contribute to delays in processing native title matters.

4.2. It is generally agreed that the 1998 amendments to the NTA gave greater certainty and endeavoured to provide a basis for agreement-making in an efficient way as opposed to more lengthy court-related resolution. However, only a relatively small number of claims have been resolved by agreement (see paragraph 4.12). There are significant opportunities to improve the efficiency and effectiveness of the claims resolution process. Some of the issues contributing to the inefficiency of the current process are discussed below.

4.3. A number of aspects of the claim process indicate a tendency for the process to be inefficient. For example, failing to identify the issues required for mediation or for resolution by the Court is a common complaint. Such a fundamental difficulty may result in wastage of resources early in the process because of the extra effort required to deal with the most basic aspects of the claim and work which may be performed unnecessarily. Also, it is often unclear in the early stages of a claim whether the claim encompasses a particular area of land. This can cause concern to landowners who are not sure whether or not their land falls within the claim area. Determination of the tenure history of the land involved is also an important and time-consuming task. Likewise, many applications do not clearly identify the people on whose behalf the claim is made, thus sometimes creating uncertainty on the part of some Indigenous people as to whether or not they are included.

4.4. It seems that many of the informational requirements for proving a native title claim are almost never obtained until the matter is well progressed or is being set down for hearing by the Court.

4.5. Finding authoritative information about connection and extinguishment can be very time-consuming and expensive. Information relating to tenure is another important area of information and this can also be difficult, time-consuming and expensive. State governments have been reluctant to give priority to tenure history work, particularly where there are overlapping claims or where the claim appears weak. It would be highly beneficial if a way was found to give priority to the acquisition of this material.

Funding and general outcomes to date

4.6. Over the past nine financial years (1997-98 to 2005-06), the Commonwealth allocated over $900 million to native title. This amount does not include the amounts expended by State and Territory governments. However, there have only been 81 determinations to date and over 600 other claims remain.

4.7. A detailed breakdown of Commonwealth funding for 2001-02 to 2005-06 is set out below.

	2001-02	2002-03	2003-04	2004-05	2005-06	**Total**
	$m	$m	$m	$m	$m	**$m**
AGD (NTU)	4.9	5.7	5.9	5.4	6.6	**28.5**
AGD (IJLAD)	6.0	8.05	9.89	6.99	7.7	**38.63**
OIPC[5]	50.9	52.5	53.9	52.5	56.4	**266.2**
Federal Court[6]	9.9	10.6	10.55	11.4	9.7	**52.15**
NNTT	28.4	29.6	32.0	33.8	31.9	**155.7**
Total	**100.1**	**106.45**	**112.24**	**110.09**	**112.3**	**541.18**

4.8. There is clearly significant government funding provided to the native title system. However, it is not within our Terms of Reference to make any assessment of the adequacy of the level of funding.

4.9. As at 17 January 2006, the following claims are recorded:

- total number of native title applications filed – 1683
- total number resolved, discontinued, withdrawn or combined – 1062, and
- current applications – 621.

4.10. Most of the 1062 matters mentioned above which have been 'resolved, discontinued, withdrawn or combined', were lodged with the NNTT prior to 30 September 1998 but were discontinued, withdrawn or combined following the 1998 amendments.

4.11. As at 17 January 2006, there were 621 active claims, of which 571 were claimant applications, 37 were non-claimant applications and 13 were compensation applications. As at 1 January 2006, 356 claims had been referred to the NNTT for mediation. Of those, 272 (approximately 76%) had formally been in NNTT mediation for more than three years and 170 (just under 48%) for more than five years. (We understand that not every application that has been referred to the NNTT for mediation is being actively mediated. The NNTT has advised that many such applications are not being substantively mediated and that much work needs to be done in relation to numerous applications before mediation with respondent parties will occur.[7])

4.12. As at 17 January 2006, 81 determinations had been made. Forty-eight of these determinations were made by consent, 16 were unopposed and 17 were litigated. Fifty-six determinations recognise that native title exists in all or part of the relevant determination areas and 25 determine that native title does not exist in the determination area. Of the 48 consent determinations, 32 have been made in Queensland (24 in respect of islands in the Torres Strait), 10 in Western Australia, three in Victoria, two in New South Wales and one in the Northern Territory.

4.13. Seventeen of the determinations were made following hearings in the Federal Court, some lengthy and expensive. One of them was made by consent after the hearing had commenced but before the Court had to rule on it.[8] Another was made after the hearings had concluded but before

[5] OIPC figures include ATSIC and ATSIS supplementation in 2001-02 to 2004-05.
[6] 2004-05 figures for NNTT and Federal Court are estimates only.
[7] See NNTT *Annual Report 2004-05*, page 9.
[8] *Smith v WA* (2000) 104 FCR 494.

the Court delivered its reasons.[9] Three others were made by consent at the appeals level (that is, after substantive hearings, judgments and appeals).[10]

4.14. There are currently 46 Federal Court judges. Of those, 27 currently have one or more native title matters substantively allocated to them. Overall, 30 judges have been responsible for hearing native title claims (including claimant applications, non-claimant applications, compensation and appeals). As at 21 February 2006, there have been a total of 1164 hearing days in the Federal Court in native title hearings (including litigated hearings, consent hearings, non-claimant hearings, preservation of evidence hearings and a compensation hearing.) We do not have comparable information about the time spent by NNTT members in NNTT mediations.

4.15. Relevant statistics about current applications as at 17 January 2006 are as follows.

Table 1: Current native title applications

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Claimant	1	34	201	171	25	0	16	123	571
Compensation	0	1	5	3	0	0	1	3	13
Non-claimant	0	34	0	1	0	0	0	2	37
Sub-Total	1	69	206	175	25	0	17	128	621

Table 2: History of current native title claims – year of lodgement

	1994 - 1998	1999	2000	2001	2002	2003	2004	2005	Total
No of claims lodged	207	80	54	104	56	24	35	50	610

Table 3: History of current native title claims – year filed with or referred to NNTT for mediation

	1995	1996	1997	1998	1999	2000	2001	2002	Jan 2003 - June 2004	July 2004 - now	Total
No of claims referred to NNTT mediation	4	8	24	69	33	32	49	53	57	27	356

4.16. Another area of significant activity in the native title system is agreement-making. As at 17 January 2006, there were 231 registered Indigenous Land Use Agreements (ILUAs) and over 6000 other agreements which relate to native title. Many of those agreements deal with issues other than native title (such as cultural heritage issues) and provide alternative outcomes.

[9] *Karajarri Peoples (Nangkiriny v State of Western Australia* [2004] FCA 1156 (8 September 2004)).

[10] *Ward* (Western Australia), *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 (9 December 2003)*; Ward* (Northern Territory), *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 (9 December 2003)*; Wandarang v NT, Alawa, Marra and Ngalakan Peoples v Northern Territory* [2004] FCAFC 187 (3 June 2004).

4.17. 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.

Litigation

4.18. The process of finalising a native title claim is often complex. This is partly due to the nature of the evidence required. Claims often require anthropological, archaeological, genealogical, historical, linguistic and other areas of research and expertise. Tenure research is also necessary to determine whether native title may have been extinguished as provided by the NTA. This research is also often time-consuming, costly and complex.

4.19. Since the 1998 amendments to the NTA, the Court has been bound by the rules of evidence (except to the extent that the Court otherwise orders).[11] Trials, while small in number, have generally been lengthy in terms of hearing time, number of preliminary hearings and time for judgment writing. In particular, a number of the trials in the early days of the development of native title jurisprudence took a significant amount of time including for example, *Yorta Yorta*[12] (114 hearing days) and *Ward*[13] (83 hearing days). Some trials have also been lengthy and complex because of inter-Indigenous and intra-Indigenous disputes, for example, *Daniel,*[14] *Rubibi,*[15] *Wongatha* and *Larrakia*.

4.20. The NNTT has advised in this context.

- Trials are 'procedurally complex and factually difficult.'[16] *Daniel* commenced in September 1999 and was decided in July 2003 (delayed because of pending High Court decision in *Ward* between December 2000 and February 2003).
- In *Daniel*, leave was sought to reopen the case. Supplementary reasons were subsequently delivered resulting in a final determination on 2 May 2005. There were 81 hearing days in this trial.
- In *Wongatha*, the NTRB had a deficit of $532,228 in respect of the total budget of $2,502,427.[17]
- In *Wongatha*, the NTRB indicated to Lindgren J that its funding would be exhausted by the trial and that it would have to be finalised with parties being legally unrepresented.[18]

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[11] Section 82.

[12] *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606. Olney J heard 201 witnesses and the transcript of evidence amounted to 11,664 pages.

[13] *Ward v Western Australia* (1998) 159 ALR 483. The unsatisfactory nature of the litigation was specifically commented on by McHugh J in *Western Australia v Ward* (2002) 213 CLR 1 in the following terms (at page 240, paragraph 560): 'the current state of the law can hardly be described as satisfactory. The present case took eighty-three days to hear in the first instance and fifteen days on appeal to the Full Court of the Federal Court. The orders of the majority Justices in these appeals now send the case back to the Federal Court to further hearing. Further evidence may be taken, and further litigation in this Court is a possibility.'

[14] *Daniel v Western Australia* [2005] FCA 536.

[15] *Rubibi Community v Western Australia* (2001) 114 FCR 523.

[16] *Sampi v Western Australia* [2005] FCA 777 at paragraph 2.

[17] *Harrington-Smith v Western Australia (No.6)* [2003] FCA 663 at paragraph 17.

[18] *Harrington-Smith v Western Australia (No.6)* [2003] FCA 663 at paragraphs 18 to 30.

- The *Wongatha* matter is still in trial mode and has been so for almost four years. A number of factors appear to have lead to the length of the hearing to date, including that there have been 30 expert reports filed and 1426 separate objections.
- In *Wongatha*, Lindgren J said:

> I do not regard the statement, or, for that matter, what I am now saying, as relevant to the issues raised by the motion, but it is appropriate for the Court once again to draw to the parties' attention the desirability that mediation be fully explored.[19]

Olney J in *Yorta Yorta* said:

> The time and expense expended in the preparation and presentation of a large part of the evidence has proved to be unproductive, a circumstance which calls into question the suitability of the processes of adversary litigation for the purpose of determining matters relating to native title.[20]

O'Loughlin J has also commented on the potential for inadequate evidence, noting that the Court depends on the evidence placed before it by Counsel 'without the Court knowing whether it is the totality of the evidence that is available on the subject.'[21]

- The Full Federal Court in *Ward* welcomed agreement by the parties:

> As we have seen, native title litigation tends to be inordinately slow and expensive. … Neither the general community, nor the main participants in native title litigation, the Land Councils and the State governments, can afford litigation of all of the outstanding native title claims (currently about 550); or even a substantial proportion of them.[22]

4.21. More recently, a number of cases have been disposed of in relatively short periods of time, including *Blue Mud Bay*[23] (14.5 hearing days) and *Timber Creek* (18 hearing days). The applicants' evidence in the *Perth Metropolitan portion* of the *Single Noongar Claim* was heard in four weeks.

4.22. However, despite improvements in trial management techniques, it is possible that future native title trials may be lengthy and expensive, particularly where they involve overlapping claims.

Mediation

4.23. Native title mediation is fundamentally different from mediation conducted in other areas. In other types of mediation, the parties almost invariably have a prior relationship and the facts and history of the dispute will be well known to them. In native title mediation, there is usually no pre-existing relationship and the history and facts to be mediated are often not clear to the parties for a considerable time. Other factors that can complicate native title mediations are overlapping claims, vague or poorly drawn claims, a shortage of resources and a lack of will to progress a claim.

4.24. NNTT mediation can be positive and effective. When the Court makes a determination under section 225, it does no more than determine whether there is native title and, if so, where it

[19] *Harrington-Smith v Western Australia (No.6)* [2003] FCA 663 at paragraph 49.
[20] *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at paragraph 130.
[21] *De Rose v State of South Australia* [2002] FCA 1342 (1 November 2002) at paragraph 144.
[22] *Attorney-General of the Northern Territory v Ward* (2003) 134 FCR 16, introductory statement of the Court per Wilcox, North and Weinberg JJ.
[23] *Gawirrin Gumana v Northern Territory of Australia* (No 2) [2005] FCA 1425 (11 October 2005).

exists and who holds what rights. The added value of mediation is that it can resolve how those rights operate in practice.

4.25. The NNTT performs a number of other roles that can contribute to achieving mediated outcomes, such as mapping, legal services, publications, information workshops and training. The NNTT also produces research reports about particular claims at the request of individual members. We were very impressed with the sample that we were shown.

4.26. Some parties hold concerns about a perceived conflict between the various roles of the NNTT in assisting applicants to prepare claims in order to comply with the registration test, administering the registration test, dealing with future acts and mediating a resolution between the parties. However, it is important to distinguish between the administrative and support staff of the NNTT and the members of the NNTT, both of whom carry out their functions independently of each other.

4.27. Legally qualified mediators in this jurisdiction are sometimes perceived as having greater chances of success than non-legally qualified mediators. However, we consider that the wide range of issues sometimes encountered in native title mediation requires people with a broad range of skills to be available to conduct mediations.[24] For some mediations the President of the NNTT will appoint two members, one with legal skills and another with whatever other particular skill is required for that task. NNTT mediators also have access to a wide range of other NNTT staff who have various other skills. Therefore, we do not recommend that all NNTT mediators be required to be legally trained.

Duplication of mediation by the Federal Court and NNTT

4.28. Native title mediation seems to be at the centre of many of the complaints about the ineffectiveness of the system. 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.

4.29. The NNTT has contended that it was intended to have an exclusive role under the NTA to conduct mediations in native title matters and that the Federal Court does not have the power to conduct mediation in native title matters. However, the Court's view is that, although the NTA does not express a role for the Federal Court in native title mediation, the Court can refer a native title matter to mediation under the general power in section 53A of the *Federal Court of Australia Act 1976*. While section 86C of the NTA enables the Court to take matters out of NNTT mediation, it seems that this is only intended to occur when there is no prospect of the matter being successfully mediated. Therefore, the Federal Court does not necessarily remove matters from NNTT mediation prior to referring them to Court-annexed mediation. This has resulted in confusion as a single matter may be mediated by both institutions at the same time.

4.30. It was suggested to us that there is some pressure on parties by members of both the Court and the NNTT to have mediation conducted by the respective institution and that the two

[24] This need is also reflected in various provisions in the NTA including section 110 and subsections 124(2) and 131A(2).

institutions are now operating in competition with one another. This is not a healthy sign for cooperative effort. It also allows for parties to attempt to engage in 'forum shopping'.

4.31. We both agree that mediation should not be duplicated. However, we have differing views as to whether different parts of a matter ('issues') should ever be the subject of dispute resolution ('mediated') before two or more different bodies, albeit at the same time. Graham Hiley QC considers that there may well be matters, parts of which might best be 'mediated' by one body while other parts are being 'mediated' by another. For example, in a particular matter, issues regarding connection might be dealt with in NNTT mediation while issues concerning the existence, validity and extinguishing effect of public works might be mediated by someone else. On the other hand, Dr Ken Levy considers that a matter should always be 'mediated' in whole by a single body, and that different parts ('issues') should not be referred to different bodies (at the one time). Accordingly, we are only able to jointly recommend what is common ground between us, namely that the same issue should not be mediated by more than one body at one time. We say more about this in our separate comments below.

4.32. However, we agree that if Option 1 or Option 2 (in Chapter 5) is adopted, it would not be appropriate for the same matter to be mediated by more than one body at one time. If Option 3 (in Chapter 5) is adopted, it would not be appropriate for the same issue to be mediated by more than one body at one time.

Recommendation 1: That the NTA be amended to provide that, consistent with paragraphs 4.31 and 4.32, mediation should not be carried out by more than one body at the one time.

NNTT mediation powers

4.33. There is a perception that the NNTT has insufficient legislative powers of compulsion (for example, the power to compel people to attend at mediation conferences and to produce documents) to effectively conduct mediation. 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.

4.34. By comparison with the Court, the lack of these powers for the NNTT in relation to its mediation function under the NTA is apparent. The Parliament intended in the pre-1998 legislation that the NNTT would have powers to be an effective mediation institution. However, since *Brandy v Human Rights and Equal Opportunity Commission*[25] and the consequential amendments to the NTA in 1998, we believe that the NNTT's present powers are inadequate for it to effectively perform its mediation role.

Recommendation 2: That the NNTT be given the following powers in relation to a matter referred to it by the Federal Court for mediation:

- to direct a party to attend or participate in a mediation conference
- to direct a party to produce documents for the purpose of mediation within a nominated period or by a nominated date

[25] (1995) 183 CLR 245.

- to conduct a review of material provided by the applicant (or any other party) to establish whether the native title claim group has, by its traditional laws and customs, connection to the land or waters claimed
- to assess whether the material would support a determination of native title, and
- to provide that assessment to a party or parties to the proceeding (subject to an order under section 136F of the NTA).

New NNTT inquiry power

4.35. There are potentially a wide range of matters that could be the subject of an inquiry by the NNTT with a view to achieving an earlier and more efficient resolution of some aspects of or even whole claims. These could include inquiries into overlapping claims, authorisation and other kinds of inter-Indigenous and intra-Indigenous disputes.

4.36. The NNTT has suggested that it be given the power to conduct inquiries directed at the resolution of particular native title claims. This would be an additional function to section 137 inquiries (discussed later in paragraph 4.148) and would be initiated by the President rather than the Minister. It is proposed that the President should have a power to direct an inquiry into an issue which, if resolved, might be likely to lead to the parties agreeing to action which would result in the application being withdrawn or amended in such a way as to advance its resolution. As the application would formally be an application before the Federal Court, the NNTT proposes that the President should first consult with the Chief Justice of the Federal Court, the relevant representative body, the Commonwealth Minister, the relevant State or Territory government and the applicant in any affected native title application.

4.37. Whilst the NNTT would not be able to make binding decisions, it could at least hear the relevant evidence and make recommendations. Even where the parties are not prepared to accept the recommendations, the evidence and recommendations could be put before the Court via section 86, saving the Court the time and expense that would otherwise be involved in hearing that evidence.

4.38. We consider that this proposal is a useful and sensible one. The adoption of such a proposal would require amendments to the NTA conferring the relevant power upon the President as well as consequential amendments to Division 5 of Part 6.

Recommendation 3: That the NNTT be given a new inquiry function enabling the NNTT to collect evidence and make non-binding recommendations about overlapping claims and other inter-Indigenous and intra-Indigenous issues and about the kinds of matters covered by section 225.

After an application has been referred to the NNTT under section 86B of the NTA, the President of the NNTT should be empowered to, of his/her own motion or at the request of a party to the proceeding, direct that the NNTT conduct an inquiry in relation to an issue that, if resolved, is likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application.

The President should be empowered to so direct where he/she is satisfied that:

- the applicant and other relevant parties would participate in the inquiry
- the issue is sufficiently important to justify an inquiry, and

- the results of the inquiry are likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application.

Before directing an inquiry (having regard to the fact that each application is a proceeding before the Federal Court), the President should be required to first consult with:

- the Chief Justice of the Federal Court
- the relevant NTRB (or body performing NTRB functions) for the relevant area
- the Commonwealth Minister
- the relevant State or Territory government, and
- the applicant of any affected native title application.

Such inquiries may be directed and conducted in relation to two or more applications where the same issue arises in relation to those applications.

Obligation to mediate in good faith

4.39. It has been reliably reported that there is a growing tendency for parties to mediation to exhibit a lack of good faith during mediation. One option to increase the effectiveness of mediation is to impose a requirement that those formally participating in mediation act in good faith. We consider that the obligation to mediate in good faith should apply to all parties, including applicants, governments, third parties, representative bodies and lawyers or other persons acting on a party's behalf. A good faith obligation exists in relation to ADR ordered under section 34A of the *Administrative Appeals Tribunal Act 1975* (Cth).

4.40. It would be preferable to include this good faith obligation in the NTA. To assist in ensuring that parties know what the good faith obligation requires, a code of conduct for all involved in mediation of native title matters, including legal practitioners, could be formulated. Parties could then be required to mediate in accordance with the behaviour and ethical principles set out in the code of conduct. We believe that a code of conduct should not have statutory force but should be a statement of best practice.

4.41. A code of conduct could be developed by a working party comprised of AGD, the Federal Court, the NNTT, the Office of Indigenous Policy Coordination (OIPC) and the Law Council of Australia.

4.42. A number of issues would need to be considered before these proposals could be implemented, including:

- the consequences of breaching the good faith obligation or a code of conduct, including how allegations of bad faith should be dealt with, and
- how to ensure procedural fairness, in particular, how a party could defend an allegation of bad faith where the allegation arose out of conduct during a confidential NNTT mediation.

Recommendation 4: That consideration be given to formulating a good faith obligation to be included in the NTA and developing a code of conduct for parties involved in native title mediations.

Communication between the Federal Court and NNTT

4.43. The Federal Court and NNTT have been key institutions in the resolution of native title claims since 1994, although their roles changed significantly after the 1998 amendments to the NTA. Since the 1998 amendments, claims are commenced in the Federal Court and remain Court proceedings even when they are referred to mediation with the NNTT under section 86B. This means that claims are subject to the ongoing management of the relevant Federal Court judge, who may make orders setting timeframes for the provision of connection information, the hearing of early or preservation evidence or Court-annexed mediation. This can occur in parallel with the NNTT's mediation process and timeframes.

4.44. 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. Whilst most of the mechanisms noted below have already been utilised by some judges, we consider that there is room for greater uniformity across the country.

4.45. One way to improve coordination between the Court and the NNTT is to increase informal communication between the relevant members of the two institutions about the management of particular claims and about managing native title claims generally. For example, the Court could convene more regular user group meetings with the NNTT to discuss likely approaches to the resolution of claims, including consideration of possible ADR options for particular claims. These user group meetings offer an opportunity for the Court and NNTT to discuss their views about how cases are progressing and possible improvements to the process for resolving claims.

4.46. We also believe it is beneficial for the Court to convene regular regional call overs, including the Provisional Docket Judge, Substantive Docket Judge, the NNTT and other parties. These call overs provide an opportunity to discuss the status and progress of each claim in a region and future options for resolving the claim. It is important for the Court to consider the progress of NNTT mediation in a particular claim when considering future options for its resolution.

4.47. There may be other ways to improve communication between the Court and NNTT, for example, regular liaison meetings and informal communication between the Chief Justice, Provisional Docket Judges and the President and members of the NNTT. We encourage the Court and the NNTT to actively seek mechanisms to improve communication between the institutions in order to coordinate the approach to resolving native title claims and to reduce the cost imposition on parties of meeting competing demands and complying with inconsistent timeframes.

Recommendation 5: That the Court should convene regular user group meetings and regional call overs involving the NNTT. The NNTT and the Court should actively seek new methods of improving institutional communication.

NNTT participation in Court proceedings

4.48. We believe that the litigation process could be more efficient if the NNTT played a more active role in Court hearings, primarily in relation to matters that are the subject of NNTT mediation. The NNTT could assist by advising the Court of particular issues hindering mediation, regional issues and mediation strategies and priorities. The NNTT could also play a role in

explaining mediation work plans and progress towards achieving mediated outcomes. The NNTT could provide information to the Court about future timeframes for mediation. This would assist the Court to set realistic deadlines in its orders and may assist parties to use their limited resources more effectively.

4.49. However, we do not consider it necessary for the NNTT to be a party. The NNTT does not have an interest in the litigation as do other parties. Party status could interfere with the NNTT's role as an independent mediator, and may inhibit the ability of the two institutions to coordinate their activities. We think it is preferable for the NTA to be amended to provide the NNTT with a right to appear before the Court and to assist the Court, in effect as amicus curiae. It is desirable to enshrine this right in the NTA to ensure that Federal Court judges take a consistent approach to the participation of the NNTT in Court proceedings. We understand that practices vary between judges.

Recommendation 6: The NTA should be amended to give the NNTT a right to appear before the Court and to provide assistance to the Court.

NNTT reports to the Federal Court

4.50. Under section 136G of the NTA, the relevant NNTT member may provide a written report to the Federal Court setting out the progress of the mediation if the member thinks that this information would assist the Court in progressing the proceeding. Section 86E allows the Court to request a report from the NNTT about the progress of mediation.

4.51. The NNTT has developed practices for providing reports to the Court without breaching the confidentiality of the parties. The reports inform the Court of the stage which NNTT mediation has reached, whether there are obstacles or anticipated delays to a mediated outcome and the prospects of a mediated outcome being reached. These reports are undoubtedly a useful resource and provide important information to the Court about the status and prospects of NNTT mediation. However, we understand that Federal Court judges around Australia do not take a uniform approach to accepting or considering these reports.

4.52. We consider that section 136G currently provides sufficient basis for the NNTT to generate mediation reports where the member believes that the report would assist the Court. Similarly, section 86E provides sufficient power to the Court to request such reports. However, there is currently no obligation on the Court to accept reports prepared by the NNTT under sections 136G or 86E or to take the report into account when considering appropriate orders or directions. Such an obligation would ensure that the Court has considered all relevant information about a claim before making orders and directions.

4.53. We also consider it essential for the NNTT to be able to report to the Court frankly about the prospects of the NNTT mediation and any specific obstacles to a mediated outcome without breaching the confidentiality of the mediation process. In this regard, consideration should be given to whether it is advisable and possible to amend the confidentiality provisions of the NTA to enable the NNTT to report more fully and frankly about the prospects of mediation. This should assist the Court to decide whether to utilise any other dispute resolution options to seek to resolve the claim.

4.54. It may be appropriate to amend section 136G to impose an obligation on the Federal Court to take into account any report provided by the NNTT in deciding whether to make orders.

Recommendation 7: The NTA should be amended to require the Federal Court to take into account any report provided by the NNTT under section 136G of the NTA when considering whether to make an order in relation to an application that has been referred to the NNTT for mediation.

4.55. In addition to reports prepared under sections 136G and 86E, we understand that the NNTT currently produces regional work plans and regional mediation progress reports. This process has been developed to provide the Court with regional information and to form the basis of Court orders, progress assessments and future planning. For example, the regional reports provide information to the Court about regional anthropological research, the resources available to parties, prioritisation of applications by the major parties and the involvement of parties in other negotiations or proceedings that might affect their ability to engage fully in a particular mediation.

4.56. We consider it appropriate for the NNTT to be expressly empowered to prepare regional work plans and regional mediation reports, and for the Court to be able to request the NNTT to prepare such reports. The NNTT should continue to generate these reports for the Court's consideration. If the Court wishes to order the production of regional work plans or regional mediation reports, it should request these reports from the NNTT.

Recommendation 8: That the NNTT's reporting functions be expanded to enable the Court to obtain relevant feedback on a regional basis.

(i) The Court be empowered to request the NNTT to prepare a regional mediation progress report and/or a regional work plan in respect of a State, Territory or region. When so requested the NNTT must prepare such a report.

(ii) The NNTT may prepare a regional mediation progress report and/or a regional work plan in respect of a State, Territory or region to assist the Court in progressing the proceedings in the State, Territory or region.

Overlapping claims

4.57. Overlapping claims invariably result in extensive delays and make it very difficult for negotiations to proceed, even where the parties are willing to do so.[26] The NTA does not prevent overlapping claims from being made. Indeed, the NTA permits more than one group to pass the registration test over common land, thereby conferring significant procedural rights on the registered claimants. This creates little incentive for the overlaps to be resolved or for claims to be amended to resolve overlaps.

4.58. The NTA contains a structure which should be generally effective to deal with overlaps in a hierarchical way. In the first instance, NTRBs should seek to resolve overlaps using their dispute resolution functions under section 203BF or with NNTT assistance requested under subsection 203BK(3). The NNTT can also seek to resolve overlaps during mediation. Finally, the Court can seek to resolve overlaps through Court-annexed mediation or by resolving a matter of fact or law referred to it by the NNTT under subsection 136D(1).

[26] Competing claims have been responsible for much of the Court time involved in some of the lengthy cases so far, for example, *Wongatha, Rubibi (Rubibi Community v Western Australia* (2001) 114 FCR 523*), Ngarluma / Yindjibarndi (Daniel v Western Australia* [2005] FCA 536), and *Larrakia.*

4.59. We are aware that at least one NTRB has a practice of requiring claimant groups to enter into agreements which reflect their agreed (non-overlapping) boundaries and refusing to lodge overlapping claims. However, the NTA does not prevent another group from lodging an overlapping claim.

4.60. Some States require overlaps to be resolved before commencing settlement negotiations. This may be because States prefer to direct their resources to single claims with no overlaps which are more likely to be resolved by agreement.

4.61. We are aware that NTRBs, the NNTT and Federal Court registrars have all attempted to resolve overlapping claims with limited success. It is not clear whether any of these bodies is better equipped than others to attempt such resolution. NTRBs have some 'clout' in that they can refuse to support a recalcitrant group, the NNTT has excellent resource facilities and Federal Court registrars are seen as having strong powers to encourage resolution and to make orders giving effect to such resolution.

4.62. There appear to have been successful resolutions in recent times in parts of at least five complex matters – Spear Creek (South Australia), Dieri Mitha (South Australia), the Ceduna cluster (South Australia), Mitchell (south-west Queensland) and the Kalkadoon cluster (north-west Queensland). These negotiations involved the relevant claimants and other advisors, including anthropologists, lawyers and mediators. The NNTT and Federal Court played varying roles in several of these resolutions.

4.63. A number of the options listed below are already being utilised to some extent. However, it may be helpful for us to identify possible suggestions for dealing with future disputes regarding overlapping claims. The suggestions include:

(a) performing historical research, mapping and geospatial work in relation to the land subject of the overlap – the NNTT has demonstrated an expertise in these areas and may well be the ideal body to perform that work if the relevant NTRB does not wish to or cannot do it

(b) engaging an independent anthropologist to provide advice[27]

(c) NTRBs arranging a meeting of the competing claimants, hopefully attended by senior elders with respect and authority, preferably in the relevant country

(d) having relevant experts attend the meeting to assist – these might include one or more competent and respected mediators, an independent anthropologist and lawyer, and mapping and geospatial experts such as those employed by the NNTT

(e) requesting the Attorney-General to order an inquiry under section 137 involving the competing groups in the hope that they might accept the recommendations made

(f) empowering the NNTT to conduct an inquiry of a similar kind to that envisaged by section 137, namely where the participants can be limited, for example, to the competing claimant groups, in the hope that they might accept recommendations made[28]

[27] This has happened in relation to the Kalkadoon cluster claims. The conclusions of the anthropologists engaged by the NTRB have been accepted by the NTRB and nearly all of the claim groups.

[28] See paragraph 4.35.

(g) recording any agreement reached and arranging for it to be reflected in amendments to the claim, and

(h) where agreement cannot be reached, the Court could require the competing groups to exchange pleadings to identify the real issues in dispute and consider referring the dispute to trial, perhaps on a limited evidence basis.

Uncertainty about the claim

4.64. Another reason often advanced for an inability to proceed towards the resolution of a claim has been uncertainty about the claim.

4.65. It can be difficult for parties to obtain sufficient specific information about the claim. Despite the apparent intent of section 62, the information provided in the application which initiates the proceeding (the Form 1) is often vague and insufficient to enable other parties to know:

(a) precisely what land is being claimed, particularly in 'boundary' claims (that is, claims where the claimants claim all land within an outer boundary that has not been the subject of complete extinguishment except in cases where section 47A or section 47B applies)

(b) precisely what native title rights are claimed over particular areas of land, and

(c) the basis upon which it is said that the claimants hold the native title.

4.66. This is the kind of information that is now routinely ordered by the Court. However, those orders are rarely (if ever) made until the Court has decided to progress the matter towards trial.

4.67. It would be beneficial for such information or 'particulars' to be provided earlier in the process, preferably at the time when, or soon after, the application is filed. This would assist parties, particularly those with limited interests, to better assess whether they need to participate in the process and, if so, how actively they should participate.

4.68. We believe it would be helpful for the Court to order parties to prepare pleadings and/or particulars earlier in the process, preferably before mediation commences or during the early stages of mediation. This would assist the parties, the Court and the NNTT to:

(a) isolate the main issues between the parties

(b) identify areas which require more research, information and/or evidence

(c) facilitate the mediation process, and

(d) in the case of third party respondents and their funding bodies, to know to what extent they need to participate.

4.69. Pro forma points of claim/particulars could be drafted to save parties from the expense of starting from scratch.

4.70. Intensive case management could be used to narrow the areas of dispute that require further research, mediation or litigation. It may be desirable to require parties to:

(a) review and amend their pleadings and the relief sought as they become more informed – for example, applicants should be encouraged to more clearly identify what land is claimed and what native title rights and interests are pressed and respondents should be encouraged to make admissions where possible, and

(b) make concessions (or justify a refusal to make concessions) in light of relevant case law, for example, sea claims following *Yarmirr*[29] and pastoral claims following *Neowarra*.

4.71. It may be desirable to reconsider the current formal requirements in section 62 and the current Form 1 in light of *Yorta Yorta* and subsequent decisions. For example, amendments could require better and earlier identification of the claim group, the society to which they belong, the facts and circumstances relied upon to show continuity of the society since sovereignty, their current connection to the land and their acknowledgment and observance of traditional laws and customs.

4.72. Amendments might also be considered in relation to how the claim area is described, for example, to require a 'lot-specific' description, rather than the more common 'boundary' description. This would enable third parties to know precisely whether or not land in which they have a relevant interest is subject to the claim. The courts have been reluctant to interpret section 62 as requiring such detail, as some of the necessary information (for example, detail regarding historic extinguishment) may not be within the knowledge of the claimants. Now that the law regarding extinguishment and the operation of sections 47A and 47B is more settled, it could be appropriate to review these formal requirements. The resource implications of requiring applicants to provide lot-specific descriptions of claims would need to be considered as part of such a review.

4.73. However, we have noted the recent NNTT views that a requirement that all claims be lot-specific would be impractical in many cases and may carry some negative consequences, including:

- a risk that some groups would make a series of claims as various lots are identified (with associated implications for registration testing, notification and mediation), and

- the potential loss of significant procedural rights to some groups of Indigenous people under other legislation, such as the *Aboriginal Cultural Heritage Act 2003* (Qld).

4.74. There is merit to the suggestion that applicants should be required to file their evidentiary material earlier, if not at the time of lodging their application, then within a specified time thereafter. However, it would not be appropriate to require such information to be filed with an application which is filed in response to a future act notice. This would involve amendments to the NTA (probably section 62) and consequential changes to the relevant forms. While it is difficult to identify an appropriate, effective and fair sanction in the event of non-compliance, the introduction of such a requirement may nevertheless be worthwhile.[30]

4.75. Other ways to facilitate the earlier provision of information about the claim might include:

(a) requiring witness statements, affidavits or other notices which identify the main evidence relied upon, and

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[29] *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1.

[30] Little would be achieved by striking out the claim (using section 84C) and Parliament may be reluctant to tighten up the registration test if the effect would be to render it more difficult to pass in circumstances where the applicants are unable to obtain the necessary legal and other assistance to satisfy such evidentiary requirements.

(b) designing a standard set of 'particulars' required to be provided either at time of application or within a certain time after that, possibly before registration.

Recommendation 9: That further consideration be given to how claims can be better particularised at an earlier stage of proceedings in order to assist in the identification of relevant issues. This may require applicants to file evidentiary material earlier, preferably at the time of lodging the application (or within a stipulated time thereafter, for example, where the application is made in response to a future act notice). The Court should consider making orders for pleadings or other kinds of particularisation. Consideration should also be given to amending the requirements of sections 61A and 62 regarding the Form 1.

Connection evidence and tenure research

4.76. Connection is usually the most controversial issue in a native title matter and therefore occupies most of the time and resources of all participants in the process. Proving the relevant pre-sovereignty society and its continued existence, and relevant connection to the land by the claimants and their ancestors is usually difficult, particularly where sovereignty occurred more than 200 years ago. Proof of this important part of connection has usually been achieved by the engagement of historians and anthropologists to research and write reports on these aspects.

4.77. A matter can be in the Court lists for many years before the claimants provide evidence regarding connection. In most cases, connection evidence is not produced to the Court and all parties until a matter seems likely to proceed to trial. An exception occurs where there has been a preservation of evidence hearing or a hearing of limited evidence, during which the parties are able to gain a fairly good idea of the strength or otherwise of the claimants' connection.

4.78. Other issues that can delay the consideration or acceptance of connection material include:

(a) the resources and priority given by State and Territory governments to assessing the connection material

(b) the requirements of connection guidelines or other procedures adopted by State and Territory governments, and

(c) the availability of connection material to other respondents.

4.79. Connection reports are often long, detailed and prepared as an academic research report and are not necessarily in a form which is admissible under the rules of evidence. Such reports can take a long time to complete and involve significant cost.

4.80. In addition to the time taken to prepare connection reports, there is also a real shortage of competent anthropologists, who are often highly qualified professionals with qualifications at the Masters and Doctorate levels. We were advised that their reports are nevertheless then checked or reviewed in State government departments, often by relatively junior and inexperienced anthropologists or other officers with even less expertise.

4.81. The reports of anthropologists have come under particular scrutiny over the last few years. In one recent matter the Court ruled a long and detailed anthropologist's report inadmissible. If such a report can be rejected after a long period of research and preparation, then the time and cost involved in employing anthropologists is open to question unless more care is taken in the preparation of expert reports to ensure that they are admissible.

NNTT research facilities

4.82. Much of the work often done by anthropologists and historians can be undertaken by research staff within the NNTT. The NNTT research staff produce detailed 'background reports' at the request of the member conducting the mediation. The reports compile extensive publicly available background material about a particular claim or claim area. We were shown an example which included extensive ethnographic material (including diaries and other records of early explorers, settlers and government officers) and extracts from previous anthropological and linguistic research (for example, extracts from Professor Tindale's works). It included records regarding particular people and groups, some of whom appeared to be ancestors of the claimants. Apart from revealing genealogical links between the claimants and their ancestors at the time of early settlement, material of this kind provides the basis for conclusions regarding the relevant society and the observance of traditional laws and customs until the present time.

4.83. Anthropologists and historians spend a lot of their time locating material of this kind, before proceeding to formulate their expert opinions. Further, this research is usually undertaken by experts engaged by both the claimants and the State, and sometimes also by third parties. Therefore there is much duplication of effort, time and expense and consequent shortage of experts available to provide expert advice and reports.

4.84. Much of this effort, time and cost could be reduced if the NNTT's research facilities, particularly research reports, were made available to claimants and other parties at an early stage, albeit with a disclaimer as to accuracy. We consider that such material could be of considerable assistance to applicants and the other parties.

4.85. The provision of such material would not, of course, prevent a party from supplementing that research. However, consideration could be given to requiring the NNTT and the Court to treat such information as reliable evidence, unless contradicted by other materials provided by one or other of the parties.

Recommendation 10: More use should be made of the NNTT's research facilities and, in particular, its ability to produce research reports. In cases where the NNTT is requested to prepare a research report by the member conducting a mediation, the contents of the report should be disclosed to any party who makes a request. These reports should be supplied following the exercise of a discretion of the presiding member and taking account of any special circumstances.

Tenure research

4.86. Tenure research is also a fundamental task which should be completed as early as possible. It would be preferable for this to be done prior to a claim being lodged, but often it is not done until much later. It may be prudent for State and Territory governments to target their resources towards determining the tenure history of the area claimed at an early stage.

4.87. However, the ability of parties to undertake tenure research is very much dependent upon the way in which the relevant State or Territory has recorded tenure information (ever since it began making grants) and upon the accessibility of such materials even to its own officers. Other relevant factors include the way in which the claim area is described in the application and how far back one needs to search before finding the tenure which has had the greatest extinguishing effect. In at least two States, affidavit evidence has been filed attesting to the enormous time and resources required to carry out tenure research for particular large claims.

4.88. Establishing connection and conducting tenure research are dependent upon resources being available to the parties, particularly the claimants in relation to connection and governments in relation to tenure. There is little that the Court or NNTT can do to direct such expenditure, except to prioritise matters and make orders that are achievable and otherwise fair to the parties.[31]

4.89. It will not necessarily be cost-effective to divert valuable resources to establishing the tenure status of land in a claim where connection is unlikely to be established. The possible application of sections 47A or 47B may also be relevant.

4.90. The NNTT has been able to obtain access to some current tenure material in most States and could make it available to claimants and other interested parties. However, the NNTT is reliant on receiving accurate and comprehensive tenure information from each State and Territory. The NNTT has been developing a national database of current land tenure records. However, supporting documents and files associated with the creation of each tenure and information regarding historic tenure remains with the State and Territory agencies and these are not always readily accessible within their own information systems.

4.91. Any database of current tenure maintained by the NNTT would not necessarily be up-to-date and complete. It would be a guide but not a register, and people may need to make their own inquiries to verify that information. As noted above, it is sometimes difficult to obtain historical tenure information from States and Territories. Despite these obstacles, we consider that there is great value in the NNTT continuing to develop a database of tenure material for use by all parties as it would assist them to identify the current tenure status of the claimed land as early as possible.

Recommendation 11: That further consideration be given to assisting the NNTT to continue to develop a database of current tenure material. This database should be publicly accessible to parties and their legal representatives.

Re-registration after amendment of claim

4.92. The requirement for an amended application to be re-submitted for registration[32] acts as a disincentive for claimants to amend their claim. Claimants are unlikely to amend their claim, even to make important concessions such as withdrawing overlaps or removing claims for rights that may not be sustainable (for example, claims for exclusive possession in relation to the sea, or over land subject of a grant inconsistent with exclusive possession). The requirement also presents a problem where an applicant dies and should be removed from the record. We consider that not every amendment should have to be re-submitted for registration.

4.93. There have been many occasions where claimants have been prepared to make concessions, for example, after mediation or after receiving better evidence and/or advice, which would promote the resolution of their claim. However, there has been an understandable reluctance to formalise these concessions by making the appropriate amendments to the claim in case they fail the registration test the next time and therefore lose their procedural rights.

[31] In this regard, the Court should consider other claims which may also be imposing demands upon the resources of the same NTRB or the same State.

[32] See subsections 64(4) and 190A(1).

4.94. AGD has issued a discussion paper on technical amendments to the NTA which addresses this issue.[33] The paper proposes that some amendments to applications should no longer trigger the registration test. It is proposed that section 190A of the NTA be amended to provide that amendments to claims to reduce the area covered by the claim, to remove the name(s) of deceased claimants from the application, or to make purely procedural changes such as changing the address for service, will not trigger the registration test. It is also proposed that section 190 be amended to provide that the details on the Register of Native Title Claims of applications which are amended but are not required to go through the registration test again are updated, to ensure that all parties are aware of any changes. We agree with these proposals.

4.95. Another approach might be to amend section 190A to:

(a) specify types of amendments that must be the subject of re-testing (for example, if the claimants seek to expand the rights claimed, or expand the identity of the claim group)

(b) specify types of amendments which do not have to be re-tested (for example, to reduce the area claimed, reduce the kind of native title rights claimed, or to remove the name of a deceased applicant), and

(c) give the Court a discretion to decide whether or not other types of amendments should be re-tested.

4.96. Consideration can also given to amending the NTA to provide that re-registration would only be necessary where:

(a) the registered rights and interests are expanded, or

(b) the constitution of the claim group is expanded.

4.97. We have considered these approaches and propose the course outlined in Recommendation 12 below.

Recommendation 12: That amendments be made to avoid the requirement for all amended applications to undergo the registration test again if the application has already passed the registration test. In particular, we recommend the following.

(i) An amended application should not to be subject to the registration test, unless the Court orders otherwise, where a claimant application is amended to:

- reduce the area of land or waters covered by the application
- reduce the list of asserted native title rights and interests, or
- remove the name of a deceased applicant where other applicants remain.

(ii) Where a claimant application is amended to replace a deceased person as applicant, the amended application is not to be subject to the registration test if the Native Title Registrar is satisfied that:

- the amendment has been certified by the relevant representative body, or

[33] Attorney-General's Department, *Technical amendments to the Native Title Act 1993 Discussion Paper*, November 2005, <http://www.ag.gov.au/nativetitlesystemreform>.

- the amended application was accompanied by an affidavit sworn by the new applicant stating that the new applicant is authorised by the other persons in the native title claim group to deal with matters arising in relation to the application and stating the basis on which the new applicant is so authorised (see subsections 64(5) and 190C(4)).

(iii) Where an amendment is made which is not to be subject of the registration test, the Native Title Registrar must amend the Register to reflect that amendment as soon as possible.

Authorisation and inter-Indigenous and intra-Indigenous disputes

4.98. Another impediment to the resolution of claims arises from disputes between Indigenous people on questions such as authority to act on behalf of the group, and disputes both within and between groups.

4.99. Difficult issues have arisen as a result of the authorisation requirements in the NTA. [34] These issues arise at various stages in the process including authorisation of the claim itself, authorisation of important changes for example, to the named applicants (section 66B) and authorisation of agreements including ILUAs. Although the NTA has attempted to clarify how such acts should be authorised,[35] considerable frustration remains with the processes which appear necessary for compliance. For example, many section 66B applications have failed despite considerable resources having been spent on authorisation meetings.

4.100. Although section 84C empowers the Court to strike out an application that has not been properly authorised, there is doubt as to whether the lack of authorisation renders the claim invalid and is thus fatal to the claim, and as to whether defective authorisation can later be rectified in some way. There is also doubt as to whether the registered native title claimants must be unanimous in giving instructions, executing agreements and otherwise, or whether a majority is sufficient, or whether some other rules should apply, for example, rules similar to those in sections 251A and 251B.

4.101. Disputes can arise within a claim group, sometimes between two or more sub-groups and sometimes between two or more registered native title claimants. Disputes can also arise between a claim group and other Indigenous people who might also assert a claim to the same area.

4.102. Such disputes commonly occur in the process of agreement-making, and even after agreements have been made with the registered native title claimant. Although a large number of agreements reached to date confer non-native title benefits on the parties, for example, upon registered native title claimants on the one hand, and mining companies or government on the other, few have resolved the underlying native title claims.[36] Consequently there have been numerous disputes between registered native title claimants and other Indigenous people who claim to hold native title rights, where the latter claim that their interests have not been recognised in such agreements and that they are not receiving the benefits conferred under the agreement. Such disputes have been the basis of many of the section 66B applications before the Court.[37]

[34] See also discussion in *Davidson v Fesl* [2005] FCAFC 183 and article by Graham Hiley QC, *How Important is Authorisation* in [2005] 7 NTN 83.
[35] See sections 251A and 251B.
[36] See, for example, NNTT *Annual Report 2002 – 2003*, p 25.
[37] Examples are the *Gubbi Gubbi #2* matter (Spender J) and the *Noble* matters (Spender J, Dowsett J and the Full Court).

4.103. These problems result from the fact that until a determination is made there is room for dispute about who the native title holders are and whether their interests are being protected by the registered native title claimants.

4.104. At the heart of many of these issues is the process by which the applicants are authorised to have the carriage of the proceeding. It is necessary for competent legal advice to be provided about the constitution and conduct of meetings convened for the purpose of authorising applications or substituting applicants. The relevant NTRB is able to provide such advice. However, disputes about the membership of claim groups can arise even where the most competent advice has been provided. Appropriate amendments to the NTA in relation to these matters may enable parties to reach agreements with greater confidence that they will be binding and effective.

Recommendation 13: That amendments be made to the authorisation provisions in the NTA to remove ambiguities. For example, it seems appropriate to clarify whether:

- lack of authorisation is fatal to a claim
- authorisation that might have been defective can be later ratified or otherwise cured, and
- the registered native title claimants must be unanimous in giving instructions, executing agreements and otherwise, or whether a majority is sufficient, or whether some other rules should apply, for example, rules similar to those in sections 251A and 251B.

Lack of resources

4.105. Lack of adequate funding, especially for claimants, is a common cited reason for claims not progressing. As claimants must perform much of the preliminary work, resource constraints can limit their ability to carry out such work as quickly and thoroughly as others might wish.

4.106. Some of those consulted raised concerns about the lack of competent and experienced lawyers and other support people, including anthropologists, linguists and other experts. This lack of experienced professionals, coupled with uncertainty about the law, has resulted in the inefficient use of resources both in mediations and hearings. This may also have contributed to hearings being much longer than they should have been.

4.107. It is essential that NTRBs are properly resourced so that they can engage experienced lawyers, anthropologists and other experts to ensure that those resources which they do have are efficiently used. Some good examples of the efficient use of such resources during trials include *Yarmirr* (where the parties accepted virtually all of the experts' material without challenge), *Blue Mud Bay* (where the applicants only called a sample of key witnesses, the respondents consented to much of their evidence being tendered in written form and the parties accepted virtually all of the experts' material without challenge, following a conference of experts) and more recently the hearing of the *Single Noongar* claim (where the Indigenous and expert evidence for the purpose of the Perth portion of the claim was completed in four weeks)

4.108. Facilities such as the NNTT's assistance services, especially the research reports noted above, could also be used to avoid unnecessary duplication of work and of resources.

4.109. Rigorous case management, and perhaps the use of pleadings, may also assist to narrow the issues in dispute and focus resources on resolving the key issues. We understand that a number of matters in the Northern Territory have been conducted efficiently as a result of clear definition and narrowing of the issues before trial. However, we are cognisant of the fact that the Northern Territory jurisdiction has had the benefit of an experienced government, Land Councils, lawyers

and other participants involved in land claims since 1977 under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) and complementary legislation. We are not confident that these efficiencies could be easily replicated in other States or Territories in the short term, but much can be learnt from the processes that have been used in those matters.

Notification requirements

4.110. It appears that the notification requirements of subsection 66(3) coupled with paragraph 66(6)(a) have caused difficulties in several respects. First, because paragraph 66(6)(a) prohibits the Registrar from notifying a claim until after the registration test has applied, avoidable delays occur before interested (potential) parties become aware of the claim and before the Court can attempt to settle the party list or feels able to take other steps towards advancing the matter.

4.111. Secondly, the requirement of subparagraph 66(3)(a)(iv) that the Registrar notify any person who held a proprietary interest in the area subject of the claim (subject to the exception in subsection 66(5)) also leads to delays, particularly where the claim is a large 'boundary' claim, due to the extensive tenure enquiries that need to be carried out. This occurs mainly because not all proprietary interests are readily identifiable by searching the land titles register. For example, searching the land titles register will not disclose licences and short term leases.

4.112. It has been suggested that section 66 should be amended to allow the Court to order notification of potential affected interested holders at a time appropriate to the proceeding. We presume that this suggestion relates to persons falling within subparagraph 66(3)(a)(iv). This amendment could avoid the cost and delays associated with the present notification regime, particularly where the Court may wish to take other steps which would not concern such third parties before involving them. For example, the Court may first decide to attempt to narrow the issues by referring an overlap issue to mediation or some other form of dispute resolution, by ordering further particulars, or by requiring particular tenure research to be carried out in order to clarify the extent of the claim.

4.113. A further suggestion was that the NNTT should be able to delay notifying a claim where the claim is made solely for the purpose of obtaining procedural rights, for example, in response to a section 29 notice.

4.114. The NTA currently requires the Native Title Registrar to notify the relevant State or Territory Minister and the relevant NTRB as soon as practicable after he or she receives a claim from the Registrar of the Federal Court – that is, soon after the claim is filed.[38] However, other potentially interested persons are not entitled to be formally notified until after the registration test has been performed. This can take some time.

4.115. In most cases the identity of the other persons referred to in subparagraphs 66(3)(a)(i) to (iii), (v) and (vi) would be readily ascertainable and they could and should be notified earlier. It is also likely that the identity of any person with a major proprietary interest (such as a person whose title is registered on the relevant State's land titles register) in the land could be readily ascertained and that the relevant State could advise the Court of that person's interest and monitor the need to notify that person of his or her right to become a party.

4.116. We consider that greater flexibility in the notification requirements will have the following advantages.

[38] Subsections 66(2) and (2A).

- It will enable the Court to make directions earlier in the matter where such directions only concern the claimants and the State, for example, regarding resolution of overlaps and/or clarification of the claim.
- It may avoid the cost to the NNTT and the State in having to carry out extensive enquiries as to the holders of minor proprietary interests.
- It will save potential third parties (and funding bodies such as AGD) the expense associated with having to seek advice, apply to the Court to become a party and participate in directions hearings where their interests will not be affected by proposed orders.

4.117. This may mean that notifications will be given by the Native Title Registrar at different times with the consequence of there being several 'notification dates'.

4.118. In addition, we consider that the Court should have the power to order notification of any particular person at any stage of the matter, and also to order the dispensation or deferral of notification of persons covered by subparagraph 66(3)(a)(iv) in whole or in part (for example, in relation to classes of persons holding certain minor interests) in a particular matter.

Recommendation 14: That the notification requirements in subsection 66(3) of the NTA be amended to provide the Court with greater flexibility in relation to who should be notified and as to when people are to be notified. In particular, we make the following recommendations.

(i) Section 66 should be amended to allow the Court to order notification of potentially affected interested holders at any time which it considers appropriate.

(ii) The President of the NNTT should be empowered to direct the Registrar not to notify an application under subsection 66(3) of the NTA where:

- a claimant application is lodged in response to a notice under section 29 of the NTA and is registration tested within four months of the notification day (see paragraph 30(1)(a) and subsection 190A(2)), and
- it is apparent that the application is primarily for the purpose of securing the right to negotiate.

If subsequently the President is satisfied that the application should be notified, the President should be required to direct the Registrar to notify the application under subsection 66(3).

Reducing the backlog of native title claims

4.119. As mentioned in paragraph 4.17, the majority of likely claimant applications appear to have been lodged already. Therefore, a key challenge for the native title system is dealing with the backlog of claims.

Lack of incentive to proceed

4.120. A large number of claims (about one-third) appear to have been lodged in response to future act notices (future act claims). Many future act claims were only lodged to obtain procedural rights, with no current desire to proceed to a determination of native title. In many cases the claim remains although the relevant acts which prompted the claim have already been done.

4.121. Once future act claims are registered, there appears to be little incentive for the claimants to seek to progress their claim – indeed there is considerable risk that the claim will not be successful and the claimants will lose the procedural rights conferred by registration of the claim. Registration under the NTA can also confer procedural rights under other legislation, such as the *Aboriginal Cultural Heritage Act 2003* (Qld). Registration also gives claimants a basis for holding themselves out as the traditional owners of the relevant land.

4.122. Where there appears to be no desire on the part of the applicant (or anyone else) to proceed with the claim and no real prospect of the claim proceeding any further, there is no point in actively managing the claim towards a determination. The time and resources of the Court, the NTRB, the NNTT and other parties should not be used for claims that the applicants do not wish to progress. Those claims are sometimes placed into an 'abeyance list' or otherwise not progressed.

4.123. We consider that the Court should be required to dismiss these claims unless satisfied that there are compelling reasons not to do so. We are aware that many parties are reluctant to seek the dismissal of such claims due to their desire to maintain good relations with the applicants. We believe that the NTA should be amended to require the Court to dismiss future act claims on its own initiative where the future act has been completed and the applicants have not sought to progress the claim, for example, by providing connection material.

Recommendation 15: The NTA should 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 NTA
- the future act has occurred, and
- the applicant has not produced connection material or sought to advance the substantive resolution of the application.

The Court should not be required to order a claimant application to be dismissed if there are compelling reasons not to do so.

Unregistered claims

4.124. Another method of reducing the backlog of native title claims would be to reconsider some unregistered claims.

4.125. We think it is appropriate for the Federal Court to be required to dismiss new claimant applications that do not pass the merits component of the registration test contained in section 190B[39] unless the Court is satisfied that additional information will be provided to meet the conditions of the registration test. In deciding whether an application should not be dismissed, the Court could have regard to the reasons of the Native Title Registrar or delegate and any other relevant material. This proposal would not apply to claimant applications that failed any of the registration conditions about procedural and other matters (section 190C).

4.126. In relation to current claimant applications that are not on the Register of Native Title Claims, we think the NTA should be amended to require the NNTT to re-apply the registration test to applications which have previously failed the registration test and to apply the test to applications that did not have to undergo the registration test. The registration test should be re-applied (or applied) one year after the relevant changes to the NTA are enacted to provide claimants with

[39] It may not be appropriate to dismiss claims that do not meet the requirements of subsection 190B(7).

sufficient time to amend their application. If the applicants are unable to provide sufficient information to meet the merits requirements of the registration test contained in section 190B, then the NNTT should be required to report to the Court and the Court should be required to dismiss the claim. The Court should dismiss the application unless it is satisfied that the application will be amended, or additional information will be provided, to satisfy the merits part of the registration test or that there are other proper reasons why the application should not be dismissed.

4.127. These proposals are aimed at removing at an early stage those applications which appear to have little prospect of success, avoid the cost of notification and the unproductive identification and involvement of respondent parties. These proposals:

- would not result in any loss of procedural rights (as the claimant application is not registered), and
- would not result in any loss of native title rights and interests (as the claimant group could file another, better prepared application).

4.128. The benefits of these proposals would be to either remove from the system those claims which fail to meet the basic merit conditions of the registration test or prompt the amendment of such applications so that they pass the registration test. As a consequence, only applications where merit has been established on a prima facie basis will go to notification and mediation.

4.129. The NTA should clearly provide that the claimant application will stand dismissed unless the Court is satisfied that:

- the application will be amended, or additional information will be provided, to satisfy the merits component of the registration test, or
- there are other reasons why the application should not be dismissed.[40]

Recommendation 16: The NTA should be amended to deal with the following claims as follows.

(i) Dealing with unregistered claimant applications: Where a new claimant application does not satisfy all of the conditions of the relevant part of the registration test in section 190B of the NTA (conditions about the merits of the claim), the Federal Court must order that the claim be dismissed unless the Court is satisfied that:

- the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period
- there are good prospects of a negotiated outcome, or
- there are other reasons why the application should not be dismissed.

In deciding whether an application should not be dismissed, the Court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material.

(ii) One year after the proposed amendments to the NTA commence to operate, the Native Title Registrar must apply the registration test to:

- all claimant applications that are not on the Register of Native Title Claims, and

[40] For example, it is sometimes the case that a highly prospective claimant application will be well advanced in mediation although unregistered. It would be disadvantageous to all parties if such a claim were to be dismissed as a consequence of these proposals despite good prospects of a negotiated outcome.

- claimant applications that did not have to undergo the registration test.

The registration test should be re-applied (or applied as the case may be) to determine whether each application would satisfy all of the conditions of the relevant part of the registration test in section 190B of the NTA (conditions about the merits of the claim). If an application would not satisfy all those conditions, the Native Title Registrar must inform the applicant of the reasons why the application would not satisfy the conditions and invite the applicant to amend the application or provide additional information within a nominated period. If the application is not amended or the additional information is not provided, the Native Title Registrar must report to the Federal Court about the current status of the application and the reasons why it is not registered. Where the Court receives such a report from the Native Title Registrar, the Court must order that the claim be dismissed unless the Court is satisfied that:

- the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period
- there are good prospects of a negotiated outcome, or
- there are other reasons why the application should not be dismissed.

In deciding whether an application should not be dismissed, the Court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material.

Uncertainty about the law

4.130. Some of those consulted pointed to the need for certain legal principles to be settled before claims can be resolved by agreement.

4.131. Many of the main principles have now been established, as a result of the High Court's decisions in *Yarmirr*, *Ward*[41] and *Yorta Yorta*. Some of the more recent decisions, for example, the Full Court's decisions in *De Rose*[42] (regarding society and connection), and the Federal Court's decisions in *Neowarra*, *Lardil*,[43] *Ngarluma / Yindjibarndi*, *Blue Mud Bay*, *Bardi Jawi*[44] and *Rubibi* have also gone a long way towards showing how the High Court's decisions should be applied to different fact situations.

4.132. However, the law is still being developed in relation to important connection issues like the relevant 'society', the degree and kind of connection sufficient, and the extent to which traditional laws and customs may change before they cease to be 'traditional', and can probably only do so on a case by case basis. There are also legal questions yet to be determined in relation to extinguishment, particularly because of differences in tenures between States.

4.133. There are mechanisms by which parties (and the NNTT[45]) can refer particular issues of fact and law to the Court for judicial determination and the Court also has power to determine separate questions in a proceeding under its Rules.[46] The NNTT and parties should be encouraged to make greater use of these mechanisms.

[41] *Western Australia v Ward* (2003) 213 CLR 1.
[42] *De Rose v State of South Australia* [2005] FCAFC 110 (8 June 2005).
[43] *Lardil Peoples v State of Queensland* [2004] FCA 298 (23 March 2004).
[44] *Sampi v State of Western Australia (No 3)* [2005] FCA 1716.
[45] See section 136D.
[46] See, for example, Federal Court Rules Order 29.

Recommendation 17: That the NNTT and parties be encouraged to make greater use of the provisions in the NTA and of the Federal Court Rules such as Order 29 rule 2 to refer particular issues of fact and law to the Court for determination.

Third party respondents

4.134. Third party respondents (that is, non-government respondents) are sometimes perceived as seeking unreasonable outcomes in the native title mediation process, which can delay the resolution of a claim that may otherwise be agreed between the major parties. Similarly, some respondent parties (including some self-funded respondents) are perceived as taking a disproportionately active role in a claim, despite having only a minor interest in the area of the claim.

4.135. Various suggestions have been made to limit the role of third party respondents. These include:

(a) narrowing the definition of 'interest'

(b) removing some third parties from the proceeding, especially if there is already another party with a similar or more extensive interest

(c) requiring the NNTT to advise the Court if it considers that a party does not have a relevant interest

(d) limiting the ability of third party respondents to participate in mediation or trial to their particular interest, for example, confining their right to participate and to object to a consent determination, and

(e) curtailing access to legal aid.[47]

4.136. Section 84 confers broad powers upon the Court in relation to both the joinder and removal of parties. Even if a party does satisfy the 'interest that may be affected' test, the Court has a discretion. Further, the Court could limit the extent to which a new party may participate in the proceeding.[48]

4.137. To be a party to a native title claim a person or body must have an interest that 'may be affected by a determination'. In some cases, such an interest may only 'be affected' if certain native title rights and interests are claimed. For example, a recreational user of claimed land will only be entitled to participate in a claim if the claimants are seeking exclusive rights over the land. If it is apparent that a party does not have, or no longer has, an interest that may be affected by the claim, the party should be required to withdraw. Closer case management by the Court and the NNTT should enable parties who may not have a relevant interest to be identified and required to justify why they should remain as a party.

4.138. We understand that there have been situations where someone in the NNTT has concluded that a third party respondent does not have an interest in the claim and should not continue to be a

[47] One of the elements of the reform package announced by the Attorney-General on 7 September 2005 is reform of the respondent financial assistance program to encourage agreement-making rather than litigation. See paragraph 1.3 above. Further information about reform of the respondent financial assistance guidelines can be found at <http://www.ag.gov.au/nativetitlesystemreform>.

[48] This happened for example, in the *Bandjalang #2* preservation of evidence hearing in relation to some pastoralists whose land was just outside the claim area. See *Wilson v Minister (NSW)*.

party to a claim. For example, mapping undertaken by the NNTT may disclose that the party's interest is located outside the boundaries of the claim and will not be affected by the proposed determination, or a claimant application may be amended to reduce the area or the native title rights and interests claimed so that a party's interests would no longer be affected by a determination of native title. In such cases, it is desirable for the NNTT to be able to seek the removal of that party.

4.139. This could be done by referring the matter to the Court under section 136D but the NNTT does not regard this as satisfactory. One suggestion was to empower the Federal Magistrates Court to remove a party in these situations. However, we consider it preferable for such issues to be referred to the Federal Court and delegated for decision by a registrar. Federal Court registrars already undertake related functions under judge-delegated powers.

Recommendation 18: The NNTT should refer to the Federal Court for determination the question of whether a party should be removed if it considers that a party does not have a relevant interest. Such referral should be dealt with by a Court registrar under judge-delegated powers.

4.140. It has also been suggested that section 84 be amended to enable an industry body to apply to become a party, notwithstanding that its 'interest' is merely that of a representative body.[49] This should enable the removal of multiple individual parties all with the same interest as members of the industry body and provide the Court, the NNTT and other parties with a single body to deal with rather than dozens or more of its individual members. The NNTT has contended that there is good reason for not following this suggestion as the joinder of industry bodies may elongate the process and result in an intervention which is more political in character. If an industry body is joined as a party it may be appropriate to remove any individual members of the industry group who are parties if their interests are properly represented by the industry body.[50]

Recommendation 19: That consideration be given to amending the 'party' provisions of the NTA (section 84) to allow an industry body to intervene in a representative capacity if one or more of its members is or was otherwise entitled to be a party and wishes the industry body to represent him, her or them. This should be subject to the Court's discretion to refuse permission to intervene as appropriate, to allow intervention on terms, and to later remove the industry body if relevant circumstances change.

Recommendation 20: That consideration be given to limiting the right of participation of a third party (that is, a non-government respondent party) to issues that are relevant to its interests and the way in which they may be affected by the determination sought.

Gathering evidence

4.141. The Court has frequently indicated its willingness to hear the evidence of elderly and frail witnesses prior to the trial itself, for the purpose of having it preserved (preservation hearings). Consequently there have been several occasions when this has occurred, mainly at the request of claimants. These include *Lardil* (Queensland), *Bidgara #4* (Queensland), *Bandjalang #1* (New South Wales),[51] *Wangkumarra* (New South Wales/Queensland), *Neowarra* (Western Australia),[52]

[49] In several matters to date, industry bodies whose sole relevant role is of a representative kind, such as the Northern Territory Seafood Council and Pastoralist and Graziers Association of Western Australia, have been joined as parties (by consent) notwithstanding that they may not have had sufficient interests to be joined as parties.

[50] Compare subsection 84(9).

[51] *Wilson v Minister for Land and Water Conservation (NSW)*, NG6034 of 1998 - *Bandjalang #1* - Hely J, October 2002.

Hayes (Western Australia*),*[53] *Bullen (*Western Australia) (now *Dimer*), *Sambo* (Western Australia),[54] *Colbung* (Western Australia), *Kuyani #2* (South Australia)[55] and *Eringa* (South Australia).[56]

4.142. On at least one occasion (*Gundungurra*[57]*)* the Court heard 'limited evidence' – that is evidence from about six of the main Aboriginal witnesses – and this evidence has been used in an attempt to resolve the claim without further litigation. More recently the Court has heard limited evidence as an aid to mediation in the *Gournditch Mara Peoples* matter (Victoria) and in the *Thalanji* matter (Western Australia). In *Frazer,*[58] after noting that the gathering and collation of connection material and its assessment by the State 'appear to be major factors in the mediation of native title claims', French J said:

> There is a question whether, given the time taken in this aspect of the mediation process, it may be desirable that the Court hear important elements of connection evidence from the applicants themselves, in order to facilitate the preservation of that evidence, to give the applicants an opportunity to tell their story to the Court at an early stage and to facilitate subsequent mediation.[59]

4.143. Preservation of evidence hearings and limited evidence hearings present an excellent opportunity for relevant connection evidence to be tendered and examined. They provide a real opportunity for the parties to see and hear key Indigenous witnesses, usually on their own country, instead of having to rely upon the second hand material contained in connection reports. Such hearings provide the parties with perhaps the best look at the strengths and weaknesses of the claim that they will ever get, short of a full trial.

4.144. Therefore, hearings of this kind should also provide a very good opportunity for resolution by agreement, whilst the evidence and the issues are clearly before the parties. Following one such preservation of evidence hearing, the parties agreed to submit the matter for early neutral evaluation (ENE) carried out by an experienced retired judge. The evaluator was provided with the transcript of the hearing and with detailed written submissions, and subsequently provided his confidential views regarding the matter to the parties. As far as we are aware that particular matter has not been resolved, notwithstanding the attempt to use ENE.

4.145. Like other attempts at dispute resolution ENE, if unsuccessful, would simply add to the overall costs and demand upon resources. However, if successful the savings may be significant.

4.146. ENE may have stronger prospects of success if the evaluator were to attend part or all of the hearing of limited and/or preservation evidence and engage directly with the parties during, and immediately after, the hearing.

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[52] *Paddy Neowarra, Paddy Wama and Others v State of Western Australia and others* [2003] FCA 1402 at paragraph 29 - six witnesses, November 2000.

[53] See M McKenna, *Hayes & ors on behalf of the Thalanji People v Western Australian & ors (WAG 6113 of 1998) - an observation on the taking of preservation evidence in native title cases* 6 NTN 206, September 2004 – six witnesses.

[54] *Sambo v Western Australia*, WAG 68 and 6216 of 1998 and part WAG 76 of 1997, 2 and 6243 of 1998.

[55] *Mackenzie (Kuyani People) v South Australia*, SG 6004 of 1998.

[56] *Eringa #1 and #2*, SG 6010 of 1998 and SG 6002 of 1999, November 2004.

[57] *Gundungurra Tribal Council Aboriginal Corporation v Minister for Land and Water Conservation (NSW)*, Wilcox J. That evidence is now being used to assist with the mediation of that claim.

[58] *Frazer and ors v State of Western Australia* [2003] FCA 351.

[59] *Frazer* at paragraph 30. See too paragraph 31 where His Honour indicated advantages in the Court determining connection as separate issue (as has now occurred in several other cases).

4.147. Therefore, we recommend that the Court and other relevant participants give greater priority to the holding of limited evidence and/or preservation hearings, coupled with some kind of ENE or other form of dispute resolution to be held as soon as the hearing is complete (and/or even during the hearing). Ideally the hearing should be attended by an experienced mediator or negotiator, perhaps from the NNTT or the Court and/or an experienced independent lawyer.

Recommendation 21: That the Court and other relevant participants be encouraged to give greater priority to the holding of limited evidence and preservation hearings, coupled with contemporaneous dispute resolution.

Section 137 inquiries

4.148. The Terms of Reference state that we 'should consider whether and in what circumstances the inquiry power under section 137 of the Act can be used to enable the more effective disposition of claims'. Section 137 refers to 'special inquiries' and seems to contemplate inquiries of a more systemic nature.[60] However, the inquiry power can only be exercised after the relevant Commonwealth Minister has given written notice directing the NNTT 'to hold an inquiry in relation to a particular matter or issue relating to native title'. As we understand it that power has never been invoked.

4.149. Examples of the kinds of inquiry that might be conducted in relation to a particular region include:

- the extent to which the Indigenous people of the region continue to observe and acknowledge relevant laws and customs
- extinguishment within the region, and
- considering what agreements could be made to recognise traditional and customary association within the region.[61]

4.150. It seems that not much serious thought has been given to utilising this mechanism, perhaps because it needs to be triggered by the Minister. A perceived problem with section 137 inquiries is that the views expressed at the end of the process would not bind the parties and therefore resources may be wasted on a futile exercise.

4.151. However, the fact that section 137 entails an inquisitorial rather than adversarial function (similar to the function of the Aboriginal Land Commissioner under the ALRA) was of appeal to some people. Other attractive aspects include the fact that:

- the parties can be confined to those to whom the NNTT grants leave[62]
- the inquiry may cover more than one matter, issue or application[63]
- the laws of evidence would not apply (see section 82 in relation to matters heard by the Court)
- use can be made of evidence and findings in other proceedings[64]
- evidence and findings etc in an inquiry can be used in the Court[65]

[60] Subsection 137(2).
[61] These examples were set out in a paper by Justice French to the Native Title Ministers' Meeting dated 16 September 2005.
[62] Subsection 141(3).
[63] Section 140.
[64] Section 146.

- the NNTT can compel the attendance of witnesses and the production of documents and take evidence on oath or affirmation,[66] and
- certain parties can seek assistance from the Attorney-General under section 183.

4.152. A section 137 inquiry could be useful to attempt to resolve competing claims for the one area (overlaps), particularly if neither claim was very strong. A 'finding' from an independent body such as the NNTT as to who are in fact the 'traditional owners' of disputed land may be of some utility, even if the claim did not proceed to a determination.

4.153. We consider that an inquiry of this kind could be useful for the reasons noted above. Therefore we recommend that section 137 not be amended. However, this is premised on the assumption that Recommendation 3, proposing a new inquiry function for the NNTT, will be adopted.

Recommendation 22: That section 137 of the NTA not be amended.

Federal Court power to request NNTT inquiries

4.154. In addition to conferring the power to direct an inquiry upon the President of the NNTT as suggested in Recommendation 3, we recommend that the Chief Justice be empowered to request the NNTT to conduct an inquiry into a particular issue or matter. As there will be significant resource implications associated with NNTT inquiries, the decision to order an inquiry should rest with the President of the NNTT. We propose that the Chief Justice be empowered to request the President to exercise the power proposed in Recommendation 3. If the President agrees to the Chief Justice's request, he or she would be required to comply with the consultation requirements set out in Recommendation 3. A key factor to be considered before an inquiry is instituted will be whether the NNTT has resources available to undertake the inquiry within a reasonable time.

4.155. Conceivably, an inquiry could be ordered even before a matter is referred for mediation, for example, to attempt to resolve some preliminary issue such as an authorisation question or an overlap.

Recommendation 23: That the NTA be amended to empower the Chief Justice to request that the NNTT hold an inquiry of the kind outlined in Recommendation 3, subject to the President's consideration of the availability of resources and the likely workload of the proposed inquiry.

Federal Court

4.156. Native title matters which are dealt with by the Federal Court in the litigation process can be long and frustrating. Of course, it must also be recognised that, to date, the mediation process has also been long and frustrating. Much time is lost at various stages of the process, including the registration and notification stages, followed by sometimes lengthy periods during which the claim is in mediation before the NNTT.

4.157. In addition to the Federal Court Rules and practice directions and procedures which operate in relation to all Federal Court matters, the Court has developed specific rules and procedures for the conduct of native title claims.

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[65] Section 86.
[66] Section 156. See also sections 171 to 177.

4.158. These include Order 78 of the Federal Court Rules and notices to practitioners concerning:

- allocation of native title cases
- joinder of parties to native title matters
- amendments to main (section 61) applications, and
- access to pastoral leases.[67]

4.159. The Court has implemented a wide range of strategies to assist with the management of native title cases. These include allocation of each new matter to a Provisional Docket Judge and later the referral of a matter likely to require substantive action to a Substantive Docket Judge by the Chief Justice, active case management, mechanisms such as conferences of experts, regional case conferences (of all the matters within a particular region), the ordering of mediation protocols and timetables[68] and Court-annexed mediation.

4.160. Practices and precedents have also been developed in relation to:

- programming orders
- pleadings – points of claim and points of response, or statements of facts and contentions
- standard directions and orders, for example, regarding combining claims, amendments, grouping of parties and service
- requirements for mediation timetables and/or 'work plans'
- protocols for preservation of evidence hearings[69]
- experts including conferences of experts and use of the 'hot tub'[70]
- witness statements and 'notices of request to lead evidence orally'[71]
- procedures for allowing evidence to be given on a restricted basis
- protocols for recording evidence (for example, important but inaccessible sites) by video
- template mediation reports for use by the NNTT
- making early concessions, including during directions hearings or opening addresses[72]

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[67] These notices can be found at <http://www.fedcourt.gov.au/litigants/native/litigants_nt_practitioners.html>.

[68] See detailed discussion by French J in *Frazer v WA* (2003) 198 ALR 303. In Queensland, the applicant is often ordered to file a 'work plan' prepared in consultation with the other parties, to be read in conjunction with a 'projected work program'.

[69] See, for example, Moore J in the *Kalkadoon* cluster.

[70] The 'hot tub' was tried during the *Wongatha* proceedings (following a 'conference of experts'), and did help to reduce the issues between some of the experts, albeit to a limited extent. A conference of experts was also used in *Blue Mud Bay* (Northern Territory), and conferences have also been convened in several other matters including *Gournditch Mara* (Victoria), *Yankunytjatjara / Antakininja* (South Australia) and the *Newcastle Waters* matters (Northern Territory) for the purposes of identifying common ground and assisting mediation and litigation.

[71] For example, see Orders 18 – 24 made by Mansfield J in the *Newcastle Waters* matters heard in March 2006. These procedures, developed in the course of the *Wongatha* matter and used in some subsequent cases, have reduced the amount of time spent eliciting evidence that is not controversial, have avoided the need for technical objections to be taken and dealt with, and have avoided surprise and the consequent need for witnesses to be recalled (as happened in some of the earlier hearings, for example, *Yorta Yorta*).

[72] This has occurred particularly in Northern Territory cases where the claimants are already regarded as being the 'traditional owners' of land nearby. Examples include *Yarmirr, Urupunga, Alyawarr* and *Blue Mud Bay*. In *Blue Mud Bay* all respondent parties conceded well before trial that the claimants had native title rights in the sea similar to those recognised by the Court in the two previous sea claims, *Yarmirr* and *Lardil.*

- use of court-annexed mediation (instead of or in addition to NNTT mediation), and
- early neutral evaluation.[73]

4.161. However, these practices and precedents have not been universally followed. There appears to be a degree of confusion on the part of people involved in the Court processes as a result of varying practices between judges and a tendency for orders and other court documents to be drafted from scratch.

4.162. We consider that greater consistency and efficiencies may be achieved if the Court were to prepare and publish guidelines, protocols and/or model orders and precedents for use across the country. These could, of course, be altered for particular circumstances. These might cover a wide range of matters such as:

- orders for mediation plans / work plans – both regional and case specific
- particulars of the claim, similar to the 'Schedule A' that is commonly used as a basis for Points of Claim
- orders for grouping of parties and service of process upon the group
- standard admissions, for example, elements of connection for respondents to concede, and tenure and extinguishment issues for applicants to concede
- programming orders, for example, regarding witness statements, expert reports, conferences of experts, objections
- preservation evidence, limited evidence, restricted evidence and video evidence
- orders regarding draft expert reports and conferences of experts, and
- the format of reports by the NNTT and/or other mediators to the Court.

4.163. In particular, it would be desirable for the Court to adopt a practice note setting out the Court's preferred method of managing native title claims. The Registrar of the Court provided us with a draft practice note which, if adopted, would become available to practitioners. The draft practice note, if adopted, will provide a lot of useful information that would better guide the judges and those appearing before them thereby ensuring greater consistency of practice. The draft addresses many of the issues raised during our consultations. In particular, the draft provides important guidelines in relation to active case management (having regard for example, to regional priorities, resource considerations, mediation timeframes and a wide range of case management mechanisms), alternative forms of dispute resolution, and it emphasises the specialist mediation role of the NNTT.

4.164. Other suggestions for improvement have included:

- earlier particularisation of claims (thereby identifying the real issues in the case) perhaps with the assistance of pleadings of some kind
- more extensive case management
- greater communication with the NNTT regarding the progress and prospects of NNTT mediation
- relaxation of the laws of evidence[74]

[73] As far as we are aware ENE has only been tried once so far in a native title matter.

- guidelines for expert witnesses in native title cases, particularly anthropologists,[75] and
- more use of the conference of experts and / or the hot tub.[76]

Recommendation 24: That the Court be encouraged to adopt a practice note setting out the Court's preferred method for managing native title claims to ensure all parties have a shared understanding of the process.

[74] This would require revisiting the amendments made to section 82 in 1998.

[75] While the Federal Court has guidelines in relation to the provision of experts' reports, the nature of social science disciplines do not accord with the rules of evidence. Therefore, the reports by anthropologists will often not be in a state which could be readily acceptable to a Court, and some way of having a 'quality control' of the contents of these reports might assist the Court and result in less delays when in trial mode. In particular, anthropologists need some guidance as to what information can be included and how direct evidence is differentiated from hearsay.

[76] The 'conference of experts' approach entails the experts within a given discipline meeting in order to find common ground and to identify the real areas of disagreement between them. This occurred in both the *Wongatha* matters and the *Blue Mud Bay* matter, and is being tried in other matters. In *Wongatha* the experts, having participated in a 'conference of experts' before the relevant stage of the trial, were all sworn in together at the hearing and were able to make a short statement and to ask questions of each other in Court (the 'hot tub').

5. OPTIONS FOR INSTITUTIONAL REFORM

5.1 In addition to considering possible improvements to the existing relationship between the Federal Court and NNTT and their systems, we have been asked to consider whether there is a need to clarify or re-assign functions between the Court and NNTT. We have formed the opinion that there is a need for some institutional reform. This chapter sets out a number of options for institutional reform, as well as a subsidiary option that could be adopted in combination with any option for institutional reform or with the current system.

5.2 We have reached different views on the options for institutional reform and make separate recommendations at the end of this chapter. Graham Hiley QC recommends that Option 3 be adopted and supports the creation of a native title panel. Dr Ken Levy recommends that Option 2 and the native title division subsidiary option be adopted.

5.3 The key institutional reform options are listed below.

Option 1 – Provide the NNTT with an exclusive mediation jurisdiction for a period of three years.

Option 2 – Provide the NNTT with an exclusive mediation role with no time limitation on Federal Court intervention.

Option 3 – Provide the Federal Court with greater flexibility in relation to alternative dispute resolution.

Option 4 – Introduce a modified pre-1998 model for resolving native title claims.

Option 5 – Create a new native title court.

5.4 The following subsidiary option could be implemented in combination with any of the options for institutional reform or with the status quo.

Subsidiary option – Create a separate native title panel or division within the Court.

5.5 Whichever option is adopted, we recommend that the NNTT be given the additional powers and functions referred to in Recommendations 2, 3, 6, 7, 18 and 23. We also consider it essential for the NTA to be amended to provide that consistent with paragraphs 4.31 and 4.32 mediation should not be carried out by more than one body at the one time (see Recommendation 1).

5.6 Another suggestion for institutional reform made during the consultations was to remove the mediation function from the NNTT altogether. However, as we believe that the NNTT plays an important role in mediating native title claims, we have not developed an option that would give effect to this suggestion.

Key options for institutional reform

Option 1: Provide the NNTT with an exclusive mediation role for a period of three years

5.7 This option would maintain the existing legislative structure of both the Federal Court and the NNTT and is premised on the assumption that the NNTT would be given the additional powers

outlined in Recommendation 2 and that the NTA would be amended to prohibit any other body from mediating the matter whilst it is in NNTT mediation.

5.8 Under this option, the NNTT will be empowered to mediate a claim if it is referred to it by the Court under section 86B for a minimum period of three years. However, during that three year period, the NNTT will be required to recommend cessation of mediation if the grounds currently set out in subsection 86C(1) arise. At the end of the three year period, NNTT mediation will continue unless either a respondent party or the native title applicant or a government submits that further NNTT mediation is unnecessary or there is no likelihood of the parties reaching agreement.

5.9 The key features of Option 1 are listed below.

- Claimant, non-claimant and compensation applications would continue to be filed with the Federal Court.
- All applications would be required to be referred by the Federal Court to the NNTT for mediation as at present.
- All mediation of claims would be conducted by the NNTT for a statutory period of three years (in addition to any previous NNTT mediation).
- The NNTT would continue to have the power to mediate all aspects of claims referred to it, including the power to conduct inquiries as recommended in Recommendation 3.
- Although the Court would be precluded from conducting concurrent mediation it would continue to have the ability to engage in other ADR initiatives such as pre-mediation conferences, case conferences and conferences of experts.

5.10 Advantages and disadvantages of Option 1 are listed below.

<u>Advantages</u>

- It avoids duplication of mediation functions, as the Court would be unable to conduct mediation during the three year period in which the NNTT has an exclusive mediation role.
- It commits parties to the NNTT mediation process and prevents them from thinking that they can ‘forum shop’.
- Although the Court would retain its oversight role for matters in NNTT mediation, control of mediation would be centralised in the NNTT, thereby adding to efficiency.
- It retains the existing institutions and therefore minimises disruption.
- It could empower the NNTT to contribute to the rationalisation of claims which are not properly motivated by encouraging a claimant to withdraw the claim or by referring the matter to the Court with a recommendation for its dismissal.
- There would be better coordination and resource allocation for NNTT mediation of individual matters, taking into account regional management of mediation in order of priority.

<u>Disadvantages</u>

- The Court would not have complete control over the process for resolving claims for a period of three years.
- The Court would be unable to refer matters to another form of dispute resolution at an early stage.

- The prospects of a matter being resolved would be largely dependent on the effectiveness of NNTT mediation.
- Over 75% of the current claims were referred to the NNTT for mediation over three years ago and have not been resolved. Requiring these claims to remain in NNTT mediation for a further three years may further delay the resolution of claims. However, it may be that many of them have never been in active mediation at all.
- Even after the three years the Court would be unable to remove the matter from NNTT mediation of its own motion even if it considered that there was some prospect of the matter, or some part of it, being resolved by way of agreement by means of some other ADR process.[77]

Option 2 – Provide the NNTT with an exclusive mediation role with no time limitation on Federal Court intervention

5.11 This option would retain the status quo. Under this option, there would be no minimum statutory time period within which the NNTT would have an exclusive mediation power.

5.12 The Federal Court would still be required to refer a matter for mediation under section 86B and the NNTT would be the only body entitled to mediate until the Court removed it from NNTT mediation.

5.13 This option is also premised on the NNTT being given the additional powers referred to in Recommendation 2, 3, 6, 7, 18 and 23.

5.14 Advantages and disadvantages of Option 2 are listed below.

Advantages

- As with Option 1, an advantage of this option is that mediation would only be conducted by one body at one time, which would curtail the current competition between the institutions.
- The Federal Court would have ongoing supervision of a matter and a capacity to withdraw a matter from NNTT mediation under section 86C.

Disadvantages

- It does not have the same degree of certainty and control as Option 1 while the matter is in NNTT mediation.

Option 3 – Provide the Court with greater flexibility in relation to native title alternative dispute resolution

5.15 This option would remove the 'mandatory' requirement in section 86B that the Federal Court refer claims to the NNTT for mediation, and would thus enable the Federal Court to determine who undertakes mediation and other ADR functions in relation to claims and when such mediation or other ADR functions are undertaken.

5.16 The key features of Option 3 are listed below.

- Claimant, non-claimant and compensation applications would continue to be filed with the Federal Court.

[77] Subsection 86C(1).

- The NNTT would continue to have the power to mediate all aspects of applications referred to it.
- Section 86B would be amended so that the Court would no longer be obliged to refer an application to the NNTT for mediation.
- However, there would be a requirement that the Court refer an application or an issue to the NNTT for mediation unless it believed that the matter or issue would benefit from being handled differently.
- Section 86B would be amended so that the Court would no longer be obliged to refer an application for mediation at any particular time.
- However, section 86B would be amended so that as soon as practicable after the end of the notification period the Court must consider referring the application or part of it to the NNTT for mediation or to some other appropriate form of dispute resolution.
- The Court would be free to refer different issues to different forms of dispute resolution, albeit simultaneously.
- Section 86C would be amended to give the Court greater freedom to order that mediation cease or to remove a matter or issue from mediation and refer it elsewhere.

5.17 Advantages and disadvantages of Option 3 are listed below.

Advantages

- The Court maintains complete control of all matters before it at all times, including when they are being mediated.
- It provides flexibility to the Court to use the most appropriate means of dispute resolution as and when appropriate.
- The Court can refer different matters or issues to different forms of dispute resolution, albeit concurrently.
- The Court could more easily identify and decide particular questions (using Order 29) in order to facilitate the resolution of the matter by agreement.
- It retains the existing institutions.
- It recognises the specialist mediation and other capabilities of the NNTT and requires the Court to recognise these important functions of the NNTT.
- There would be better coordination and resource allocation for mediation or other resolution of individual matters, as the Court can take into account regional management of mediation in order of priority

Disadvantages

- Individual judges may take different approaches to referral of matters to NNTT mediation. This could limit the ability of the NNTT to develop regional mediation strategies.
- The NNTT may perform a less active mediation role.
- More people may be mediating more than one matter at the same time.
- It may result in less effective mediation if the Court refers matters to a large range of mediation service providers, rather than concentrating mediation expertise in the NNTT.

Option 4 – Introduce a modified pre-1998 model for resolving native title claims

5.18 This option is intended to streamline the process and have only one institution dealing with native title claims at one time. The key features of this option are listed below.

- All applications would be lodged with the NNTT.
- Applications would continue to be referred to the Native Title Registrar for registration testing.
- Applications would be publicly notified and the party list settled by the NNTT for the purposes of mediation.
- Questions regarding the status of a party that required judicial determination would be referred to a judge or registrar of the Federal Court.
- The NNTT could continue to refer questions of fact or law to the Federal Court under section 136D (or to a registrar as appropriate) to facilitate agreement about issues that are the subject of mediation.
- If parties reach agreement then the matter would be referred to the Federal Court for a consent determination under section 87. If the parties do not reach such agreement, then the matter would be referred to the Federal Court.[78]

5.19 Advantages and disadvantages of this option are listed below.

Advantages

- It would reduce the administrative work associated with the referral of matters from the Federal Court to the NNTT for registration testing and public notification.
- It could allow the NNTT to use its resources more efficiently, as it could conduct more integrated planning and target its resource allocation from pre-mediation to the conclusion of mediation.
- Parties would not be required to divide their resources between the sometimes competing demands of the Court and NNTT.

Disadvantages

- This option would have no operation in relation to the current (600 odd) claims and therefore would not facilitate their resolution.
- In view of the fact that the number and rate of new claims is not likely to be significant (in comparison to current claims) there is little utility in making such a fundamental change now.
- Transitional provisions would be complex, for example, in relation to new claims that overlap with or are sought to be combined with existing claims.
- Until a matter is referred to the Court there would be little, if any, judicial control or supervision of the process.
- It would be a major change to the existing system and would cause unnecessary disruption and uncertainty for the process of claims resolution.

[78] Compare sections 70, 71, 72 and 74 of the original NTA.

Option 5 – Create a new native title court

5.20 This option would involve the creation of a new Chapter III court to deal exclusively with native title claims. The new court would also be responsible for the mediation of native title claims. This would result in claims being dealt with by one institution from lodgement to determination.

5.21 The new native title court could be headed up by a Federal Court judge and could comprise other judicial officers, possibly some with the status of federal magistrates. It would be necessary to consider appropriate appeal mechanisms, for example, as to whether appeals would be heard by a full bench of the native title court or by the Federal Court.

5.22 Advantages and disadvantages of Option 5 are listed below.

Advantages

- A specialised jurisdiction would be created and specific experience developed.
- Mediation and judicial functions would be integrated within one court rather than distributed between the two bodies.
- The new Court would be a 'one stop shop' for claims resolution and related issues, such as registration, ILUAs and other agreements, other future acts, mediations, arbitrations, determination of compensation and provision of other services of the kind that the NNTT presently provides.
- An integrated native title court may result in greater consistency and efficiency and, as a result, greater cost effectiveness.
- This option may enable more consistency in the prioritisation and management of native title claims.

Disadvantages

- The establishment of a new native title court would cause significant disruption to the claims resolution process. This could delay some negotiations and create uncertainty amongst parties.
- A new structure would involve substantial initial costs. Existing NNTT resources, staff and accommodation could be used to minimise the cost and disruption.

Subsidiary option

Create a separate native title panel or division within the Court

5.23 These proposals would result in a specialist group of judges who would be available to handle all native title matters. The concept of a panel was suggested by the Registrar of the Federal Court but, as yet, has not been officially endorsed by the judges. The concept of a division was suggested by the NNTT and the Law Council of Australia. The proponents of each option argue that a separate panel or division could result in a more consistent approach to the resolution of native title claims by Federal Court judges. This option responds to concerns about inconsistent approaches which have emerged in the Federal Court when dealing with native title matters.

5.24 A native title division would be established by legislation to enable the Government to appoint judges to a division whose judges handled all native title matters. A specialist division need not require judges of the division to be responsible only for the conduct of native title matters. A division would be capable of being modified to meet changing circumstances and workload,

although such decisions would need to be made through the usual Government processes involving Cabinet and the Executive Council.

5.25 If the Chief Justice agreed to establish a native title panel, it would be created as an administrative structure within the Court and would be comprised of judges nominated by the Chief Justice. The judges would not need to be responsible only for the conduct of native title matters.

5.26 A separate panel or division could:

- result in a more consistent approach to the administration and resolution of native title claims by the Court, and
- develop more specialised native title expertise within the Court.

6. CONSULTANTS' RECOMMENDATIONS ABOUT OPTIONS FOR REFORM

Graham Hiley QC

Options for institutional reform

6.1 I have regarded and intended the primary focus of Options 1, 2 and 3 to be mediation and dispute resolution, as summarised in paragraph 5.3. In my view the merits of each of those options are not necessarily dependent upon the acceptance of our other recommendations, but their suitability and effectiveness will be enhanced by their implementation.

6.2 If any of these 'options' are adopted, albeit in a different form, it will be necessary to amend sections 86B and 86C of the NTA.

6.3 Options 4, 5 and the native title division proposal were all suggested by the NNTT in the course of its written submissions and the native title panel proposal was advanced by the Registrar of the Court in February this year. As the main focus of our consultations (most of which had already occurred) and of the written submissions was on 'the existing framework of the NTA' (and the Court and the NNTT as they presently exist)[79] very little feedback was obtained from others in relation to these additional 'options'. Although I am supportive of the native title panel proposal I am reluctant to elevate that support to a positive recommendation because I think that it deserves more feedback than we have obtained. Similarly, whilst I do not support any of the other 'options' I do not dismiss any of them out of hand, because I consider that they would require greater input from relevant bodies before firmer recommendations can be made.

<u>Mediation options – my preference for Option 3</u>

6.4 Just as other superior courts must have complete control over their own processes, I consider it essential that the Federal Court have complete control over all native title claims which have been brought before it (under the NTA), from the time of their commencement to the point of their ultimate determination (under section 225).[80]

6.5 It is equally clear that the NNTT has been set up and equipped as a specialist tribunal for the purpose of carrying out many functions under the NTA, including mediation.

6.6 The NTA, particularly sections 86A, 86B and 86C, assumes that the NNTT is the (only) body suitable for mediating native title matters. Those provisions seem to contemplate that all matters must be and remain subject of NNTT mediation unless there is no likelihood of the parties being able to agree on matters referred to in section 86A[81], namely the matters that must be agreed for there to be a consent determination. (This is fairly similar to what we have called Option 1, except for the fact that Option 1 purports to remove from the Court its general powers to refer a matter or issue to some other form of dispute resolution instead of to the NNTT.)

[79] See the Terms of Reference.
[80] See section 81.
[81] In effect the NTA requires all matters with some mediation prospects to be referred to NNTT mediation unless paragraphs 86B(3)(b) or (c) apply, and prevents the Court from removing a matter from mediation unless paragraphs 86C(1)(b) or (3) apply.

6.7 I do not consider that there is any need to alter the fundamentals noted above, namely complete control by the Court, and recognition of and better support for the NNTT's specialist role in the mediation of claims. (Most if not all of the complaints we have received have related more to the ways in which members of the respective organisations have conducted themselves during the process of carrying out their respective functions.)

6.8 However, I do not consider that NNTT mediation should be the only means by which native title claims should be mediated or otherwise resolved, short of litigation. There are a wide range of other dispute resolution mechanisms that are and should remain available to the Court, any of which may well lead to the resolution of a claim or at least a particular part of a claim that appears to constitute a sticking point (for example, overlapping claims). Option 3 leaves the way open for the Court to use such other means of resolution.

6.9 The Court is in the best position to case manage matters effectively, for example, by:

(a) conducting public directions hearings and case management conferences

(b) grouping parties, and where necessary determining party status

(c) requiring better clarification of claims

(d) defining and narrowing issues, for example, by pleadings and similar mechanisms

(e) making enforceable orders

(f) arranging hearings on a regional basis with a view to prioritising matters, inter alia, according to resources, and

(g) utilising a wide variety of mechanisms, including ADR, limited evidence hearings, determining separate questions and conferences of experts, in order to narrow issues and resolve disputes.

6.10 The NNTT is designed and well equipped to perform mediations, but its effectiveness is constrained by various factors including:

(a) the 'non-public' nature of its mediation functions (necessitated by the confidentiality provisions) and thus the difficulty for other parties and the Court to know whether and how the matter is progressing

(b) its (perceived and actual) lack of power to 'compel' greater cooperation in the mediation processes, and

(c) the reluctance of some parties to cooperate because of confusion about the NNTT's various roles.

6.11 The Registrar of the Court has noted that Option 3 has the dual benefits of increasing the flexibility available to the Court in its management of native title matters and building on and harnessing the current levels of expertise and experience in the Court and the NNTT. I agree with this comment.

6.12 In relation to the 'disadvantages' referred to in paragraph 5.17 above, I make the following comments.

- The 'disadvantage' stated at the first dot point is unlikely to have any significant consequence, particularly in light of the requirement that there be a prima facie assumption that matters would be referred to the NNTT for mediation.[82] See my comments about this below.
- Nor do I see any real disadvantage in 'more people mediating more than one matter at the same time', as long as the Court is conscious of any practical problems that this might entail, for example, due to limited resources.[83] Indeed I think it may often be more efficient if different issues could be dealt with concurrently, albeit by different bodies. For example, the NNTT could be mediating a connection issue while some other body is resolving a tenure issue.
- In relation to the last dot point in paragraph 5.17, the Court would be expected to select whatever mediation service provider it considers likely to be most 'effective' to perform the relevant mediation.

Option 3 – prima facie referral to NNTT for mediation

6.13 Whilst there seems to be general consensus that the Court should endeavour to utilise the expertise of the NNTT instead of referring a matter off to some other form of dispute resolution, questions arise as to how that should be achieved.

6.14 The NNTT submits that the NTA should require that, as a general rule, applications are to be referred to the Tribunal for mediation and the decision should not be left to the discretion of a single judge. I agree with the first part of this submission but not the second.

6.15 The draft practice note referred to in paragraph 4.163 clearly expresses the Court's preference for NNTT mediation as a general rule, and this would be an important guideline for each judge to follow. However, I think it is also appropriate that this issue is dealt with in the amendments to the NTA, presumably to section 86B (and possibly section 86C).

6.16 One possibility may be to:

- add a subsection to section 86B, say subsection 86B(1A), which gives the Court a discretion to not refer a matter to the NNTT in certain circumstances which are set out in the sub-section – eg where it considers that there is no utility in referring the whole matter at that time, where it considers that part of the matter should be referred to some other form of dispute resolution or where some other special reason exists, and
- add at the start of subsection 86B(1) something like 'Subject to subsection (1A).

6.17 The Registrar has suggested that section 86B should be amended so that the Court is *allowed* (rather than required) to refer to the NNTT for mediation (and that the Court be directed to have regard to the matters referred to in the new section 86AA in deciding whether referral to the NNTT is the most appropriate course). I would prefer that the language be stronger so as to expressly require the Court to consider referral to the NNTT before taking some other course.

6.18 Changes would also need to be made to other subsections within sections 86B and 86C, for example, to remove the inference that a matter or issue can only be withheld or removed from NNTT mediation if it is incapable of being successfully resolved by agreement.[84]

[82] See paragraph 5.16, 4th dot point.
[83] This should be further minimised by practice directions of the kind referred to in paragraph 4.163.
[84] Compare paragraphs 86B(3)(b) and 86C(1)(b).

6.19 Contrary to the NNTT's submission, I do consider that decisions regarding referral to the NNTT or some other form of ADR should be made by the (single) judge handling the matter. Like all interlocutory decisions, such powers are best left with the judge handling the matter, whose exercise of discretion can be challenged by way of appeal if appropriate.

Summary

6.20 In summary, I make the following points.

(a) As a general rule matters should initially be referred to the NNTT for mediation, but at a time to be decided by the Court.

(b) The Court should be free to refer particular issues to some other form of ADR if it considers that such ADR is more likely to resolve that issue.

(c) The Court should be able to refer particular issues to the NNTT for mediation (or inquiry) instead of referring the whole matter for NNTT mediation.[85]

(d) If the Court forms the view that NNTT mediation (general or specific) is not working, but that some other ADR mechanism should be attempted, the Court should be able to remove the matter (or a particular part of it) from NNTT mediation.[86]

(e) A particular issue should not be subject of mediation in more than one forum at the one time, unless there are exceptional circumstances, in which case the Court must have clearly identified (to the respective mediators and to the relevant parties) the respective roles of each body in relation to that issue and, where appropriate, made orders suspending one or other of those mediations.

Other mediation options

6.21 It follows from the comments above that I do not support either Option 1 or Option 2.

6.22 Most importantly, adoption of either option would deprive the Court of its general power to refer matters before it (and particular issues) to such form of dispute resolution as and when it thinks fit and on such terms as it sees fit. This would substantially weaken the ability of the Court to control its own processes.

6.23 I do feel confident that if the NNTT is given additional powers of the kind which we recommend its ability to resolve claims more effectively and quickly will improve. However, I do not consider this prospect is sufficient to justify denying the Court the ability to use other forms of dispute resolution as and when it considers appropriate.

6.24 I am troubled by the fact that over 75% of the matters referred to the NNTT for mediation were referred more than three years ago and a significant number more than five years ago.[87] No doubt there are many reasons for this including the inability or reluctance of parties to have the matter resolved earlier or to have it removed from mediation, and the limited scope of section 86C. I fear that prohibiting the Court from attempting to mediate or otherwise resolve these, and the other matters, for another three years (in the case of option 1) or until section 86C can be invoked (in the

[85] This can be done now under section 86B.
[86] This would require amendment of section 86C.
[87] See paragraph 4.11 and Table 3 in paragraph 4.15 above.

case of Option 2) will inhibit their more efficient resolution. Even some of the matters which have ended up in lengthy trials, such as *Wongatha*, have been subject of extensive, but unsuccessful mediation attempts, both by the NNTT and others.

6.25 I do not consider that the 'advantage' identified at the 5th dot point of paragraph 5.10 necessarily flows from the adoption of this option. Rather, to the extent that the NNTT cannot already do these things – including by use of its reporting functions – its ability to do them will be enhanced by the implementation of some of our other recommendations.

6.26 Apart from removal of the three year 'stay' of the Court's ability to progress the matter, Option 2 has the same problems as Option 1. But, like Option 1, it would ensure that there is no duplication of mediation.

6.27 In substance, without any changes being made to section 86C, the Court would still have the same difficulty removing the matter from the NNTT as it presently has. The Court can only remove it of its own motion if the Court considers that 'any further mediation will be unnecessary', or if 'there is no likelihood of the parties being able to reach agreement on, or on facts relevant to, any of the matters set out in' subsection 86A(1).[88] In other words, whilst there is a prospect of any fact relevant to a determination being agreed, the Court will not be able to remove the matter from mediation (unless a party so requests) – notwithstanding that there might be a much more efficient and appropriate way of resolving that and other issues. Indeed, even where a party does request removal, the Court's power to accede to that request is limited by the provisos in subsections 86C(3) and (4).

6.28 I think that Option 1 could be re-defined, particularly in relation to what happens at the end of the three years, for example, to give the Court broader powers to remove the matter from NNTT mediation.[89] Indeed if Option 1 were adopted, I consider that such additional powers are necessary. Also, in relation to matters which are already in mediation, it may be appropriate that the three years runs from the date when the matter was initially referred to NNTT mediation.

6.29 However, even if those changes were to be made, including changes to section 86C giving the Court a wider ability to remove a matter from NNTT mediation than it presently has, I would still prefer Option 3, for the reasons which I have stated above.

6.30 Irrespective of which option is adopted, albeit in some different form, I consider that section 86C should be amended to give the Court more power than it presently has to remove a matter from NNTT mediation.

Establishment of a native title division or panel

6.31 I see no compelling reason to favour these proposals over and above the present system. The main complaints about the Court have been in relation to differences in relation to practices and procedures. This is unsurprising having regard to the novelty and complexity of this jurisdiction, and the fact that judges are and must be free to conduct their courts in the ways they consider most appropriate. Whilst I now think it is time for the Court to attempt to draw together the benefits of particular practices and procedures developed so far and to express them in appropriate guidelines

[88] See subsection 86C(1).

[89] For example, the NNTT suggested that if at the end of the three years agreement had not been reached on the matters set out in subsection 86A(1) or otherwise finalising the application, it should report to the Court and the Court would then be free to make whatever orders it thinks appropriate, including to cease the mediation.

or practice directions, I am not convinced that the formation of a native title division is necessarily a good thing.

6.32 I do see some merit in the formation of a native title specialist panel. Whilst both proposals would result in a group of judges who could specialise in native title matters I prefer the panel option over the 'native title division' option because of:

- the greater flexibility inherent in the panel option – for example, regarding the placement of additional judges onto that panel by the Chief Justice as and when the need arises, and the use of non panel judges where appropriate
- the fact that such a panel could more easily be integrated into the Court, in the same way as specialist panels in other jurisdictions
- the fact that a panel would expand upon the Court's current system of Provisional Docket Judges for native title matters, and
- the fact that its members would be seen primarily as Federal Court judges with specialist interests and knowledge rather than primarily as 'native title judges' who belong to their own division.

6.33 For the reasons stated at the outset of these additional comments, whilst I see merit in and support the idea of having a panel of judges who are particularly interested in native title work, I really think this is a matter for consideration by the Chief Justice in consultation with relevant judges and Court officers.

6.34 Further, I consider that there is a lot of native title work that may not require specialist knowledge and could be done just as effectively by a judge who is not on the panel (or division). I have in mind interlocutory issues such as party issues (under section 84), interlocutory injunctions, amendments to applications and future act issues, many of which are largely matters of statutory construction. Also, I think it generally desirable that one member of a Full Court hearing a native title appeal should not be a panel member. The ability to so use the full range of judges on the Court may be difficult to achieve if there was a formal division of the Court, as distinct from a panel.

Option 5

6.35 Apart from constitutional questions that may arise I see no reason for favouring Option 5 over the present system. It seems very similar to the regime originally set up in 1994 which was replaced with the present system. I would assume that a variation of the original scheme was considered at length during consideration of the 'Ten Point Plan' and the numerous amendments made in 1998, and I see no need to revisit such consideration.

System deficiencies and potential for reform

Recommendation 1

6.36 Although we both recommend that the NTA be amended to avoid the duplication of mediation, we had difficulty reaching agreement as to a more precise definition of this recommendation. Our differing views are noted in paragraph 4.31 above.

6.37 I consider that in some matters it will be appropriate for the Court to:

- refer a particular issue to mediation or some other form of dispute resolution[90]
- remove a particular issue from mediation (or other form of dispute resolution),[91] for example, if it considers that it might be more effectively resolved if referred to some other body, and
- refer different issues to different forms of dispute resolution.

6.38 However, I consider that unless there are exceptional circumstances, a particular issue should not be subject of mediation in more than one forum at the same time. I would prefer to have worded Recommendation 1 by saying just that.

6.39 Another approach, also consistent with my views, would have been to recommend that:

- where the whole of a matter is being mediated by one body, neither that matter nor any part of it should be mediated by another body at the same time, and
- where part of a matter is being mediated by one body, that part should not be mediated by another body at the same time.

Litigation and mediation

6.40 There is no question that litigation, and agreement-making, has been lengthy and expensive, and that these and other components of the native title system have been costly and have only resulted in a small number of determinations. That said, I do not consider that any useful conclusions can be drawn from the statistics quoted in paragraphs 4.19 and 4.20 above, without having regard to statistics in relation to the other cases and, more importantly, the circumstances concerning those cases most of which were heard and decided during the early days of the development of this difficult area of jurisprudence.

6.41 Further, although it is usually intended that dispute resolution be attempted before and instead of trial, there have been several cases where resolution has succeeded only after the trial has proceeded. An example of this is *Smith v WA*[92] which was resolved after the hearing had proceeded for five weeks. When making the consent determination Madgwick J noted (at paragraph 19) that although the parties had originally hoped to settle the matter by agreement, they had different views about the appropriate framework and concluded that the matter had to be litigated. At paragraph 33, His Honour observed that 'in this case, it would not have been possible to resolve the case, I believe, without the matter having been partly heard.'

Federal Court

6.42 The Registrar of the Court has made a number of suggestions about case management of native title matters by the Court. The Registrar has also suggested a series of amendments at the end of Division 1A of Part 4 (which relates to the general functions of the Court in relation to native title matters).

6.43 I agree with all of those suggestions. Although the matters addressed may already be or could be covered by practice directions and/or by the existing powers of the Court (including the Federal Court Rules) I think it advantageous to articulate them in the NTA, particularly as they are specifically designed to cover this important and significant part of the Court's jurisdiction.

[90] Section 86B already contemplates that a 'part of the proceeding' may be referred to the NNTT for mediation.
[91] See section 86C.
[92] *Smith and others v State of Western Australia and others* (2000) 104 FCR 494.

Concluding comment

6.44 I do think that the present system, that is with the Court having exclusive jurisdiction and thus ultimate control over native title matters brought under the NTA, does work, notwithstanding the cost and time involved in conducting the landmark cases which have now settled much of the relevant law. As time goes by the time and cost of litigating native title matters should reduce and the scope for resolution by agreement should increase. I believe that the present system can be markedly improved by applying Option 3, by giving the NNTT all (or most) of the additional powers which we are recommending and by attending to some of the other matters discussed by us elsewhere in this report.

Dr Ken Levy

6.45 I am cognisant that the thread running through the Terms of Reference relates to 'efficiency and effectiveness'. These essentially require a concentrated focus on systemic issues. In particular I have focused on proposals aimed at improving native title outcomes rather than reconfiguring the native title system to accord with the preferences of either the Federal Court or the NNTT. It seems clear from the Terms of Reference that we have been asked to make recommendations aimed at maximising agreement-making in the most efficient and effective manner.

6.46 Our Terms of Reference are not aimed at facilitating more efficient native title trials and encouraging litigation options. If our Terms of Reference were focused on improving Federal Court trial management, then I consider that there would be merit in Option 3. However, I do not believe that an option based on merely giving more discretion to the Federal Court in the management of litigation can provide any realistic prospect in the medium or longer term for efficient and effective agreement-making. In fact, I have formed the view, based on the oral and written submissions we received, that there is already far too much focus on Federal Court trial and litigation outcomes by key system participants to the detriment of agreement-making. Adoption of Option 3 will entrench a litigation mentality which, while beneficial for the many lawyers involved in this system, will prove to be a costly detour to the goal of achieving final and just settlement of native title applications throughout Australia.

6.47 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.

6.48 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'. Likewise there is no debate that if NNTT mediation fails or stalls, then the Federal Court can and should intervene and determine whether to send the application to trial or to refer it to another form of mediation or use some other approach (for example, ENE). In this context, it is counter-intuitive to recognise the primary mediation skills of the NNTT and give it powers to ensure it maximises agreement-making, but simultaneously repeal the requirement that the Court send all applications to it for mediation. The Court's approach focuses on the independence of the judiciary and the need for each judge to manage a proceeding in his or her own way. I have formed the view that this has led to inconsistency and inefficiency in native title proceedings and such inconsistency and inefficiency would be exacerbated if Option 3 were adopted and judges were given the right to pick and choose mediators.

6.49 If the current mediation arrangements between the Federal Court and the NNTT were effective, one would have to query why we might be suggesting such significant change to the law and practice. As the behaviour of many people in the existing native title system has lead to the present ineffectiveness, it is an important learning from this study that a period of stability is required during mediation of native title matters. The psychological impact on participants in the native title system where there is a general knowledge that the system can be manipulated in an uncontrolled way can encourage more such inappropriate behaviour. This effect should not be underestimated.

6.50 I therefore believe that if the present problems are to be significantly improved, then mediation by one institution at the one time is essential. That should be seen to be synonymous with 'control and coordination' of mediation by one institution at the one time. It is apparent that Option 3 would exacerbate the current problems in the native title system by further proliferating concurrent mediation, thereby leading to cost and effectiveness implications and imposing reputational risks for the Federal Court.

6.51 For the reasons stated, I am strongly convinced that Option 2 (or, in the alternative, Option 1) is likely to be clearly more efficient in rectifying the deficiencies defined during the Review. Option 1 is almost as appealing as Option 2. Without greater efficiency in the use of resources, it is unlikely agreement-making will be increased in native title cases and therefore, it is unlikely that effectiveness will be improved. I believe these were the fundamental questions to be answered by the Terms of Reference.

6.52 In relation to the options, these have been analysed and debated from many perspectives. With Options 1 or 2, it is envisaged that mediation of a matter would be by one institution only and is central to those proposals. No mediation by a second institution of any subsidiary issue of a matter is contemplated. With Option 3, mediation of a matter or any subsidiary issue, at any time and by more than one institution is included in the scheme proposed by that option. This is an important concept to be considered in determining the relative overall merits.

6.53 Nevertheless, we have concluded that if the NNTT is vested with the additional powers and functions proposed in the recommendations, it will become significantly more efficient and should be able to more effectively mediate native title claims. After considering all of the material, the relevant law and the systemic deficits to be overcome, I believe that the Court should continue to be required to refer matters to NNTT mediation because the NNTT is more accessible to system participants and has specialised skills in this area. That is not to say that the Court does not have these skills, but the Court's procedures and basic skills are necessarily and primarily adjudicative and not in sensitive and complex mediation, which is the hallmark of native title matters. Also, the cost of legal representation before the NNTT should be more economical. The parties can be directly in control of their matters at that stage whereas they may be less adept at dealing with litigation and may be easily overwhelmed.

6.54 Therefore, I recommend that Option 2 and the subsidiary option be adopted. In the alternative, I support Option 1, supplemented by the subsidiary option. Options 1 and 2 are very similar and the only point of difference is that Option 1 includes a fixed three year period of mediation for the NNTT in matters referred to it. Option 2 has the benefit of allowing greater flexibility for the Federal Court than Option 1.

6.55 Options 3, 4 and 5 each have some virtues. However, in my view, Option 3 is unlikely to be as efficient as Options 1 or 2 at the mediation stage in terms of outputs, for a number of reasons. Firstly, there is currently inconsistency of practice within the Federal Court, which would not be

addressed by Option 3 alone. Secondly, the independence of the Court may be perceived to be weakened if the Court has greater involvement in mediation activities. Thirdly, this option is likely to be more costly for the parties. Fourthly, I believe that the NNTT will be better equipped to encourage parties to gather connection evidence and tenure information at an early stage.

6.56 If Option 3 is ultimately regarded as the preferred option, the subsidiary option of a native title division may complement Option 3 to make it more efficient.

6.57 Options 4 and 5 are likely to be less 'efficient' in the short term compared to the other options, as they are likely to be more expensive as a result of changing organisational structures and the disruption which occurs with major legislative and institutional change. Interestingly, Option 5 was proposed to us by both NNTT and the Law Council of Australia. However, in the long term, it is possible that these options may ultimately result in greater efficiency and effectiveness.

6.58 In relation to the subsidiary options, I support the creation of a native title division as it can be modified quickly to adapt to changing circumstances through Executive Council approval. I believe that a division also has the hallmark of greater public accountability. A benefit of the legislative mandate of a native title division of the Federal Court is that there is certainty as to its establishment and maintenance and appropriate ministerial input into the selection of judges who would constitute the native title division.

APPENDICES

1. Steering Committee members
2. Persons consulted
3. Individuals and organisations who provided written submissions

APPENDIX 1

Steering Committee members

Ian Govey, Deputy Secretary, Attorney-General's Department (chair)

Warwick Soden, Registrar, Federal Court of Australia

John Sosso, Member, National Native Title Tribunal

Greg Roche, Assistant Secretary, Office of Indigenous Policy Coordination, Department of Families, Community Services and Indigenous Affairs.

APPENDIX 2

In-person consultations

Queensland

- Department of Natural Resources and Mines – 4 November 2005
- Crown Solicitor's Office – 4 November 2005
- Ebsworth and Ebsworth (solicitors) – 4 November 2005
- Andrew Preston (barrister) – 4 November 2005
- Tony Dalton (native title claimant) – 4 November 2005
- Gore and Associates (solicitors) – 4 November 2005
- Queensland Seafood Industry Association – 4 November 2005
- Federal Court of Australia – 15 November 2005, 8 December 2005
- Macdonnells (solicitors) – 15 November 2005
- Local Government Association of Queensland – 15 November 2005
- Central Queensland Land Council – 15 November 2005
- National Native Title Tribunal – 15 and 21 November 2005
- Queensland Native Title Liaison Committee – 16 November 2005
- North Queensland Land Council – 16 November 2005
- Marita Stinton (legal practitioner) – 16 November 2005
- Chris Athanasiou (barrister) – 16 November 2005
- Carpentaria Land Council – 16 November 2005
- Cape York Land Council – 18 November 2005
- Gurang Land Council – 1 December 2005
- Torres Strait Regional Authority - 1 December 2005
- Bob Munn (native title claimant) –8 December 2005
- BHP Billiton –8 December 2005

Western Australia

- Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation – 9 November 2005
- Department of Premier and Cabinet, Office of Native Title – 9 November 2005
- Hunt and Humphry (solicitors) – 9 November 2005
- Goldfields Land Council – 9 November 2005
- South West Aboriginal Land and Sea Council – 9 November 2005
- National Native Title Tribunal – 9 and 10 November 2005
- Philip Vincent (barrister) – 10 November 2005
- State Solicitor's Office – 10 November 2005

- Kimberley Land Council – 18 November 2005
- Ngaanyatjarra Land Council – 1 December 2005

Northern Territory

- Northern Land Council – 7 November 2005
- Central Land Council – 7 November 2005
- Northern Territory Solicitor-General, Tom Pauling QC – 7 November 2005
- Department of Justice – 7 November 2005
- Chief Minister's Department – 7 November 2005
- Cridlands (solicitors) – 7 November 2005
- Northern Territory Seafood Council – 7 November 2005
- Northern Territory Cattleman's Association – 7 November 2005
- Federal Court of Australia – 8 November 2005

Victoria

- Department of Justice – 11 November 2005
- Federal Court of Australia – 11 November 2005
- Native Title Services Victoria – 11 November 2005
- Tom Keely (barrister) – 11 November 2005

New South Wales

- Department of Lands – 17 November 2005
- Crown Solicitor's Office – 17 November 2005
- Federal Court of Australia – 17 November 2005

South Australia

- Crown Solicitor's Office – 8 December 2005

Australian Capital Territory

- NTRB Chief Executive Officers – 24 November 2005
- Australian Government Solicitor – 24 November 2005
- Minerals Council of Australia – 24 November 2005

APPENDIX 3

Individuals and organisations who provided written submissions

Individuals

- Rosemary Craddock
- Bob Munn

Native Title Representative Bodies

- South West Aboriginal Land and Sea Council
- Goldfields Land and Sea Council
- Kimberley Land Council
- Carpentaria Land Council Aboriginal Corporation
- Torres Strait Regional Authority
- Gurang Land Council
- Ngaanyatjarra Land Council
- Native Title Services Victoria Ltd.
- Aboriginal Legal Rights Movement Inc.

Governments

- Department of Justice, Northern Territory Government
- Attorney General's Department, South Australia
- Crown Solicitor's Office, South Australia
- Department of Lands, New South Wales
- Deputy Premier and Treasurer, West Australian Government

Federal Court of Australia

- Justice Mansfield
- Justice French
- Registrar and Chief Executive Officer

National Native Title Tribunal

Aboriginal and Torres Strait Islander Social Justice Commissioner

Lawyers

- Allens Arthur Robinson
- Arnold Bloch Leibler
- Australian Government Solicitor

- Robert Blowes SC
- B A Keon-Cohen QC
- Law Council of Australia

Mining companies and associations

- North Queensland Miners Association
- The Minerals Council of Australia
- BHP Billiton
- Rio Tinto

Other organisations

- The Intergovernmental Committee on Surveying and Mapping (ICSM) Native Title Working Group
- Australian Institute of Aboriginal and Torres Strait Islander Studies (Indigenous Facilitation and Mediation Project, Native Title Research Unit)
- Local Government Association Queensland
- The Pastoralists and Graziers Association
- National Farmers Federation
- Telstra Corporation Ltd
- Ergon Energy Corporation Limited

GOVERNMENT RESPONSE TO THE REPORT OF THE NATIVE TITLE CLAIMS RESOLUTION REVIEW

The Native Title Claims Resolution Review was conducted by two independent consultants, Mr Graham Hiley QC and Dr Ken Levy. The Review considered how native title claims could be more efficiently and effectively resolved, primarily through mediation and agreement-making, and examined the role of the Federal Court and National Native Title Tribunal (NNTT) in resolving claims. The Review advised the Australian Government on measures for more efficient management of native title claims within the existing framework of the *Native Title Act 1993* (the NTA).

The consultants provided their report to the Attorney-General on 31 March 2006. The Government has considered the recommendations made in the report and makes the following response. The Government has taken into account advice from the Federal Court and the NNTT in relation to the recommendations.

It will be necessary to make specific amendments to the NTA to give effect to a number of the recommendations. The Government anticipates introducing proposed amendments as part of a larger Bill, towards the end of this year, to give effect to the various elements of the current native title reforms.

Options for institutional reform

The report outlines a number of potential options for institutional reform in Chapter 5. These options are listed below.

Option 1 – Provide the NNTT with an exclusive mediation jurisdiction for a period of three years.

Option 2 – Provide the NNTT with an exclusive mediation role with no time limitation on Federal Court intervention.

Option 3 – Provide the Federal Court with greater flexibility in relation to alternative dispute resolution.

Option 4 – Introduce a modified pre-1998 model for resolving native title claims.

Option 5 – Create a new native title court.

While both consultants concluded there was a need for some institutional reform, the consultants reached different conclusions on the best option for institutional reform.

Mr Hiley recommended that the Court be given greater flexibility in relation to the management of native title claims, including giving the Court the ability to decide when it is appropriate to refer a matter or issue to NNTT mediation (Option 3).

Dr Levy recommended that the current provisions in the NTA requiring the Court to refer matters to NNTT mediation be retained but that the Court be prohibited from conducting mediation while the matter remains with the NNTT (Option 2).

Response: The Government accepts Option 2. After consideration of the options for institutional reform, the Government has concluded Option 2 will best address the structural inefficiencies that exist in the native title system. This option will retain the existing requirement for the Federal Court to refer claims to the NNTT for mediation, but will make it clear the Court cannot conduct its own mediation into an issue which is also being mediated by the NNTT. Option 2 will prevent the duplication of functions that presently occurs whereby the NNTT and Federal Court can both mediate matters at the same time.

Subsidiary option

Chapter 5 of the report also considers the subsidiary option of creating a separate native title panel or division within the Federal Court.
Dr Levy supported the creation of a native title division, through amendments to the NTA. Mr Hiley supported the creation of a native title panel.

Response: The Government notes the views of the consultants. It does not consider it appropriate to enact legislation to create a native title division within the Court, and recognises any decision to create a native title panel would be a matter for the Chief Justice.

Recommendations in Chapter 4

Recommendation 1: That the NTA be amended to provide that, consistent with paragraphs 4.31 and 4.32, mediation should not be carried out by more than one body at the one time.

Response: This recommendation is accepted. Given the Government's acceptance of Option 2, the Government considers that while a claim is in mediation before the NNTT, the Court should be precluded from mediating any aspect of the claim.

Recommendation 2: That the NNTT be given the following powers in relation to a matter referred to it by the Federal Court for mediation:

- to direct a party to attend or participate in a mediation conference
- to direct a party to produce documents for the purpose of mediation within a nominated period or by a nominated date
- to conduct a review of material provided by the applicant (or any other party) to establish whether the native title claim group has, by its traditional laws and customs, connection to the land or waters claimed
- to assess whether the material would support a determination of native title, and
- to provide that assessment to a party or parties to the proceeding (subject to an order under section 136F of the NTA).

Response: This recommendation is accepted. In relation to the proposal that the NNTT be given powers to conduct a review and assessment of material, the Government considers such a review should be conducted by a Member of the NNTT who is not the Member responsible for mediating the matter.

Recommendation 3: That the NNTT be given a new inquiry function enabling the NNTT to collect evidence and make non-binding recommendations about overlapping claims and other inter-Indigenous and intra-Indigenous issues and about the kinds of matters covered by section 225.

After an application has been referred to the NNTT under section 86B of the NTA, the President of the NNTT should be empowered to, of his/her own motion or at the request of a party to the proceeding, direct that the Tribunal conduct an inquiry in relation to an issue that, if resolved, is likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application.

The President should be empowered to so direct where he/she is satisfied that:

- the applicant and other relevant parties would participate in the inquiry
- the issue is sufficiently important to justify an inquiry, and
- the results of the inquiry are likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application.

Before directing an inquiry (having regard to the fact that each application is a proceeding before the Federal Court), the President should be required to first consult with:

- the Chief Justice of the Federal Court
- the relevant NTRB (or body performing NTRB functions) for the relevant area
- the Commonwealth Minister
- the relevant State or Territory government, and
- the applicant of any affected native title application.

Such inquiries may be directed and conducted in relation to two or more applications where the same issue arises in relation to those applications.

Response: This recommendation is accepted. The Government also proposes legislative amendments to require the Court to consider the findings of such an inquiry where the inquiry addresses matters relevant to a particular claim. The Court would maintain the discretion to determine what evidentiary weight should be accorded to the findings of an inquiry.

Recommendation 4: That consideration be given to formulating a good faith obligation to be included in the NTA and developing a code of conduct for parties involved in native title mediations.

Response: This recommendation is accepted. The Government is giving further consideration to possible sanctions for breach of a good faith obligation by legal practitioners.

Recommendation 5: That the Court should convene regular user group meetings and regional call overs involving the NNTT. The NNTT and the Court should actively seek new methods of improving institutional communication.

Response: This recommendation is accepted.

Recommendation 6: The NTA should be amended to give the NNTT a right to appear before the Court and to provide assistance to the Court.

Response: This recommendation is accepted. The Government notes that the NNTT can currently appear before the Court in native title matters at the discretion of the Court but agrees it would be preferable to include the right to appear in the Native Title Act to ensure a consistent approach is taken in all native title matters.

Recommendation 7: The NTA should be amended to require the Federal Court to take into account any report provided by the NNTT under section 136G of the NTA when considering whether to make an order in relation to an application that has been referred to the NNTT for mediation.

Response: This recommendation is accepted.

Recommendation 8: That the NNTT's reporting functions be expanded to enable the Court to obtain relevant feedback on a regional basis.

(i) The Court be empowered to request the NNTT to prepare a regional mediation progress report and/or a regional work plan in respect of a State, Territory or region. When so requested the NNTT must prepare such a report.

(ii) The NNTT may prepare a regional mediation progress report and/or a regional work plan in respect of a State, Territory or region to assist the Court in progressing the proceedings in the State, Territory or region.

Response: This recommendation is accepted.

Recommendation 9: That further consideration be given to how claims can be better particularised at an earlier stage of proceedings in order to assist in the identification of relevant issues. This may require applicants to file evidentiary material earlier, preferably at the time of lodging the application (or within a stipulated time thereafter, for example, where the application is made in response to a future act notice). The Court should consider making orders for pleadings or other kinds of particularisation. Consideration should also be given to amending the requirements of sections 61A and 62 regarding the Form 1.

Response: The Government agrees to give further consideration to these issues.

Recommendation 10: More use should be made of the NNTT's research facilities and, in particular, its ability to produce research reports. In cases where the NNTT is requested to prepare a research report by the member conducting a mediation, the contents of the report should be disclosed to any party who makes a request. These reports should be supplied following the exercise of a discretion of the presiding member and taking account of any special circumstances.

Response: This recommendation is accepted. The Government understands that NNTT research reports are normally made available to parties on request but agrees this practice should be promoted and adopted on a consistent basis.

Recommendation 11: That further consideration be given to assisting the NNTT to continue to develop a database of current tenure material. This database should be publicly accessible to parties and their legal representatives.

Response: The Government notes there are significant technical and legal issues associated with the proposal for a database of current tenure material. The Government is seeking further advice from the NNTT on this recommendation.

Recommendation 12: That amendments be made to avoid the requirement for all amended applications to undergo the registration test again if the application has already passed the registration test. In particular, we recommend the following.

(i) An amended application should not to be subject to the registration test, unless the Court orders otherwise, where a claimant application is amended to:

- reduce the area of land or waters covered by the application
- reduce the list of asserted native title rights and interests, or
- remove the name of a deceased applicant where other applicants remain.

(ii) Where a claimant application is amended to replace a deceased person as applicant, the amended application is not to be subject to the registration test if the Native Title Registrar is satisfied that:

- the amendment has been certified by the relevant representative body, or
- the amended application was accompanied by an affidavit sworn by the new applicant stating that the new applicant is authorised by the other persons in the native title claim group to deal with matters arising in relation to the application and stating the basis on which the new applicant is so authorised (see subsections 64(5) and 190C(4)).

(iii) Where an amendment is made which is not to be subject of the registration test, the Native Title Registrar must amend the Register to reflect that amendment as soon as possible.

Response: This recommendation is being further considered in the context of the Government's proposals for technical amendments to the NTA.

Recommendation 13: That amendments be made to the authorisation provisions in the NTA to remove ambiguities. For example, it seems appropriate to clarify whether:

- lack of authorisation is fatal to a claim
- authorisation that might have been defective can be later ratified or otherwise cured, and
- the registered native title claimants must be unanimous in giving instructions, executing agreements and otherwise, or whether a majority is sufficient, or whether some other rules should apply, for example, rules similar to those in sections 251A and 251B.

Response: This recommendation is being further considered in the context of the Government's proposals for technical amendments to the NTA.

Recommendation 14: That the notification requirements in subsection 66(3) of the NTA be amended to provide the Court with greater flexibility in relation to who should be notified and as to when people are to be notified. In particular, we make the following recommendations.

(i) Section 66 should be amended to allow the Court to order notification of potentially affected interested holders at any time which it considers appropriate.

(ii) The President of the NNTT should be empowered to direct the Registrar not to notify an application under subsection 66(3) of the NTA where:

- a claimant application is lodged in response to a notice under section 29 of the NTA and is registration tested within four months of the notification day (see paragraph 30(1)(a) and subsection 190A(2)), and
- it is apparent that the application is primarily for the purpose of securing the right to negotiate.

If subsequently the President is satisfied that the application should be notified, the President should be required to direct the Registrar to notify the application under subsection 66(3).

Response: This recommendation is being further considered in the context of the Government's proposals for technical amendments to the NTA.

Recommendation 15: The NTA should 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 NTA
- the future act has occurred, and
- the applicant has not produced connection material or sought to advance the substantive resolution of the application.

The Court should not be required to order a claimant application to be dismissed if there are compelling reasons not to do so.

Response: This recommendation is accepted.

Recommendation 16: The NTA should be amended to deal with the following claims as follows.

(i) Dealing with unregistered claimant applications: Where a new claimant application does not satisfy all of the conditions of the relevant part of the registration test in section 190B of the NTA (conditions about the merits of the claim), the Federal Court must order that the claim be dismissed unless the Court is satisfied that:

- the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period
- there are good prospects of a negotiated outcome, or
- there are other reasons why the application should not be dismissed.

In deciding whether an application should not be dismissed, the Court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material.

(ii) One year after the proposed amendments to the NTA commence to operate, the Native Title Registrar must apply the registration test to:

- all claimant applications that are not on the Register of Native Title Claims, and
- claimant applications that did not have to undergo the registration test.

The registration test should be re-applied (or applied as the case may be) to determine whether each application would satisfy all of the conditions of the relevant part of the registration test in section 190B of the NTA (conditions about the merits of the claim). If an application would not satisfy all those conditions, the Native Title Registrar must inform the applicant of the reasons why the application would not satisfy the conditions and invite the applicant to amend the application or provide additional information within a nominated period.

If the application is not amended or the additional information is not provided, the Native Title Registrar must report to the Federal Court about the current status of the application and the reasons why it is not registered. Where the Court receives such a report from the Native Title Registrar, the Court must order that the claim be dismissed unless the Court is satisfied that:

- the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period
- there are good prospects of a negotiated outcome, or
- there are other reasons why the application should not be dismissed.

In deciding whether an application should not be dismissed, the Court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material.

Response: This recommendation is accepted.

Recommendation 17: That the NNTT and parties be encouraged to make greater use of the provisions in the NTA and of the Federal Court Rules such as Order 29 rule 2 to refer particular issues of fact and law to the Court for determination.

Response: This recommendation is accepted.

Recommendation 18: The NNTT should refer to the Federal Court for determination the question of whether a party should be removed if it considers that a party does not have a relevant interest. Such referral should be dealt with by a Court registrar under judge-delegated powers.

Response: This recommendation is accepted.

Recommendation 19: That consideration be given to amending the 'party' provisions of the NTA (section 84) to allow an industry body to intervene in a representative capacity if one or more of its members is or was otherwise entitled to be a party and wishes the industry body to represent him, her or them. This should be subject to the Court's discretion to refuse permission to intervene as appropriate, to allow intervention on terms, and to later remove the industry body if relevant circumstances change.

Response: This recommendation is accepted.

Recommendation 20: That consideration be given to limiting the right of participation of a third party (that is, a non-government respondent party) to issues that are relevant to its interests and the way in which they may be affected by the determination sought.

Response: This recommendation is accepted.

Recommendation 21: That the Court and other relevant participants be encouraged to give greater priority to the holding of limited evidence and preservation hearings, coupled with contemporaneous dispute resolution.

Response: This recommendation is accepted to the extent that it is consistent with the Government response to Recommendation 1. While limited evidence and preservation hearings can be conducted by the Court while a matter is in mediation before the NNTT, the Court should not engage in mediation in relation to the preservation hearing while the claim remains before the NNTT. The Court should also consult with the NNTT on the timing of such hearings, to avoid disruption to the NNTT mediation.

Recommendation 22: That section 137 of the NTA not be amended.

Response: This recommendation is accepted.

Recommendation 23: That the NTA be amended to empower the Chief Justice to request that the NNTT hold an inquiry of the kind outlined in Recommendation 3, subject to the President's consideration of the availability of resources and the likely workload of the proposed inquiry.

Response: This recommendation is accepted.

Recommendation 24: That the Court be encouraged to adopt a practice note setting out the Court's preferred method for managing native title claims to ensure all parties have a shared understanding of the process.

Response: This recommendation is accepted.

ATTACHMENT E

THE NATIVE TITLE AMENDMENT BILL 2006 AND THE RECOMMENDATIONS OF THE NATIVE TITLE CLAIMS RESOLUTION REVIEW

Recommendation	Item numbers	Relevant sections	Summary of proposed amendments
Option 2 Provide the NNTT with an exclusive mediation role with no time limitation on Federal Court intervention. Retain the current provisions in the Native Title Act requiring the Court to refer matters to NNTT mediation but ensure that the Court is prohibited from conducting mediation while the matter remains with the NNTT.	12	Repeals subsection 86B(2)	The Court must refer matters to NNTT for mediation unless criteria in subsections 86B(3)(a)-(c) are met.
Recommendation 1 That the NTA be amended to provide that mediation should not be carried out by more than one body at the one time.	19	Subsection 86B(6)	If a matter is referred to the NNTT for mediation, the Court must not mediate or order parties to attend before a Court Registrar for the purpose of satisfying the Registrar that all reasonable steps have been taken to achieve a negotiated outcome unless the mediation ceases.
Recommendation 1 and Option 2	8-9, 11, 14-17, 21-27, 29-30, 79-80	Sections 86A, 86B, 86C	Clarifies that references to mediation in Part 4, Division 1B generally refer to 'NNTT mediation'.

Recommendation 2 – compulsory powers That the NNTT be given the following powers in relation to a matter referred to it by the Federal Court for mediation: • to direct a party to attend or participate in a mediation conference • to direct a party to produce documents for the purpose of mediation within a nominated period or by a nominated date	31, 45, 47, 51	Subsections 86C(3), 86D(3), 136B(1A), section 136CA and subsection 136G(3B)	Presiding member may compel parties to attend mediation conferences or compel parties to produce certain documents for the purpose of mediation conferences. If parties fail to comply, the NNTT can make a report to the Court. The Court has a discretion to enforce the NNTT direction. If the Court makes an order enforcing an NNTT direction, it must make an order in similar terms to the NNTT direction.
Recommendation 2 - review of connection material That the NNTT be given the following powers in relation to a matter referred to it by the Federal Court for mediation: • to conduct a review of material provided by the applicant (or any other party) to establish whether the native title claim group has, by its traditional laws and customs, connection to the land or waters claimed • to assess whether the material would support a determination of native title, and • to provide that assessment to a party or parties to the proceeding (subject to an order under section 136F of the NTA).	53	Division 4AA (sections 136GC – 136GE)	A NNTT member (including a consultant) may conduct a review of connection material provided voluntarily by a party to the proceedings. A review can only be conducted in a matter that is already before the NNTT for mediation. The member conducting the review must make a report setting out his or her findings and provide the report to any party who participated in the review and to the member presiding over the mediation. The report may also be provided to the Federal Court and/or other parties in the proceeding.
Recommendation 3 That the NNTT be given a new inquiry function enabling the NNTT to collect evidence and make non-binding recommendations about overlapping claims and other inter-Indigenous and intra-Indigenous issues and about the kinds of matters covered by section 225. After an application has been referred to the NNTT under section 86B of the NTA, the President of the NNTT should be empowered to, of his/her own motion or at the request of a party to the proceeding, direct that the Tribunal conduct an inquiry in relation to an issue that, if resolved, is likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing	7, 57-68, 87	Subsection 86(2) Subdivision AA (sections 138A – 138G) Subsection 141(5) Section 154A Section 163A Subsection 164(2)	Introduces a new type of inquiry function – 'native title application inquiries'. The applicant is the only person required to participate in a native title application inquiry and the applicant must consent before the President may order an inquiry be conducted. A native title application inquiry is initiated by the President, on his or her own initiative or at the request of the Chief Justice of the Court or of a party to the relevant application. A native title application inquiry will examine issues relevant to a determination of native title arising in one or more application. Hearings for native title

being done in relation to the application. The President should be empowered to so direct where he/she is satisfied that: • the applicant and other relevant parties would participate in the inquiry • the issue is sufficiently important to justify an inquiry, and • the results of the inquiry are likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application. Before directing an inquiry (having regard to the fact that each application is a proceeding before the Federal Court), the President should be required to first consult with: • the Chief Justice of the Federal Court • the relevant NTRB (or body performing NTRB functions) for the relevant area • the Commonwealth Minister • the relevant State or Territory government, and • the applicant of any affected native title application. Such inquiries may be directed and conducted in relation to two or more applications where the same issue arises in relation to those applications. **Recommendation 23** That the NTA be amended to empower the Chief Justice to request that the NNTT hold an inquiry of the kind outlined in Recommendation 3, subject to the President's consideration of the availability of resources and the likely workload of the proposed inquiry.			application inquiries will generally be in private. The NNTT will be required to provide a report making non-binding recommendations at the conclusion of an inquiry. The report must be provided to parties to the inquiry and to the Court.

Recommendation 4 That consideration be given to formulating a good faith obligation to be included in the Native Title Act and developing a code of conduct for parties involved in native title mediations.	43-44, 46, 52, 84, 86	Subsection 136B(4) Sections 136GA, 136GB	All parties and their representatives will be required to act in good faith in relation to the conduct of mediation before the NNTT. The NNTT will be able to report breaches of the good faith obligation to various entities, including funding bodies, the Court and legal professional bodies.
Recommendation 6 The Native Title Act should be amended to give the NNTT a right to appear before the Court and to provide assistance to the Court.	18, 20, 40, 81	Paragraph 86B(4)(ea) Section 86BA Paragraph 123(1)(ca)	The NNTT will have a right to appear before the Court at any hearing where the Court is deciding whether to make an order there be no mediation before the NNTT. The NNTT will also have a right to appear before the Court at any hearing where a matter is before the NNTT for mediation. The President is empowered to make directions about who may appear on behalf of the NNTT.
Recommendation 7 The Native Title Act should be amended to require the Federal Court to take into account any report provided by the NNTT under section 136G of the Native Title Act when considering whether to make an order in relation to an application that has been referred to the NNTT for mediation.	28, 36, 83	Subsection 86C(5) Section 94B	The Court will be required to take into account any relevant mediation report and regional mediation report or regional work plan provided by the NNTT when deciding whether to make an order including when deciding whether to make an order that NNTT mediation cease.
Recommendation 8 That the NNTT's reporting functions be expanded to enable the Court to obtain relevant feedback on a regional basis. **(i)** The Court be empowered to request the NNTT to prepare a regional mediation progress report and/or a regional work plan in respect of a State, Territory or region. When so requested the NNTT must prepare such a report. **(ii)** The NNTT may prepare a regional mediation progress report and/or a regional work plan in respect of a State, Territory or region to assist the Court in progressing the proceedings in the State, Territory or	28, 33, 36, 50, 51, 83	Subsection 86C(5) Subsection 86E(2) Section 94B Subsections 136G(2A), (3A)	The NNTT may provide regional mediation reports or regional work plans to the Court on its own initiative or at the request of the Court. The Court is required to take relevant reports or work plans into account when deciding whether to make orders.

region.			
Recommendation 15 The Native Title Act should 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 • the applicant has not produced connection material or sought to advance the substantive resolution of the application. The Court should not be required to order a claimant application to be dismissed if there are compelling reasons not to do so.	2, 36, 77	Section 66C Section 94C	The Court will be required to dismiss claims deemed to have been made in response to future act notices in certain circumstances. Claims will be dismissed where the procedural rights attached to the initial future act notice that prompted the claim have been exhausted. The Registrar of the NNTT will be enabled to provide information, including information obtained from State and Territory government officials about the status of claims and future act notices, to assist the Court in determining whether the relevant criteria have been met. Claimants will be given a reasonable opportunity to make submissions on the question of whether their claim should be dismissed. The Court must not dismiss an application if there are compelling reasons not to do so.
Recommendation 16 The Native Title Act should be amended to deal with the following claims as follows. **(i)** Dealing with unregistered claimant applications: Where a new claimant application does not satisfy all of the conditions of the relevant part of the registration test in section 190B of the Native Title Act (conditions about the merits of the claim), the Federal Court must order that the claim be dismissed unless the Court is satisfied that: • the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period	72-73, 88-90	Subsection 190D(1B) Subsection 190D(6)	Claims that are not accepted for registration because they fail the merits component of the registration test (or are so procedurally deficient that merits cannot be assessed) may be dismissed by the Court, once any appeal or review processes are complete. Transitional provisions will require all claims that have not passed the registration test to undergo the test again. Claims that fail the merits component of the test (or are so procedurally deficient that merits cannot be assessed) may be dismissed by the Court.

• there are good prospects of a negotiated outcome, or • there are other reasons why the application should not be dismissed. In deciding whether an application should not be dismissed, the Court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material. **(ii)** One year after the proposed amendments to the Native Title Act commence to operate, the Native Title Registrar must apply the registration test to: • all claimant applications that are not on the Register of Native Title Claims, and • claimant applications that did not have to undergo the registration test. The registration test should be re-applied (or applied as the case may be) to determine whether each application would satisfy all of the conditions of the relevant part of the registration test in section 190B of the Native Title Act (conditions about the merits of the claim). If an application would not satisfy all those conditions, the Native Title Registrar must inform the applicant of the reasons why the application would not satisfy the conditions and invite the applicant to amend the application or provide additional information within a nominated period. If the application is not amended or the additional information is not provided, the Native Title Registrar must report to the Federal Court about the current status of the application and the reasons why it is not registered. Where the Court receives such a report from the Native Title Registrar, the Court must order that the claim be dismissed unless the Court is satisfied that: • the application will be amended, or additional information will be provided to satisfy the conditions of the registration test			

within a specified period • there are good prospects of a negotiated outcome, or • there are other reasons why the application should not be dismissed. In deciding whether an application should not be dismissed, the Court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material.			
Recommendation 18 The NNTT should refer to the Federal Court for determination the question of whether a party should be removed if it considers that a party does not have a relevant interest. Such referral should be dealt with by a Court registrar under judge-delegated powers.	48, 85	Section 136DA	The NNTT will be enabled to refer to the Court for determination questions about whether a party should continue to be a party to proceedings. The 'without prejudice' protection that generally attaches to mediation will not apply for the purposes of determining questions about a person's status as a party.
Recommendation 20 That consideration be given to limiting the right of participation of a third party (that is, a non-government respondent party) to issues that are relevant to its interests and the way in which they may be affected by the determination sought.	3-5, 78	Subparagraphs 84(3)(a)(i), 84(3)(a)(iii), Subsection 84(5)	Persons with an 'interest that may be affected by a determination in the proceedings' that is not an 'interest in relation to land or waters' may not automatically become parties to the proceeding. These persons may become a party with leave of the Court if the Court considers it is in the interests of justice to do so.

	1, 34, 35, 69-71, 82	Subsections 64(1B), (1C) Paragraph 87(1)(d) Section 87A Paragraph 190(3)(a) Subsection 190A(1A)	The Court may make a determination of native title over part of a claim area where some, but not all parties to the proceeding, agree to the determination being made. In considering whether to make the determination, the Court must consider the objections of any other parties to the proceeding. The application will be deemed to be amended to reduce the area of land or waters following a determination by the Court. The amended application will not be required to undergo the registration test again.

Structures and Processes of Prescribed Bodies Corporate

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Summary of Recommendations

Recommendation 1

5.7 The Australian Government should make clear to all stakeholders the extent to which NTRBs may currently assist PBCs following their establishment and incorporation.

Recommendation 2

5.28 The Australian Government should arrange the preparation and maintenance of information packages for PBCs for each jurisdiction, outlining relevant State and Territory legislation, potential sources of assistance through Government grants and programs, as well as available information on support from the private sector.

Recommendation 3

5.32 The Attorney-General and the Attorney-General's Department should press State and Territory Governments to agree to:

- place PBC establishment and needs on the agenda for consideration of all parties as a matter of practice when negotiating consent determinations or future act agreements, and
- actively promote a better understanding of the functions, needs and responsibilities of PBCs among other stakeholders in the native title system.

This should be done through multilateral forums, such as the Native Title Ministers' Meeting, as well as through bilateral meetings and consultations at ministerial and officer level.

Recommendation 4

6.7 The Office of the Registrar of Aboriginal Corporations should coordinate the provision of relevant information on PBCs to native title claimants in the lead-up to the making of any native title determinations. This should include information and training on roles and responsibilities and related governance issues, and sound decision making-processes and record keeping. Such information could be provided with the assistance of the National Native Title Tribunal and the relevant Native Title Representative Body.

Recommendation 5

7.7 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.

Recommendation 6

7.12 The PBC regulations should be amended to clarify the circumstances in which 'standing authorisations' may be issued to a PBC, and, in particular, to provide that only one certificate needs to be issued with each authorisation.

Recommendation 7

7.16 The PBC regime should be amended to enable an existing PBC 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.

Recommendation 8

7.18 The PBC regulations should be amended to remove the requirement that all members of a PBC be native title holders and associated safeguards should be included to ensure the protection of native title rights and interests.

Recommendation 9

7.24 The Office of the Registrar of Aboriginal Corporations should develop and distribute appropriate educative material regarding obligations and requirements under the CATSI legislation to all PBCs and NTRBs. This should include:

(a) a Guide to Good Governance specifically tailored to PBCs

(b) model rules for PBCs, and

(c) additional information as appropriate.

Recommendation 10

8.4 The process for allocating funds to NTRBs should be modified to ensure that appropriate priority is given to the performance of NTRB functions associated with assistance to PBCs. NTRBs should be required to detail the nature and level of support which they expect to provide to PBCs, and to report on the implementation of such measures.

Recommendation 11

8.10 The Native Title Act should be amended to authorise PBCs to charge a third party for costs and disbursements reasonably incurred in performing its statutory functions under the NTA or the PBC Regulations at the request of the third party. The amendments should also provide for an appropriate authority to investigate such arrangements on request, to ensure the costs were reasonably incurred.

Recommendation 12

8.17 The General Terms and Conditions Relating to Native Title Program Funding Agreements should be amended to enable NTRBs to assist PBCs with their day to day operations in circumstances where this has been approved by the Office of Indigenous Policy Coordination.

Recommendation 13

8.20 The Australian Government should, in consultation with State and Territory Governments, actively promote measures for providing support to PBCs via Shared Responsibility Agreements and/or Regional Partnerships Agreements.

Recommendation 14

8.24 The Australian Government should consult State and Territory Governments on possible measures to enable State or Territory land rights corporations to act as PBCs where the native title holders agree to this.

Recommendation 15

8.31 The Australian Government should note the need to develop a mechanism for the determination of a default PBC in appropriate circumstances. The Office of Indigenous Policy Coordination should develop a comprehensive proposal for the establishment of 'default' bodies corporate to perform PBC functions in circumstances where there is no functioning PBC nominated by the native title holders.

1. Background

1.1 In September 2005 the Government agreed upon a series of measures aimed at improving the efficiency and effectiveness of the native title system. The six interconnected elements of reform are:

- measures to improve the effectiveness of Native Title Representative Bodies (NTRBs)[1]
- reform of the native title respondents financial assistance program to encourage agreement-making rather than litigation
- preparation of exposure draft legislation for consultation on possible technical amendments to the *Native Title Act 1993* (NTA) to improve existing processes for native title litigation and negotiation
- an independent review of the claims resolution processes to consider how the National Native Title Tribunal (NNTT) and the Federal Court may work more effectively in managing and resolving native title claims
- increased dialogue and consultation with State and Territory governments to promote and encourage more transparent practices in the resolution of native title issues, and
- an examination of the current structures and processes of Prescribed Bodies Corporate (PBCs),[2] the bodies established to manage native title once it is recognised, with a view to finding ways to improve their effectiveness.

1.2 The last-mentioned element of the reforms is the focus of this report. Specifically, the Government agreed that the examination of PBCs should:

- identify their basic functions and resource needs
- ensure those functions and resource needs are aligned with existing funding sources from Australian Government, state and non-government sectors, and
- assess the appropriateness of the existing statutory governance model for PBCs.

2. Overview of the issues

The role of PBCs

2.1 PBCs are a key element of the native title system, and the NTA envisages that eventually all dealings with native title holders will occur through PBCs. In seeking to accommodate native title within the Australian property law regime, the PBC model was adopted to provide a mechanism

[1] In this report, the term NTRBs is applied to representative Aboriginal and Torres Strait Islander bodies which are recognised under section 203AD of the *Native Title Act 1993* (NTA), as well as alternative service providers which receive funds to perform NTRB functions under subsection 203FE(1) of the NTA (NSW Native Title Services, Native Title Services Victoria, and Queensland South Native Title Services).

[2] Once the details of a Prescribed Body Corporate are entered on the National Native Title Register, the body then has the status of a "Registered Native Title Body Corporate". For ease of reference, this report uses the term PBC to cover both Prescribed Bodies Corporate and Registered Native Title Bodies Corporate.

through which the communal character of native title may be recognised by means of a clearly identified entity that can act for the native title holding group. 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.

2.2 Available evidence suggests very few PBCs are operating effectively, if at all, in fulfilling these roles. 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 to incorporate under, and there has been increasing criticism from stakeholders about their workability. PBCs need to operate effectively so that native title holders are able to utilise their native title rights to derive economic and other significant benefits, and to discharge their land management obligations.

Current and anticipated number of PBCs

2.3 Any reforms to the existing arrangements for PBCs will need to take into account the number of PBCs which are likely to be established in the foreseeable future. As at 19 May 2006 there were 42 PBCs and 58 determinations that native title exists.[3] The locations of PBCs determined to date, as well as those yet to be established in relation to a determination that native title exists, are set out in the following table[4]:

Table 1: PBCs determined and yet to be determined as at 19 May 2006

Jurisdiction	**Existing PBC**	**PBC yet to be determined**
Torres Strait	20	0
Queensland	7	1
Western Australia	11	2
Northern Territory	2	5
South Australia	0	1
Victoria	1	0
New South Wales	1	0
Total	**42**	**9**

2.4 Although there are currently 574 native title claims, it is unlikely that there will be anywhere near that number of PBCs established in future. A significant proportion of those claims would have been lodged primarily to attract the procedural rights afforded to registered native title claimants under the NTA, and it is possible that some of these claimants may not intend to seek a native title determination. Many of the claims are overlapping and are likely to be consolidated. It

[3] In part, the discrepancy between the number of determinations and PBCs relates to the practice of the Federal Court to allow a delay (in one case of over a year to date) between a determination native title exists and determining the PBC that is to manage the native title. At times the Federal Court has also determined two PBCs for a single determination area, enabling each PBC to manage the rights of a particular sub-group. It is also possible for the Court to determine single PBCs to manage native title for multiple determinations in cases where the native title holders for each determination are the same.

[4] Based on statistics provided by the NNTT.

is also clear that a large number of claims are unlikely to result in a finding of native title.[5] Of the 83 native title determinations made as at 19 May 2006, 25 are to the effect that no native title exists in the claim area. Further, over the last 5 years the number of new claims lodged has slowed significantly - 129 claims were made in 2001 contrasting with only 35 claims in 2005.

2.5 Based on this, it is possible that no more than approximately 100 PBCs will be established in total, although this estimate is subject to the possible determination of multiple PBCs over a single area. It is also likely that, once the stronger claims have been dealt with, some residual cases will see determinations of PBCs with solely non-exclusive rights over land to which another entity – Government or private – holds title and/or management responsibilities. The estimate would also be affected if there was to be a move away from the current trend to the consolidation of claims once residual claims are determined, although it would appear there is less likelihood of determinations in such cases.

3. Approach to the report

3.1 The examination was progressed by a Steering Committee, which was chaired by the Attorney-General's Department (AGD) given its responsibility for the native title system as a whole and the Prime Minister's request that the Attorney-General consider how to improve the effectiveness of PBCs. The Steering Committee also comprised the Office of Indigenous Policy Coordination (OIPC), which has formal responsibility for parts of the NTA relevant to PBCs, and the Office of the Registrar of Aboriginal Corporations (ORAC), which has extensive experience with Indigenous governance issues and is responsible for the *Aboriginal Councils and Associations Act 1976* (ACA Act), under which PBCs must incorporate.

3.2 Targeted consultations were undertaken between November 2005 and January 2006. In recognition of the differing needs and cultural backgrounds of stakeholders, the consultations were undertaken in a range of formats, primarily through personal meetings and through the distribution of issues papers seeking comment on particular issues from stakeholders. Stakeholders who were consulted included representatives from a number of PBCs, NTRBs, State and Territory Governments, and industry bodies.

3.3 Information was also drawn from a number of public sources, including submissions made to the recent inquiry by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account (PJC) into NTRBs, and to the continuing inquiry by the Senate Legal and Constitutional Legislation Committee into the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 (CATSI Bill).[6] The Steering Committee also had regard to relevant published material on PBCs, primarily produced by legal and anthropological practitioners in the native title system.

3.4 This report analyses the key issues identified through the consultation process, and recommends a range of measures for consideration by Government. These issues have been the subject of detailed consideration by the Steering Committee.

3.5 Further details of the consultations are included at **Appendix 1**.

[5] The report of the Claims Resolution Review notes that as at 17 January 2006, there had been 1683 native title applications filed in total, but that 1062 had been resolved, discontinued, withdrawn or combined. [Native Title Claims Resolution Review, 31 March 2006, paragraph 4.9.] The Review stated that "[b]y now it is likely that most land (and water) that can be claimed has been claimed" [paragraph 4.17].

[6] It is expected that the CATSI Bill will replace the ACA Act as the incorporation vehicle for PBCs.

4. PBC functions and obligations

Introduction

4.1 PBCs are currently governed by a complex legislative framework, which includes a series of functions and powers prescribed by the NTA and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations), as well as a number of corporate governance requirements imposed under the *Aboriginal Councils and Associations Act 1976* (ACA Act). The following paragraphs summarise the key elements of the existing framework.

Requirement that a PBC be established

4.2 Under the NTA, if the Federal Court determines that native title exists, the native title holders are required to establish a PBC to manage their native title rights and interests. The PBC Regulations provide that all members of the PBC must be native title holders. However, not all native title holders must be members of the PBC. At the time of the determination, the native title holders must[7] nominate a PBC to the Court and indicate whether it will hold their native title on trust (trust PBC), or whether the native title will be held by the native title holders, in which case the PBC will act as their agent and operate on their instructions (agent PBC). The choice between trust and agent PBC will result in different legal relationships between the PBC and the broader native title holding group. For example, in the case of an agent PBC, the broader native title holding group will be liable for any debts that may exist if the PBC becomes insolvent.

Native title functions

4.3 The NTA and the PBC Regulations set out the functions to be carried out by a PBC in managing and holding native title. The functions set out in the NTA include the following:

- receiving future act notices, as well as possibly advising native title holders about, or providing them a copy of, such notices[8]
- exercising procedural rights afforded to native title holders under the NTA,[9] including commenting on, objecting to and negotiating about proposed future acts
- preparing submissions to the NNTT or other arbitral bodies about right to negotiate matters, including whether negotiations have occurred in good faith and objecting to the application of the expedited procedure[10]

[7] The Federal Court has however adopted a practice of "springing orders" where no PBC is nominated, such that the determination is expressed as being subject to the nomination of a PBC within a specified time period (usually 6 months) and is only actually made if the PBC is nominated. This issue is examined further at paragraphs 8.25-8.31 of this report.

[8] The NTA establishes a procedural framework, known as the future act regime, within which future activity impacting on native title may be undertaken. The regime seeks to ensure that native title rights are taken into account by laying down procedures which must be complied with before acts affecting native title may be done.

[9] Procedural rights may also arise under an alternative state or territory right to negotiate regime. The NTA allows States and Territories to develop their own native title regimes that apply instead of the right to negotiate under the NTA, where the Commonwealth Minister determines that the regime complies with criteria set out in the NTA.

[10] Under the NTA native title holders have the right to negotiate about the doing of certain acts. The NTA also allows for an expedited procedure to apply in relation to acts which would otherwise be subject to the right to negotiate, if those acts are unlikely to interfere directly with the activities of, or sites or areas of significance to, the native title holders. Native title parties have four months to object to the application of the expedited procedure.

- negotiating, implementing and monitoring native title agreements
- considering compensation matters and bringing native title compensation applications in the Federal Court, and
- bringing revised or further native title determination applications cases in the Federal Court.

4.4 The functions set out in the PBC Regulations include the following:

- managing the native title holders' native title rights and interests
- holding money (including payments received as compensation or otherwise related to the native title rights and interests) in trust
- investing or otherwise applying money held in trust as directed by the native title holders
- consulting with the native title holders about decisions that would affect native title and preparing and maintaining documentation as evidence of consultation and consent
- consulting and considering the views of the relevant NTRB for an area about a proposed native title decision, and
- performing any other function relating to the native title rights and interests as directed by the native title holders.

Corporate governance obligations

4.5 The PBC Regulations provide that PBCs must be incorporated under the ACA Act. The corporate governance requirements that PBCs are required to meet under the ACA Act include:

- conducting and managing meetings of the Governing Committee of the PBC
- conducting annual general and special meetings of PBC members, including elections and nominations for the Governing Committee
- maintaining a register of members to be given to the Registrar of Aboriginal Corporations within six months of the end of each financial year
- keeping accounts and records of the transactions and affairs of the PBC by the Governing Committee, and
- preparing annual committee and examiner's reports at the end of each financial year, which are to be filed with the Registrar.

4.6 As noted below (paragraphs 7.20 to 7.23), the corporate governance obligations imposed on PBCs would be modified significantly under the CATSI Bill, which is currently before the Parliament.

Native title related functions

4.7 PBCs may also have other functions or obligations under Australian and State or Territory government legislation by virtue of their roles in managing rights and interests in relation to lands

and waters. These will vary according to requirements of the legislation in the relevant jurisdiction, and the nature of the native title rights held. Those PBCs which manage exclusive native title rights are most likely to be subject to a series of land management obligations, which may include:

- controlling and/or destroying feral pests and weeds
- maintaining watercourses or lakes within or adjoining the relevant land
- establishing and maintaining firebreaks, and
- clearing and removing rubbish or refuse.

4.8 PBCs may also have cultural heritage functions to perform. Such functions may arise under the NTA in considering future act notices,[11] as well as under relevant State and Territory legislation and procedures governing heritage issues.[12]

Community expectations

4.9 A number of stakeholders observed that, following formal recognition of traditional owner status through a native title determination, expectations may be placed on PBCs to fulfil broader roles with respect to indigenous issues, and PBCs may be asked to become involved in activities such as town-planning, social harmony projects, cultural protocols, welcomes to country and interpretive and cultural signage. For example, the Lhere Artepe PBC in Alice Springs is currently promoting measures to address anti-social behaviour by visitors to Alice Springs through strategies such as the development of Visitors Protocols, aimed at educating and providing guidelines for all visitors to Alice Springs. The Mer PBC in the Torres Strait also indicated a strong interest in progressing economic development opportunities within the community.

4.10 While meeting such expectations may go beyond native title functions under the NTA or PBC Regulations, these are often regarded by native title holders and other members of the community as a responsibility which comes with being traditional owners in respect of an area. Although such expectations may be regarded as being of secondary importance in the context of considering measures to improve the effectiveness of PBCs in performing their primary roles (as summarised in paragraph 2.1), the existence of such expectations is clearly relevant to the manner in which PBCs will perform those roles.

5. Existing sources of assistance

Introduction

[11] For an act to attract the expedited procedure under the NTA (see footnote 10, above), it must not be likely to interfere with areas or sites of particular significance to the native title holders. When considering a future act notice claiming to attract the expedited procedure, the PBC may need therefore need to consider cultural heritage issues relevant to the area over which the proposed act would relate.

[12] For example, the Western Australian Government has implemented regional standard heritage agreements aimed at reducing objections to the expedited procedure. The Government will only seek to attract the expedited procedure for exploration and prospecting licences if the licence applicants have signed one of these agreements. PBCs would be involved in negotiations for such agreements in cases where the licence applies to land managed by the PBC. Under Queensland heritage protection legislation, proponents must develop an approved cultural heritage management plan to undertake any high impact projects. The regime requires proponents to notify any relevant 'Aboriginal party' of proposed activities and to negotiate with them on the development of the plan. PBCs are included in the definition of 'Aboriginal party' under the legislation.

5.1 There is currently no dedicated Australian Government funding to support the ongoing activities of PBCs and it became clear during consultations that assistance from other sources is generally only provided on an *ad hoc* basis. The Australian Government has taken the view that it is not solely responsible for funding of PBCs, and that it is appropriate that the States and Territories and proponents of activity, who are the primary beneficiaries of land development, contribute to the costs of such development, including the costs of bodies corporate with whom they negotiate.

Assistance from Native Title Representative Bodies

5.2 The primary form of Australian Government assistance available to PBCs is provided through NTRBs, which receive funding to represent persons who hold or may hold native title within a designated area. Paragraph 203BB(1)(a) of the NTA provides that the functions of an NTRB include assisting PBCs in consultations, mediations, negotiations and proceedings relating to the following:

(i) native title applications

(ii) future acts

(iii) indigenous land use agreements or other agreements in relation to native title

(iv) rights of access conferred under the NTA or otherwise, and

(v) any other matters relating to native title or to the operation of the NTA.

5.3 The provision of funding assistance to NTRBs is governed administratively by the General Terms and Conditions Relating to Native Title Program Funding Agreements. Those terms and conditions make clear that NTRBs are generally *not* able to use funding to support or contribute to the operating costs of PBCs or to assist such bodies to meet their regulatory compliance obligations. However, NTRBs *are* able to use the funding to:

(i) assist with the establishment, incorporation and registration of PBCs up to an including the holding of the first annual general meeting of such bodies, *and*

(ii) perform the functions of NTRBs (see paragraph 5.2, above) in respect of PBCs *at any time*.

5.4 The latter point is significant in terms of current perceptions regarding Australian Government support for PBCs. A number of stakeholders, including some NTRBs, have suggested NTRBs must cease all involvement with a PBC following its first annual general meeting. An industry representative group suggested in consultations that claimants were reluctant to finalise claims as this would mean that they would be severed from the NTRB and its resources. Similarly, the report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account on its inquiry into NTRBs stated that:

> A major problem highlighted during the inquiry was the lack of adequate resourcing of PBCs by the Commonwealth. At present, funding provided by the Commonwealth to NTRBs can

only be used in the initial establishment of PBCs. NTRBs must cease being involved with PBCs when PBCs hold their first annual General Meeting.[13]

5.5 The fact that NTRBs may continue to perform their NTRB functions in respect of PBCs following the first annual general meeting means that NTRBs may continue to assist PBCs at meetings for which PBCs may consult with and obtain the consent of native title holders with respect to proposed future acts, and to provide legal and related advice in relation to such acts.

5.6 OIPC has written to the Chief Executives of all NTRBs in order to make this position clear. Given the extent of concerns among other stakeholders about PBC funding, the Steering Committee considers it would be appropriate for the Australian Government to convey the position more broadly, particularly in the context of any future announcements about PBC reforms.

Recommendation 1

5.7 The Australian Government should make clear to all stakeholders the extent to which NTRBs may currently assist PBCs following their establishment and incorporation.

5.8 As part of OIPC's performance enhancement program, OIPC arranges training courses for NTRB staff in Corporate Governance and Administrative Law and in Contract Management. PBC members may attend these courses where numbers allow.[14]

Assistance from the National Native Title Tribunal (NNTT)

5.9 The primary role of the NNTT is to provide assistance to people in resolving native title issues through mediation and assistance in agreement making. The NNTT has provided specific forms of assistance to PBCs in performing their statutory functions. This has included the development of information packages outlining and explaining the statutory functions of the PBC, as well as training for PBC members. One NTRB commented in consultations that "the NNTT provides an excellent training module and associated literature in relation to the general roles and responsibilities of PBCs."

Office of the Registrar of Aboriginal Corporations

5.10 ORAC's role is to assist the Registrar of Aboriginal Corporations in administering the ACA Act and to deliver incorporation, regulation and related services for Aboriginal and Torres Strait Islander people in a manner consistent with the special needs, requirements and risks of Indigenous corporations and within the context of current and emerging law and practice on good corporate governance. ORAC is currently able to provide the following forms of assistance to PBCs:

- assistance with corporate design and developing of the constitution pre-incorporation
- re-design and rule changes post-incorporation
- information sessions on good corporate governance, and
- accredited and non accredited training in Governance.[15]

[13] 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, paragraph 5.65 [footnote omitted].

[14] The relevant training courses are each of 1.5 days duration.

[15] These comprise an introductory workshop in governance (3 days), and a course for the Certificate IV in Business (Indigenous Governance).

5.11 NTRBs which had utilised ORAC's governance training and support, or organised it for PBCs, indicated high levels of satisfaction. Some stakeholders considered more specific and ongoing training, tailored to the circumstances and needs of individual PBCs would be useful.

Indigenous Land Corporation (ILC)

5.12 The ILC is established by Commonwealth statute to assist Indigenous Australians to acquire and manage land. Its land management program is directed at assisting in activities which provide sustainable cultural, social, environmental or economic benefits, through the managed use, care or improvement of indigenous-held land. The ILC advised that it can assist PBCs with capacity development, property management plans and business plans to develop good corporate management practices. Such assistance may be provided in conjunction with services offered by ORAC.

5.13 As a matter of policy, the ILC does not provide recurrent funding, and has a threshold requirement that corporations they assist have a basic level of sustainability. At present, it is probable only a few PBCs could meet this requirement and we understand that to date the ILC has offered assistance to a small number of PBCs.

Indigenous Business Australia (IBA)

5.14 The IBA is established by Commonwealth statute to promote business participation among Indigenous people. Its roles include administering the Indigenous Business Development Programme (IBDP), which aims to facilitate the establishment of commercially viable enterprises among Indigenous people through the provision of business support services, business finance, and funding economic development initiatives.

5.15 The main criteria for IBA investment in a given project are the financial viability of the project and the benefits to the local Indigenous community from employment, training and income. As such, it is again probable that few if any existing PBCs would currently be eligible for such support. IBA does not simply fund such projects, but enters into joint venture agreements with private sector interests and appropriate community organisations in various ways. It is not permitted to provide grant funding but may provide loans to an Indigenous body or assist that body to identify alternative sources of finance.

Office of Indigenous Policy Coordination

5.16 OIPC is responsible for coordinating a whole-of-government approach to programs and services for Indigenous Australians. Its roles include:

- coordinating and driving whole-of-government innovative policy development and service delivery across the Australian Government
- brokering relations with State and Territory Governments on Indigenous issues
- communicating government policy directions to Indigenous people and the community generally, and
- developing new ways of engaging directly with Indigenous Australians at the regional and local level, including through Regional Partnership Agreements (RPAs) (where there is local interest) to customise and shape Australian Government interventions in a region and Shared Responsibility Agreements (SRAs) at community/clan/family level.

5.17 SRAs are agreements at the local level between communities, governments and others and set out what each will contribute to achieve long-term changes in Indigenous communities. RPAs are similar to SRAs but are made with a group of communities. RPAs address government investment across a whole region, to promote coordination, eliminate overlaps or gaps, and meet regional needs and priorities.

Australian Government portfolio agencies

5.18 Information provided by Australian Government departments and agencies indicates there is a diverse range of programs that PBCs may *potentially* access to build capacity, obtain training, develop partnerships or progress specific projects. For example:

- the Department of Communications, Information Technology and the Arts (DCITA) will be launching the Backing Indigenous Ability segment of the Connect Australia Package in July 2006. Under this program PBCs may be able to apply for telecommunications specific funding including broadband and mobile services.

- DCITA also administers an IT Training and Technical Support Program which has been allocated $10.1m and provides community-based assistance for 'first time' computer users located in very remote areas of Australia.

- the Department of Employment and Workplace Relations (DEWR) administers the Indigenous Economic Development Strategy, which includes training and support for local Indigenous business entrepreneurs and asset and wealth management initiatives.

- DEWR advises that it also has business development assistance which can assist PBCs with the investigation of any potential business start ups and provide business training.

- The Department of Agriculture, Fisheries and Forestry (DAFF) is developing a National Indigenous Forestry Strategy to identify opportunities for Indigenous people to participate in the growth of Australia's forest and wood products sector, and to develop a means of support for Indigenous people to participate in these activities.

- the Department of Industry, Tourism and Resources administers a Working in Partnership program which is designed to foster better relationships specifically between the mining industry and Indigenous communities. The program provides support for regional committees to meet on a regular basis in some of the country's main mining provinces.

- the Natural Heritage Trust, administered jointly by the Department of Environment and Heritage (DEH) and DAFF, which supports environmental and natural resource management investment, has several components that can support Indigenous groups. This includes the Indigenous Protected Areas Program, administered by DEH, under which Indigenous landowners can obtain support to manage their lands for the protection of natural and cultural features.

5.19 We understand the majority of these programs are application based, and as such PBCs may need assistance in applying for them.

State and Territory governments

5.20 State and Territory governments have adopted differing approaches to funding and support for PBCs. For example, the Northern Territory Government provided assistance to the Lhere Artepe PBC in Alice Springs in the form of a one-off establishment grant of $200,000, and a special purpose grant of $50,000.[16] The Victorian Government provided funding for the administration and operation of the only PBC established in Victoria (under an agreement established in relation to the determination for the Wotjobaluk, Jadawadjali, Wergaia and Jupagulk Peoples). The funding facilitates compliance with the fulfilment of the PBC's statutory functions. WA has recently indicated that it may be prepared to consider funding for bodies corporate which are established under an alternative settlement framework.

5.21 Like the Australian Government, State and Territory governments also offer a range of land management and other programs which may be suitable for PBCs. However, information about such programs is not widely available and in the course of consultations States and Territories did not provide any specific details about appropriate programs. It is understood that some programs may utilise State or Territory funding while others may combine Australian Government funding with State/Territory on-the-ground assistance.

The private sector

5.22 There is limited information available on possible forms of assistance for PBCs from private sector bodies. A number of private financial institutions operate programs to assist Indigenous people and businesses with financial matters and capital, including support in accessing commercial finance, and access to professional and mentoring support services.[17] The mining industry also provides programs for and support to Indigenous people.[18]

5.23 Funding for PBCs is also potentially available on an *ad hoc* basis through proponents of activities in the context of negotiations for future acts. Such assistance is generally in the form of facilitating a PBC's participation in negotiations, such as through funding attendance at meetings or access to professional services (i.e. legal or anthropological advice), or in the form of compensation negotiated in relation to the act, which the native title holders may apply to operating their PBC. While industry bodies are generally prepared to provide assistance for consultations about acts they will benefit from, many bodies consider that establishment and operating costs should be the responsibility of Government.

Conclusion

5.24 Although there is clearly a broad range of potential sources of assistance for PBCs, it should be noted that the availability of such resources will depend on the particular circumstances of the relevant PBC, and that most would only be available to PBCs which already have established a

[16] The special purpose grant was to cover office equipment and expenses, and the establishment grant in 2004-05 was for the employment of a co-ordinator and clerk's position for 12 months.

[17] For example, in December 2005 the Macquarie Bank announced its intention to establish a development fund and an on-going investment fund to assist indigenous land owners to utilise their land to achieve financial rewards and a long term sustainable income.

[18] For example, Pilbara Iron has an Aboriginal Training and Liaison unit, which is designed to support self-determination and community capacity building within Aboriginal communities in the Pilbara. The unit runs education programs, pre-employment training programs, and scholarship and cadetship programs and supports Aboriginal people in the development of small business enterprises - in particular, small community businesses that can service the needs of Pilbara Iron operations.

basic level of sustainability. (Options for assistance to establish this level are considered in Part 8 of this report.)

5.25 Nevertheless, it is apparent that of the existing sources of potential funding, very few are currently being accessed by PBCs, and our consultations indicated that NTRBs and PBCs were largely unaware of the forms of assistance which may be available. In particular, there is no readily available means of accessing comprehensive information about how those sources may be applied assist bodies which hold native title.

5.26 Although a number of Australian Government agencies such as OIPC, ORAC and the NNTT have access to information regarding such programs for the purposes of their functions, to date there has been no dedicated effort to collate such information into user-friendly packages directed specifically to native title issues. Such information packages could be tailored to each State and Territory, thereby incorporating relevant programs and resources from all Governments.

5.27 The Steering Committee notes it may be appropriate to commission the development of such information packages from the Native Title Research Unit (NTRU) of the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS). Currently, the NTRU publishes the Native Title Resource Guide, an on-line resource that acts as a portal site for accessing information about native title. It collates native title and related Indigenous land issues information from a wide range of sources including NTRBs, the NNTT, the ILC, government Departments and the Federal Court. The NTRU receives funding from OIPC to perform its functions in providing independent research and policy advice to promote the recognition and protection of native title. In order to ensure a transparent process, it may be preferable for OIPC to issue a tender for the development and maintenance of such packages.

Recommendation 2

5.28 The Australian Government should arrange the preparation and maintenance of information packages for PBCs for each jurisdiction, outlining relevant State and Territory legislation, potential sources of assistance through Government grants and programs, as well as available information on support from the private sector.

5.29 One fact which became clear from consultations was that many stakeholders in the native title system have a limited understanding of the functions, needs and responsibilities of PBCs. This may itself affect the ability and readiness of stakeholders to develop appropriate packages of support. In particular, is important to ensure that industry bodies and local government authorities are aware of the critical role which PBCs perform in delivering certainty for dealings and activities on lands and waters over which native title has been determined. Equally, native title holders need to be aware of the fundamental role played by PBCs in relation to the protection of native title, and the appropriate management of their native title rights and interests.

5.30 Although the Australian Government has a clear role to play in promoting a better understanding among stakeholders of PBC functions (including through the NNTT), it is critical that this be done in consultation with State and Territory Governments. This would recognise the important role that State and Territory Governments play in brokering agreements between stakeholders, as well as their particular interests and responsibilities in land management. In particular, consent determination negotiations will generally involve key parties with an ongoing interest in the relevant land and waters, and therefore an interest in the effective functioning of the PBC following the determination (such as governments, native title parties and industry bodies). It is in the interests of all such parties that post-determination links be considered as one aspect of the

matters to be addressed in relation to a proposed consent determination, whether as part of the determination itself, or in an ancillary agreement.

5.31 Adoption of a consultative approach across jurisdictions should be implemented as part of a related element of the native title reform package, namely increased dialogue and consultation with State and Territory Governments to promote and encourage more transparent practices in the resolution of native title issues.

Recommendation 3

5.32 The Attorney-General and the Attorney-General's Department should press State and Territory Governments to agree to:

- place PBC establishment and needs on the agenda for consideration of all parties as a matter of practice when negotiating consent determinations or future act agreements, and
- actively promote a better understanding of the functions, needs and responsibilities of PBCs among other stakeholders in the native title system.

This should be done through multilateral forums, such as the Native Title Ministers' Meeting, as well as through bilateral meetings and consultations at ministerial and officer level.

6. Resource needs

Introduction

6.1 In considering the resource needs of PBCs, two key points became apparent from our consultations. First, it is clear that the level of resources currently available will not meet all of the requirements imposed on PBCs under the current regime. While some of these difficulties can be alleviated through possible reforms to streamline the existing statutory governance model (see Part 7), we consider that there will need to be additional measures taken by Governments to ensure that PBCs may function effectively.

6.2 Second, the basic needs of PBCs will vary considerably according to their circumstances, and cannot be addressed through an approach which assumes one solution will resolve all of these issues. The key theme emerging from consultations and previous studies of PBCs is that a large number of factors will determine the ultimate resource needs of a PBC. These include geographical location (remoteness), the nature and extent of native title rights and interests held, the nature of the relevant group of native title holders (including dispersion), the complexity of the consultation and decision making processes of the native title holders, and the level and type of future acts which may apply to the area.

6.3 It should also be recognised that, while a determination of native title rights may offer economic opportunities, many PBCs are unlikely to have a capacity to be self-funding, even over the longer term. In a number of regions subject to native title determinations, there may be few if any future acts proposed that will affect the determined native title for some years. Not all future acts concern economic activities or can offer economic benefit to a PBC. In other regions, however, the extent of future acts may be intensive. While this may impose greater demands on the PBC, it may also offer further avenues of support to meet such demands.

Basic establishment needs

6.4 As noted in paragraphs 5.2 to 5.5, NTRBs are able to assist PBCs with their establishment, incorporation and registration up to and including the PBC's first annual meeting. It is apparent, however, that some native title holders are experiencing difficulties in establishing a PBC prior to their native title determination being made and, as noted above, on several occasions the Federal Court has allowed a delay between a determination that native title exists and the determination of the PBC. It is unclear whether this is primarily attributable to resource needs, or to other factors such as difficulties in reaching agreement between native title holders on the structure and processes for the PBC.

6.5 A number of stakeholders emphasised the value of seeking to initiate processes for establishment of PBCs early in the context of native title claims. Against this, however, it must be acknowledged that key factors critical to the establishment of a PBC may not be resolved until a late stage in the claims process. This may include the membership of the claimant group and, indeed, the existence of native title rights over the claim area.

6.6 In the first instance, we consider there would be value in ensuring that greater guidance is made available to PBCs in the lead up to a determination, particularly in cases where a 'consent determination' is likely to be made under section 87 of the NTA. The provision of such guidance could be coordinated by ORAC, with the assistance of the NNTT and the relevant NTRB where appropriate. Such guidance should include:

- training in the statutory roles and responsibilities of PBCs, and on governance issues
- information on potential sources of assistance for PBCs
- advice and assistance on decision making processes and record keeping.

Recommendation 4

6.7 The Office of the Registrar of Aboriginal Corporations should coordinate the provision of relevant information on PBCs to native title claimants in the lead-up to the making of any native title determinations. This should include information and training on roles and responsibilities and related governance issues, and sound decision-making processes and record keeping. Such information could be provided with the assistance of the National Native Title Tribunal and the relevant Native Title Representative Body.

Continuing needs and infrastructure

6.8 As anticipated, stakeholder views on specific continuing resource needs for PBCs varied considerably. However, the following core needs were identified by most stakeholders:

- communications facilities, whether by post, telephone, fax or internet, to enable PBCs to be contacted and to contact others, particularly in respect of proposed future acts
- administrative facilities for the production and copying of documents (including computer facilities, paper and stationary)
- facilities for storage of records relating to PBC functions (the NTA, the PBC Regulations and the ACA Act all include statutory requirements for the maintenance of significant records)

- where required, resources and support for consultations and meetings of PBC members and native title holders (the costs involved may be significant in circumstances where the members are remotely dispersed, and will normally include both travel and arrangements for meeting venues)

- access to professional services and advice (this may include legal and anthropological advice in respect of future acts, financial advice about the implications of proposed agreements, assistance with environmental and surveying matters, advice on taxation and insurance issues, as well as general management skills)

- continuing training in governance and financial management issues, and

- in certain circumstances, assistance for the costs of employing office staff.

6.9 As noted in paragraph 4.7, above, PBCs may also require specific assistance in relation to obligations imposed under Australian and State or Territory government legislation by virtue of their roles in managing rights and interests in relation to lands and waters.

6.10 A range of options to more effectively address the needs outlined above is considered in Part 8 of this report.

7. Reforms to the existing statutory governance model

Native title functions

7.1 The native title functions to be carried out by PBCs are summarised in paragraphs 4.3 and 4.4. Although these functions are generally considered appropriate, it is apparent that the existing model prescribing the way in which such functions are exercised imposes onerous burdens on PBCs. Some of the difficulties outlined below have been identified in previous analyses of this issue by Government agencies.[19]

7.2 A key theme which has emerged through consultations is that the governance models need to be flexible, and that different traditional owner groups in different circumstances will require specific structures to meet their needs and goals. The proposals outlined below are designed to provide more flexibility to the existing governance model, with a view to facilitating greater choice by native title holders in deciding which structures to adopt in light of their specific circumstances.

Requirements for consultation and consent on 'native title decisions'

7.3 Regulation 8 of the PBC regulations currently requires PBCs to consult with, and obtain the consent of, common law holders of native title rights and interests before making a 'native title decision'. This is currently defined to mean a decision:

(a) to surrender native title rights and interests in relation to land or waters; or

(b) to do, or agree to do, any other act that would affect the native title rights or interests of the common law holders.

[19] In particular, a Committee was established in 1999 to review the PBC Regulations. In September 2005 the Committee (comprising OIPC, AGD, ORAC, the NNTT, the Torres Strait Regional Authority, and a consultant anthropologist) was wound up following the Government's decision on the proposed reforms to the native title system. The work of that Committee has informed the present examination of PBCs.

7.4 The effect of paragraph (b) of this definition is presently unclear, and its ambiguity gives rise to particular difficulties. For example, it may mean that a PBC will be making a 'native title decision' when simply making comments on a proposed future act.[20] Although we did not identify any consistent approach to this by PBCs, our informal consultations indicated a number of PBCs and NTRBs *assumed* that PBCs are required to engage in the consultation and consent process in relation to all future acts. Moreover, given the resource constraints outlined in Part 6, above, it is clear that aspect of the governance model imposes a very significant burden on some PBCs.

7.5 It should be noted that the requirement to consult on native title decisions is a presumptive one, in so far as native title holders can 'opt out' of the requirement through inclusion of an express provision in their rules. However, it is apparent that few PBCs have exercised this option at the time of establishment, which means that the presumption in favour of consultation on *all* acts which may conceivably affect native title automatically applies.

7.6 We consider it would be appropriate to modify the existing requirement so the regulations only require consultation in relation to decisions which involve the *surrender* of native title rights or interests.[21] This would not affect the ability of native title holders to impose additional consultation and consent requirements on their PBC through the PBC's rules. This would mean that, subject to any decision by the native title holders to 'opt in' to more onerous consultation requirements, the automatic requirements under the regime would not apply to other decisions. It would also encourage native title holders to consider their precise circumstances in establishing procedures for consultation under their rules.

Recommendation 5

7.7 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.

Availability of 'standing authorisations'

7.8 Paragraph 9(2)(b) of the PBC regulations envisages a procedure for native title holders to issue 'standing authorisations' in relation to decisions affecting native title. In summary, it provides that the holders may be taken to have consented to a proposed native title decision if a document (complying with certain requirements) certifies that:

(i) the proposed decision is of a kind about which the holders have been consulted; and

(ii) the holders have decided that decisions of that kind can be made by the PBC.

7.9 It is apparent, however, that this procedure is almost never adopted in practice. Although this may reflect, in part, a concern on the part of native title holders against delegating authority, the existing provisions are complicated and very difficult to implement in practice. We consider they could be streamlined considerably.

[20] If the word 'affect' in paragraph (b) of the definition has the meaning given in section 227 of the NTA, it is unlikely that these processes could be said to affect the holders' native title rights and interests. Section 227 of the NTA provides that an act affects native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

[21] Such decisions would apply to acts involving the extinguishment of native title rights.

7.10 The existing process contemplates that a certificate, signed by five members of the PBC who are affected holders of native title, be provided in connection with *each* decision which is the subject of a standing authorisation.[22] This undermines the efficiency of the process, in so far as PBCs may encounter difficulties in obtaining the signature of such persons within a reasonable time.

7.11 It would be appropriate to amend this requirement so that only one certificate needs to be signed in connection with each standing authorisation issued by the PBC. The certificate should certify that the holders have been consulted about how certain kinds of decisions are made, and specify the content of decisions which have been authorised (including any conditions or circumstances attached to the authorisation). In summary, this would ensure that certificates which evidence standing authorisations need only be prepared once, at the time the authorisation is provided, rather than each time a PBC makes a decision in accordance with the authorisation.[23]

Recommendation 6

7.12 The PBC regulations should be amended to clarify the circumstances in which 'standing authorisations' may be issued to a PBC, and, in particular, to provide that only one certificate needs to be issued with each authorisation.

Enabling existing PBCs to assume functions for subsequent determinations

7.13 The PBC regulations 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.[24] The only circumstances when this may be done are where all members of the existing PBC are also native title holders in relation to the subsequent determination.[25]

7.14 Allowing an existing PBC to be determined as a PBC for subsequent determinations of native title may encourage economies of scale by allowing PBC infrastructure and resources to be utilised by more than one group of native title holders where both groups wish to be represented by the same body corporate. It could also enable more coordinated management of native title across given regions.

7.15 Assuming this is adopted, it would be necessary to include criteria in the regulations governing the appointment of existing PBCs. In particular, it would be necessary to include provisions ensuring the native title holders for the existing PBC as well as those nominating the PBC to represent their rights consent to the proposal. Given the different functions performed by trust and agent PBCs,[26] it would be appropriate to ensure that this distinction is observed when an existing PBC assumes responsibility over land covered in a subsequent determination.

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[22] Regulation 9(2)(b)(i) appears to require relevant members of the PBC to certify that a particular decision in fact falls within standing instructions issued by the common law holders.

[23] In the interests of clarity, the regulations should also make clear that a standing authorisation may be issued where the native title holders have a traditional decision making process.

[24] This is because regulation 4(2)(a) of the PBC regulations requires all members of a PBC to be persons who, at the time of making a determination, are included or proposed to be included as native title holders. This is also discussed in relation to recommendation 6.

[25] For example, the Karajarri People's claim was the subject of two separate determinations, in 2002 and 2004, although one PBC manages the native title for both determinations, as the claimant group was identical. See *Nangkiriny* v *State of Western Australia* [2004] FCA 1156.

[26] See sections 56 and 57 of the NTA, and regulations 6 and 7 of the PBC regulations.

Recommendation 7

7.16 The PBC regime should be amended to enable an existing PBC 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.

Broader membership options – non-native title holders as PBC members

7.17 A further means of providing more flexibility to the existing governance model would be to enable native title groups to include other persons in their corporate structure, including non-traditional owner Indigenous people and non-Indigenous people. This could assist in making the structure more representative of the broader community in which they live, and to increase the corporation's skill base. Although some persons consulted questioned the appropriateness of having non-native title holders perform native title functions, we consider it should be open to the native title holders to avail themselves of additional skills and representation as part of their corporate structure if they consider this appropriate. In order to ensure the ongoing protection of native title, the PBC would still be required to undertake consultation and consent with native title holders in accordance with the existing regime, as modified under recommendations 5 and 6, above.

Recommendation 8

7.18 The PBC regulations should be amended to remove the requirement that all members of a PBC be native title holders and associated safeguards should be included to ensure the protection of native title rights and interests.

Corporate governance obligations

7.19 The existing corporate governance obligations are summarised in paragraph 4.5. Many stakeholders raised concerns about the appropriateness of these obligations, noting that in some cases a PBC may have little or no future acts to deal with, no significant income, limited other functions, and will therefore have little to report on or discuss.

7.20 The CATSI Bill will significantly alleviate the existing burdens imposed on PBCs under the ACA Act. In particular:

- Reporting requirements will be calibrated in accordance with the size of the relevant corporation. Most PBCs would currently fall within the category of 'small' corporations. Under the Bill, small corporations will only be required to provide a minimum 'general' report, and may only have to provide this every second year.

- Small corporations may also only be required to hold an annual general meeting every second year, and can hold these by video or teleconference.

- Native title rights and interests held by a PBC will *not* be included in determining the value of the PBC's assets for reporting purposes.[27]

- The Bill provides further flexibility in so far as the Registrar may exempt specified classes of corporations from some or all of the record-keeping or reporting requirements.

[27] This avoids the possibility that a PBC which only holds or manages native title rights and interests may be determined as being a 'large' corporation for reporting purposes.

- The Bill makes clear that a director, officer of employee of a PBC who is acting in good faith to ensure the PBC complies with obligations under native title legislation does not breach provisions of the Bill.[28]

- The Bill provides that the internal governance rules for PBCs must be consistent with native title legislation. This will ensure the rules of a PBC do not conflict with requirements imposed by such legislation.

- The Bill will enable the making of regulations to clarify the powers and obligations of administrators, receivers, liquidators and special administrators who are appointed to a PBC. This will assist in resolving any practical issues which may arise in the interaction between the external administration provisions of the Bill and native title legislation.

7.21 The CATSI Bill is currently being examined by the House of Representatives Standing Committee on Legal and Constitutional Affairs. Assuming the Bill is passed by Parliament, it is anticipated that it will come into effect from July 2007.

7.22 We consider that the elements proposed in the CATSI Bill, would, if implemented, considerably alleviate the existing corporate governance requirements imposed on PBCs under the ACA Act. The key issue which emerged from our consultations related to the complexity of the proposed new regime, as well as the impact it may have on existing PBCs which will need to comply with the regime under transitional arrangements.

7.23 Some stakeholders suggested that, given the unique and complex nature of PBCs, it would be appropriate to address all PBC requirements in a separate part of the CATSI Bill. However, this would add further complexity to the overall Bill, which is designed to cover more than 2500 different Aboriginal and Torres Strait Islander corporations already registered under the ACA Act. Moreover, it is unlikely that the provision of a separate regime in itself would significantly simplify matters for those persons subject to the legislative requirements. It would be more appropriate to ensure that appropriate guidance and training be provided to PBCs (and related stakeholders) to enable them to operate more flexibly and effectively under the new legislation.

Recommendation 9

7.24 The Office of the Registrar of Aboriginal Corporations should develop and distribute appropriate educative material regarding obligations and requirements under the CATSI legislation to all PBCs and NTRBs. This should include:

(a) a Guide to Good Governance specifically tailored to PBCs

(b) model rules for PBCs, and

(c) additional information as appropriate.

[28] An exception to this is the duty not to trade while insolvent. If a conflict arises between the duty in the Bill not to trade while insolvent and duties under native title legislation, the primary duty is to make sure the PBC does not trade while insolvent.

8. Options to meet PBC resource needs

Introduction

8.1 The overwhelming majority of submissions received indicated there was a clear need for additional resources to be provided to support PBCs, and most of those considered the Australian Government should provide this. Although the Steering Committee considers that there is scope for further assistance to be provided to PBCs by the Australian Government in particular circumstances, it is also necessary to consider complementary measures to ensure better use is made of resources which are currently available within the native title system.

Ensuring NTRBs provide appropriate assistance to PBCs in relation to native title functions

8.2 As noted in paragraphs 5.2 to 5.5, NTRBs are currently permitted to provide PBCs with considerable assistance with respect to matters relating to native title or the operation of the NTA. In theory, this should include assistance in consultations, mediations, negotiations and proceedings relating to future acts, ILUAs and other native title agreements, rights of access, and other matters relating to native title or the operation of the NTA. However, the extent to which NTRBs provide such assistance in practice is presently unclear, and anecdotal evidence indicates that some NTRBs give greater priority to progressing claims awaiting determination.

8.3 Given the evident difficulties which PBCs (and stakeholders) are currently experiencing in dealing with future act and related issues, and the fact PBCs will assume progressively greater significance in the native title system as more determinations are made, the Government should implement measures to ensure NTRB assistance to PBCs is given appropriate priority, and that the level of such assistance is more transparent. This should not involve alterations to the *general* terms and conditions for NTRB funding, since PBCs have only been established in certain NTRB areas. It would be more appropriate for OIPC to require this to be addressed in NTRB operational plans and budget submissions. NTRBs should be required to detail the nature and level of support which they expect to provide to PBCs, and to report on the implementation of such measures as part of their general reporting requirements.[29] In considering proposed NTRB budget allocations, OIPC should give appropriate priority to functions associated with PBCs.

Recommendation 10

8.4 The process for allocating funds to NTRBs should be modified to ensure that appropriate priority is given to the performance of NTRB functions associated with assistance to PBCs. NTRBs should be required to detail the nature and level of support which they expect to provide to PBCs, and to report on the implementation of such measures.

Enabling PBCs to recover costs from other parties

8.5 The above proposal would improve the alignment between existing Australian Government funding and the operational resource demands involved in performance of PBC functions under the NTA. This should be complemented by clarifying the basis for PBC funding from other sources, namely proponents of future acts, particularly in circumstances where there is a high degree of future act activity in relation to the area.

[29] Note that NTRB reforms comprise a separate element of the native title reform package, and that the specific reporting requirements imposed on NTRBs are likely to be changed as part of those reforms. The measures proposed above could be implemented within the proposed new framework.

8.6 There have been some instances in which future act proponents (generally mining interests, and occasionally State or Territory Governments) have been prepared to provide financial assistance to PBCs in order to expedite the consultation and consent processes involved in securing agreement for the future act. Such assistance may be given directly to the PBC, or be provided through the relevant NTRB for the area.

8.7 As outlined above, it would normally be expected that NTRBs may provide the relevant assistance. However, there will be circumstances in which due to competing demands on NTRBs, it will not be possible for them to fulfil this role within the timeframes required by future act proponents. It would be appropriate to meet such circumstances by providing a clear legal basis through which PBCs may recover costs incurred in performing their functions at the request of future act proponents, in cases where NTRB assistance is not available. The costs recovered should be strictly limited to those involved in performing the specific functions sought (such as transport and convening of meetings), and should not be directed at recovery of establishment costs or continuing administrative costs for PBCs.

8.8 Under the existing legislative regime, PBCs are not able to seek reimbursement from or charge third parties for costs and disbursements expended or incurred (or estimated to be expended or incurred) by the PBC in performing its functions under the NTA or the PBC Regulations. Essentially, this is because a fee may only be charged for the performance of a statutory duty or function if the statute provides for such a charge either expressly or by necessary implication.[30] While this would probably not prevent the PBC from applying moneys obtained through an agreement to offset its negotiation costs, it would be preferable to provide clear authority for PBCs to recover the costs incurred in performing its functions.

8.9 If this proposal was implemented it would be necessary to include safeguards to ensure that smaller proponents of future acts are not disadvantaged through a distortion in PBC activity towards those projects for which third party funding is available. This may be met in part through the accountability mechanism for NTRB assistance outlined above. The legislation should make clear the authority to recover costs is limited to those reasonably incurred by or on behalf of the PBC in performing the relevant functions. It should also provide for an appropriate authority to investigate such arrangements on request.[31]

Recommendation 11

8.10 The Native Title Act should be amended to authorise PBCs to charge a third party for costs and disbursements reasonably incurred in performing its statutory functions under the NTA or the PBC Regulations at the request of the third party. The amendments should also provide for an appropriate authority to investigate such arrangements on request, to ensure the costs were reasonably incurred.

Assistance with general operations and administration through provision of common services

8.11 Recommendations 10 and 11 will assist in enabling PBCs to perform their statutory functions with respect to native title. However, these recommendations still assume the existence of a functioning corporate body with access to the resources identified in Part 6 of this report, and able to meet their obligations under the relevant corporate regime.

[30] See, for example, *Attorney-General* v *Wilts United Dairies* (1922) 91 LJKB 897 at 900, *McCarthy & Stone (Developments) Ltd* v *London Borough of Richmond Upon Thames* (1991) 3 ALR 941.

[31] The agencies represented on the Steering Committee would develop a specific proposal in this regard.

8.12 Some stakeholders, including a number of PBCs, have suggested that the Australian Government should provide each PBC with sufficient resources to establish, maintain and support its own organisational structure, so it may deal with management of native rights and interests as a completely independent stand-alone body. Such an approach would, however, be very expensive to maintain and probably impossible to implement effectively in practice. In particular, the human resource component assumes the availability of a large number of persons with specialist knowledge in anthropology, native title law and geospatial mapping. The pool of expertise in regional areas is limited, and if PBCs were to compete for professional services this would exacerbate the shortage and increase costs.

8.13 With respect to physical resources, such as office accommodation, communication and transport facilities, it should be recognised that the demand for these will vary according to the PBC. For many PBCs, the use of such resources will be minimal, although the need may arise on an ad hoc basis.

8.14 Accordingly, to the extent that assistance with general operations and administration is to be provided, it would be preferable for this to be done through provision of common services and facilities, on a regional and/or national basis, where practicable.

8.15 A significant number of stakeholders supported the provision of such assistance through existing NTRBs.[32] In general terms, it was noted that NTRBs are already authorised to assist PBCs with respect to their native title functions, and utilising NTRBs to assist with corporate responsibilities (such as arrangements for annual meetings, handling of correspondence, communications with members), could avoid duplication. NTRBs have generally established relationships with the native title holders (including through assistance in securing a determination of native title, and in initially establishing the PBC), and NTRBs have relevant staff, expertise and facilities to provide such assistance.

8.16 While this may be appropriate in some circumstances, we do not consider the provision of assistance should *necessarily* be made through NTRBs in every case. There may be instances where the native title holders are not prepared to work with the relevant NTRB, or where the other demands and priorities of the NTRB preclude the availability of direct assistance to the PBC. There may, moreover, be other avenues of assistance in relation to specific cases, such as Indigenous Coordination Centres. The implementation of a regime for providing common services for PBCs should be flexible enough to address the specific circumstances of individual PBCs.

Recommendation 12

8.17 The General Terms and Conditions Relating to Native Title Program Funding Agreements should be amended to enable NTRBs to assist PBCs with their day to day operations in circumstances where this has been approved by the Office of Indigenous Policy Coordination.

Shared Responsibility Agreements

8.18 As outlined in paragraphs 5.20 to 5.21, State and Territory Governments have occasionally been prepared to provide direct assistance for PBCs, although most consider that this should be the

[32] This included most of the NTRBs which offered comment on this issue, as well as three of the State and Territory governments, and the NNTT.

responsibility of the Australian Government. It is clear that this issue should be addressed by *all* Governments in a more coordinated and comprehensive manner.[33]

8.19 This could be most appropriately progressed through the development of Shared Responsibility Agreements (SRAs) and/or Regional Partnership Agreements,[34] which form a key element of the broader Council of Australian Governments' framework of working in partnership with Indigenous communities. SRAs are intended for Governments and communities to establish partnerships and share responsibility for achieving measurable and sustainable improvements for persons living within the community, and to support and strengthen local governance, decision-making and accountability. Measures to promote the effective functioning of PBCs in respect of land over which native title has been determined would be a logical application of the existing SRA program. Assistance could include establishment grants, infrastructure support, capacity building or funding employment for PBC staff.

Recommendation 13

8.20 The Australian Government should, in consultation with State and Territory Governments, actively promote measures for providing support to PBCs via Shared Responsibility Agreements and/or Regional Partnership Agreements.

State and Territory land rights corporations

8.21 A number of stakeholders raised concerns about the overlapping of responsibilities and rights between native title holders under the NTA and bodies performing functions under State or Territory land rights legislation. It has been suggested that the current situation, whereby PBCs and land rights corporations operate independently of each other in respect of the same area can lead to duplication of administration, wasted resources and organisational rivalry.

8.22 The introduction of changes to enable such corporations to perform PBC functions gives rise to a large number of complex legal and policy issues. In particular, it would be necessary in the first instance for States and Territories to amend the legislation by or under which the relevant bodies are established to ensure that their statutory functions and powers may include acting as a PBC. It would also be necessary to introduce changes to the rules and articles of association of such bodies. It is also unclear as to whether native title holders would be prepared to have their rights managed by land rights corporations which were initially established for other purposes. In some situations (e.g., where the land rights corporation also performs NTRB functions), there may be a conflict of interest precluding such an arrangement.

8.23 In light of these difficulties, we do not recommend the introduction of such changes at this particular time. We do, however, consider that the issue should be further examined in consultation with State and Territory Governments.

Recommendation 14

8.24 The Australian Government should consult State and Territory Governments on possible measures to enable State or Territory land rights corporations to act as PBCs where the native title holders agree to this.

[33] The communiqué issued following the Native Title Ministers' meeting on 16 September 2005 expressly acknowledged 'the importance of ensuring that Prescribed Bodies Corporate can effectively hold native title on behalf of claimants'.

[34] See discussion at paragraph 5.16 above.

'Default' PBCs

8.25 Paragraph 57(2)(a) of the NTA provides that if the native title holders do not nominate a PBC, the Court must determine which body corporate is to perform the functions of the PBC in accordance with the regulations. In effect, this contemplates a regime whereby a 'default' body may be determined to perform the functions of a PBC in the absence of a body nominated by the native title holders.

8.26 There are currently no regulations prescribing a default body or how it would operate. On several occasions the Federal Court has allowed a delay between a determination of native title and the establishment of a PBC, and in some cases it has been several years before a PBC has been established. This has resulted in considerable uncertainty for third parties in relation to dealings concerning the relevant land.

8.27 Although recourse to a default PBC should be avoided in practice wherever possible, it would be desirable to develop a mechanism for the performance of PBC functions by such a body in strictly limited circumstances, namely:

(a) if the native title holders have been unable to agree on the nomination of a prescribed body corporate by the time of the making of the determination, or

(b) if an administrator or special administrator has been appointed to the PBC as a result of the PBC being unable to perform its native title functions, or

(c) if the native title holders choose to avail themselves of the default body.

8.28 In essence, and subject to subparagraph (c), above, the use of a default PBC should be an option of last resort, and should serve as an interim measure to provide a point of contact for third parties pending the establishment, or re-establishment, of a PBC nominated by the native title holders. The default PBC's functions should be limited to exercising the procedural rights attached to the native title under the NTA, undertaking consultations with and seeking the consent of native title holders about future acts which would result in the surrender of native title, and holding native title money on trust. This would need to be addressed through amendments to the NTA as well as through regulations, given that the scheme would go beyond that originally contemplated in paragraph 57(2)(c) of the NTA.

8.29 It may be appropriate for the proposed regime to provide that a body such as the Indigenous Land Corporation normally act as a default body, although the Minister could be authorised to determine a different body, either for a particular region (such as a State, or an NTRB area), or in a particular case. The legislation should require the Minister to be satisfied that the body is capable of performing the relevant functions, and to take into account the views of the native title holders.

8.30 The development of such a mechanism gives rise to a number of legal issues, on which further consultation with stakeholders within Government would be necessary.

Recommendation 15

8.31 The Australian Government should note the need to develop a mechanism for the determination of a default PBC in appropriate circumstances. The Office of Indigenous Policy Coordination should develop a comprehensive proposal for the establishment of 'default' bodies corporate to perform PBC functions in circumstances where there is no functioning PBC nominated by the native title holders.

Appendix 1 - Consultations

Written consultations

The Steering Committee forwarded 'issues papers' on PBCs to stakeholders in the native title system in November and December 2005. These papers were tailored to specific sectors (including PBCs, NTRBs, State and Territory Governments and industry bodies) and sought information about stakeholder experiences with and views about PBCs. In summary, papers were forwarded to the 30 PBCs in relation to which contact details were available, all NTRBs, all State and Territory Governments, and a number of peak bodies. Information was also sought from relevant Australian Government Departments and agencies.

The following organisations provided written submissions in response to the issues papers.

Native Title Representative Bodies

- Central Land Council
- Goldfields Land and Sea Council
- Kimberley Land Council
- Native Title Services Victoria
- Northern Land Council
- Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation

Prescribed Bodies Corporate

- Mer Gedkum Le (Torres Strait Islanders) Corporation

State and Territory Governments

- Victoria
- Queensland
- South Australia
- Western Australia
- Northern Territory

Industry Bodies

- National Farmers' Federation
- Pastoralists and Graziers Association of Western Australia
- Rio Tinto

Australian Government agencies

- Aboriginal and Torres Strait Islander Social Justice Commissioner
- Department of Agriculture, Fisheries and Forestry
- Department of Communications, Information Technology and the Arts

- Department of Employment and Workplace Relations
- Department of Environment and Heritage
- Department of Finance and Administration
- Department of Industry, Tourism and Resources
- Department of the Prime Minister and Cabinet
- Department of Transport and Regional Services
- Indigenous Land Corporation
- National Native Title Tribunal

Discussions with stakeholders

Targeted bilateral consultations were also conducted with the following stakeholders.

PBCs

- Lhere Artepe Aboriginal Corporation (26 October 2005)
- Gumulgal (Torres Strait Islanders) Corporation (14 November 2005)
- Magani Lagaugal (Torres Strait Islanders) Corporation (14 November 2005)
- Mura Badulgal (Torres Strait Islanders) Corporation (14 November 2005), and
- Mualgal (Torres Strait Islanders) Corporation (14 November 2005)
- Mer Gedkum Le (Torres Strait Islanders) Corporation (15 February 2006)

NTRBs

- Central Land Council (26 October 2005)
- Ngaanyatjarra Council (9 November 2005)
- Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (9 November 2005)
- South West Aboriginal Land & Sea Council (10 November 2005)
- Kimberley Land Council (11 November 2005)
- Torres Strait Regional Authority (14 November 2005)
- Cape York Land Council (15 November 2005)
- Carpentaria Land Council Aboriginal Corporation (15 November 2005)
- North Queensland Land Council (15 November 2005)
- Aboriginal Legal Rights Movement Inc (1 December 2005)

State and Territory governments

- Western Australia (10 November 2005)
- New South Wales (6 December 2005)

- Australian Capital Territory (7 December 2005)
- Northern Territory (23 January 2006)

Other parties

- Chamber of Minerals and Energy, Western Australia (10 November 2005)
- Indigenous Land Corporation (11 January 2006)

Appendix 2 – List of Abbreviations

ACA Act	*Aboriginal Councils and Associations Act 1976*
AGD	Attorney-General's Department
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
CATSI Bill	Corporations (Aboriginal and Torres Strait Islander) Bill 2005
DAFF	Department of Agriculture, Fisheries and Forestry
DCITA	Department of Communications, Information Technology and the Arts
DEH	Department of Environment and Heritage
DEWR	Department of Employment and Workplace relations
IBA	Indigenous Business Australia
ILC	Indigenous Land Corporation
ILUA	Indigenous Land Use Agreement
NNTT	National Native Title Tribunal
NTA	*Native Title Act 1993*
NTRB	Native Title Representative Body
NTRU	Native Title Research Unit (AIATSIS)
OIPC	Office of Indigenous Policy Coordination
ORAC	Office of the Registrar of Aboriginal Corporations
PBC	Prescribed Body Corporate
PBC Regulations	Native Title (Prescribed Bodies Corporate) Regulations 1999
PJC	Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account
RPA	Regional Partnership Agreement
SRA	Shared Responsibility Agreement

Guidelines on the Provision of Financial Assistance by the Attorney-General under the *Native Title Act 1993*

Native Title Act 1993

I, PHILIP MAXWELL RUDDOCK, Attorney-General:

(a) revoke the *Guidelines for the Provision of Financial Assistance by the Attorney-General in Native Title Cases* that commenced on 30 November 1998; and

(b) make these Guidelines under subsection 183 (4) of the *Native Title Act 1993*.

Dated 2006

Attorney-General

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Part 1 Introduction

1 Subsection 183 (3) of the *Native Title Act 1993* allows the Attorney-General to authorise the provision of legal or financial assistance by the Commonwealth to an applicant in certain circumstances.

2 The provision of assistance may be authorised unconditionally or subject to such conditions as the Attorney-General determines. The extent of the provision of assistance authorised is also a matter for the Attorney-General's determination.

3 The Attorney-General has delegated the Attorney-General's powers under subsection 183 (3) of the *Native Title Act 1993* to certain officers in the Attorney-General's Department.

4 The Attorney-General may determine guidelines that are to be applied in authorising the provision of assistance under section 183 of the *Native Title Act 1993*.

5 The Attorney-General is prohibited, by subsection 183 (6) of the *Native Title Act 1993*, from authorising the provision of assistance under section 183 of the Act to a person in relation to:

(a) any claim by the person, in an inquiry, mediation or proceeding, to hold native title or to be entitled to compensation in relation to native title; or

(b) an indigenous land use agreement, if the person holds or claims to hold native title in relation to the area covered by the agreement; or

(c) an agreement or dispute about rights conferred under subsection 44B (1) of the Act, if the person is included in the native title claim group concerned.

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Part 2 Commencement

6 These Guidelines commence on 1 January 2007.

7 Part 11 sets out provisions for dealing with the following:

(a) provision of assistance authorised before the commencement of these Guidelines;

(b) applications that were received, but not determined, before the commencement of these Guidelines.

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Part 3 Interpretation

8 In these Guidelines:

Act means the *Native Title Act 1993*.

applicant means:

(a) a person who makes an application, including a group representative; or

(b) a person whose application has been granted under section 183 of the Act.

application means an application for the provision of assistance made under subsection 183 (1) or (2) of the Act, including an application for an extension of assistance made in accordance with section 39.

assistance means legal or financial assistance of a kind that may be authorised by the Attorney-General under section 183 of the Act.

claimant means a person who:

(a) claims to hold native title; or

(b) is authorised by a native title claim group to seek a determination of native title; or

(c) claims to be entitled to compensation in relation to native title.

Department means the Attorney-General's Department.

group representative means a society, organisation, association or other body who acts as an agent for a person who:

(a) is, or intends to apply to be, a party to an inquiry, mediation or proceeding related to native title; or

(b) is or intends to become a party to the negotiation of an ILUA or an agreement about rights conferred under subsection 44B (1) of the Act; or

(c) is or intends to become a party to an inquiry, mediation or proceeding in relation to an ILUA or an agreement about rights conferred under subsection 44B (1) of the Act; or

(d) is in a dispute with a person about rights conferred under subsection 44B (1) of the Act.

ILUA means an indigenous land use agreement as defined in section 253 of the Act.

legal practitioner means a person entitled, under an Act or a law of a State or Territory, to practise as one of the following:

(a) a legal practitioner;

(b) a barrister;

(c) a solicitor;

(d) a barrister and solicitor.

native title officer means a person who is engaged by a group representative for the purpose of undertaking work on native title matters for which assistance has been authorised under these Guidelines.

non-claimant applicant means a person, other than a claimant, who applies to the Federal Court of Australia for a native title determination.

person means an individual, a body politic, an incorporated body or an unincorporated body.

9 Unless the contrary intention appears, a term used in these Guidelines has the same meaning as in the Act.

10 References to dollar amounts are inclusive of GST payable under the *A New Tax System (Goods & Services Tax) Act 1999*.

Part 4 Scope of section 183 of the Act

Division 4.1 General

11 The activities for which an application for the provision of assistance may be made are the subject of subsections 183 (1) and (2) of the Act.

Division 4.2 What assistance can be applied for under subsection 183 (1) of the Act

12 Subsection 183 (1) of the Act provides that a person who is a party, or who intends to apply to be a party, to an inquiry, mediation or proceeding related to native title may apply to the Attorney-General for the provision of assistance in relation to the inquiry, mediation or proceeding.

13 An application for the provision of assistance may only be made under subsection 183 (1) of the Act for an inquiry, mediation or proceeding under a provision of the Act, such as the following:

(a) an inquiry, mediation or proceeding in relation to a native title determination (claimant or non-claimant applicant);

(b) mediation under Division 1B of Part 4 in relation to native title;

(c) special inquiries under section 137 or inquiries under section 139;

(d) mediation by the arbitral body (under subsection 31 (3)) to assist in obtaining an agreement under the right to negotiate process;

(e) a proceeding before the arbitral body under section 35 for a determination.

Division 4.3 What assistance can be applied for under subsection 183 (2) of the Act

14 Subsection 183 (2) of the Act provides that a person who is a party, or who intends to become a party, to an ILUA or an agreement about rights conferred under subsection 44B (1) of the Act, or a person who is in dispute with any other person about rights conferred under subsection 44B (1) of the Act, may apply to the Attorney-General for the provision of assistance in relation to:

(a) negotiation of an ILUA or an agreement about rights conferred under subsection 44B (1) of the Act; or

(b) an inquiry, mediation or proceeding in relation to such an agreement; or

(c) resolution of a dispute about rights conferred under subsection 44B (1) of the Act.

Division 4.4 Matters of which the Attorney-General must be satisfied before assistance can be authorised under the Act

15 The provision of assistance may be authorised under section 183 of the Act in respect of applications for the purposes set out in subsections 183 (1) and (2) of the Act only if the Attorney-General is satisfied that:

(a) the applicant is not eligible to receive assistance in relation to the matter from any other source (including from a representative Aboriginal/Torres Strait Islander body); and

(b) the provision of assistance to the applicant is in accordance with these Guidelines; and

(c) in all the circumstances, it is reasonable that the application be granted.

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Part 5 Eligibility for Assistance

Division 5.1 General

16 A person is eligible for the provision of assistance under section 183 of the Act if:

(a) the person:

(i) is a party, or intends to apply to be a party, to an inquiry, mediation or proceeding related to native title; or

(ii) is or intends to become a party to an ILUA or to an agreement about rights conferred under subsection 44B (1) of the Act and is seeking the provision of assistance in relation to the negotiation of such an agreement; or

(iii) is or intends to become a party to an ILUA or to an agreement about rights conferred under subsection 44B (1) of the Act and is seeking the provision of assistance in relation to an inquiry, mediation or proceeding in relation to the agreement; or

(iv) is in a dispute with another person about rights conferred under subsection 44B (1) of the Act and is seeking the provision of assistance in relation to resolving the dispute; and

(b) for an application for the provision of assistance in relation to an inquiry, mediation or proceeding related to native title — the person does not claim to hold native title or to be entitled to compensation in relation to native title; and

(c) for an application for the provision of assistance in relation to an ILUA — the person does not hold or claim to hold native title in relation to the area covered by the ILUA; and

(d) for an application for the provision of assistance in relation to an agreement or dispute about rights conferred under subsection 44B (1) of the Act — the person is not included in the native title claim group concerned.

Division 5.2 How reasonableness is determined for an application for assistance for an inquiry, mediation or proceeding under subsection 183 (1) of the Act

17 Subject to sections 18 and 19, in deciding whether it is reasonable to authorise the provision of assistance applied for under subsection 183 (1) of the Act, consideration must be given to the following matters:

(a) if the applicant is not represented by a group representative — whether the applicant has sufficient financial resources;

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(b) the nature of the applicant's interest in the inquiry, mediation or proceeding and the nature of the native title rights being claimed;

(c) if the applicant's interest does not extinguish native title as a matter of law — whether the applicant's interest is likely to be adversely affected in a real and significant way if the native title claim were to be recognised;

(d) whether the applicant's interest is protected or capable of being protected under the regime for future acts in the Act;

(e) the number of claims that directly affect the applicant;

(f) the likely benefit to the applicant of participating in the inquiry, mediation or proceeding relative to the likely cost of assistance;

(g) whether a group representative is acting as an agent of a party in the inquiry, mediation or proceeding;

(h) whether the applicant's interest is appropriately protected having regard to the identity and interests of other parties to the inquiry, mediation or proceeding;

(i) if assistance is sought for legal services to participate in a trial or preliminary or interlocutory proceeding, whether:

(i) the applicant's case has reasonable prospects of success; or

(ii) the applicant's participation will enhance the prospect of a mediated outcome.

18 The provision of assistance is not considered to be reasonable if the applicant's interest:

(a) is a previous exclusive possession act; or

(b) has extinguished native title according to law; or

(c) is a low impact future act; or

(d) is a Scheduled interest.

19 The provision of assistance for legal services to participate in a trial or preliminary or interlocutory proceedings is not considered to be reasonable unless the applicant can demonstrate that at least 1 of the following conditions is satisfied:

(a) the proceedings raise a new and significant question of law directly relevant to the applicant's interest;

(b) the court requires the applicant's participation in the proceedings;

(c) the proceedings will affect the applicant's interest in a real and significant way and mediation has failed for reasons beyond the applicant's control.

Division 5.3 How reasonableness is determined for an application for assistance under subsection 183 (2) of the Act

20 Subject to section 21, in deciding whether it is reasonable to authorise the provision of assistance applied for under subsection 183 (2) of the Act, consideration must be given to the following matters:

(a) if the applicant is not represented by a group representative — whether the applicant has sufficient financial resources;

(b) the nature of the applicant's interest and the nature of the native title rights being claimed;

(c) whether the applicant's interest is protected or capable of being protected under the regime for future acts in the Act;

(d) whether the applicant's interest is appropriately protected having regard to the identity and interests of another party to the negotiations, to the inquiry, mediation or proceeding in relation to such an agreement or to a dispute about rights conferred under subsection 44B (1) of the Act;

(e) whether a group representative is acting as an agent of any party in the negotiation, inquiry, mediation or proceeding, or in the resolution of a dispute about rights conferred under subsection 44B (1) of the Act;

(f) whether there is a significant benefit to the applicant, or likely to be a significant benefit to others, of an agreement being negotiated having regard to:

(i) the extent of any adverse effect of a determination of the existence of native title on the applicant's interest; and

(ii) the likelihood of success of a native title claim; and

(iii) the area of the proposed agreement; and

(iv) the potential parties to the proposed agreement; and

(v) the duration of the proposed agreement; and

(vi) the matters to be dealt with under the agreement; and

(vii) any indications by native title claimants or other parties to the intended agreement of an intention or willingness to negotiate an agreement;

(g) the likely cost of the negotiation of an agreement, the inquiry, mediation or proceeding in relation to an existing agreement or the resolution of a dispute about rights conferred under subsection 44B (1) of the Act.

21 The provision of assistance is not considered to be reasonable if the applicant's interest:

(a) is a previous exclusive possession act; or

(b) has extinguished native title according to law; or

(c) is a low impact future act; or

(d) is a Scheduled interest.

Division 5.4 Assessment of financial circumstances and of contribution

22 For paragraphs 17 (a) and 20 (a), whether an applicant has sufficient financial resources will be assessed by having regard to the likely cost of the assistance sought and to the income and assets of the applicant.

23 If the applicant is not a natural person or the applicant is a trustee, consideration must be given to what other financial resources may be available to the applicant. For example, in the case of a company, consideration will be given to the financial circumstances of those owning it; in the case of an association, consideration will be given to its capacity to levy its members; and in the case of a trustee, consideration will also be given to the financial circumstances of the beneficiaries of the trust.

24 A publicly listed company is regarded as having sufficient financial resources.

25 An applicant may be required to pay a contribution towards the cost of assistance as a condition of the authorisation of the provision of assistance. The maximum amount of the contribution that may be required will be determined at each stage of the matter by the Attorney-General.

Division 5.5 When assistance will be provided through a group representative

26 If an application is made for the provision of assistance in a matter in which representation is being provided to a person with a like interest by a group representative, it will generally not be reasonable for the provision of assistance to be authorised for the separate representation of the applicant.

27 If, at the time of application, representation is not being provided by a group representative but it is apparent that members of a particular group may be affected by the inquiry, mediation or proceeding related to native title, that group may be invited by the Department to make an application for the provision of assistance on behalf of its members and other persons with like interests.

Part 6 Making an application for assistance

28 These Guidelines and application forms are available from the Department and are published on the Department's website.

29 An application must be made by the applicant, or by the applicant's agent, on the form provided by the Department. An application must be lodged in accordance with the instructions on the application form.

Part 7 Making a decision on an application

Division 7.1 Deferral of decision

30 A decision on an application will be deferred until the Department receives all of the information required by these Guidelines or requested by the Department.

Division 7.2 Effect of failure to provide information

31 If the information required is not provided within a time nominated by the Department, the Attorney-General may refuse the application without any further consideration.

Division 7.3 Confidentiality of information

32 Information provided by an applicant, or by another person on behalf of an applicant, in relation to the application (including whether an application has been made) will be treated in confidence and may only be disclosed if:

(a) it is necessary for purposes relevant to administering the scheme; or

(b) it is in accordance with the applicant's express authority; or

(c) it is necessary to correct the public record; or

(d) it is required by law.

Division 7.4 Advice from other agencies

33 Advice may be sought from other government agencies or industry bodies regarding an application for the provision of assistance. In the course of obtaining such advice, information regarding an applicant's financial affairs or any legal advice obtained by an applicant is not to be disclosed by the Department.

Division 7.5 Assistance cannot be authorised retrospectively

34 The provision of assistance cannot be authorised from a date before the date of receipt by the Department of an application.

35 If a grant is urgently required, the provision of assistance may be authorised from the date of notice to the Department of an application if a complete application is received within 14 days of the notice. If a complete application is not received within that period, the provision of assistance may only be authorised from the date of receipt of the complete application.

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Division 7.6 Assistance will be authorised in stages

36 The provision of assistance will be authorised for services that are likely to be required in a 6 to 12 month period. The provision of assistance may be authorised for a shorter period if appropriate. The period for which the provision of assistance is authorised is a ***stage***.

37 If the services for which the provision of assistance is authorised will not be completed in a stage, a fresh application must be made before the expiry of the stage.

38 The provision of assistance will not necessarily be extended at the end of each stage. A decision will be made as to whether it is reasonable to extend the provision of assistance having regard to sections 17 to 21.

Division 7.7 Limits must be imposed on assistance authorised

39 An applicant will be advised of the maximum amount of the assistance authorised to be provided for a stage. If it is considered that the maximum amount will be insufficient to complete the work for that stage, an extension may be sought from the Department. However, an extension for this reason can be approved only in exceptional circumstances. Exceptional circumstances include the following:

(a) changes to the mediation program beyond the applicant's control;

(b) increased court attendances as a result of orders made by the court;

(c) a hearing initiated by another party at which the applicant's attendance is necessary;

(d) other unforeseen events beyond the applicant's control that have more than a minor financial impact on the amount of the assistance required.

40 An increase in the maximum amount of the assistance authorised to be provided for a particular stage cannot be authorised after the stage has been completed.

Division 7.8 Native Title Practitioners Panel

41 A practitioner who is to provide services covered by a grant of an application for the provision of assistance must be a member of the Native Title Practitioners Panel established by the Attorney-General.

42 A legal practitioner or other service provider who wishes to be included on the Native Title Practitioners Panel must address the criteria determined by the Attorney-General. The criteria are available from the Department and are published on the Department's website.

Division 7.9 Assistance may be varied or terminated

43 The Attorney-General may vary the provision of assistance at any time.

44 The Attorney-General may terminate the provision of assistance, for good reason. Examples of good reasons include the following:

(a) misrepresentation by the applicant or the applicant's advisers;

(b) failure to comply with the conditions on which the provision of assistance was authorised;

(c) failure to comply with directions or orders of the National Native Title Tribunal or with the rules, directions or orders of a court;

(d) failure to comply with a request by the Department to provide information;

(e) failure to act reasonably;

(f) supervening events that make the provision of assistance no longer appropriate. For example, the services in respect of which the provision of assistance was authorised are no longer required or the purpose for which the provision of assistance was authorised no longer applies or exists.

45 If consideration is being given to varying or terminating the provision of assistance for misrepresentation, non-compliance or failure to act reasonably, the applicant must be asked to show cause why the authorisation of the provision of assistance should not be varied or terminated.

46 A grant may be terminated retrospectively for good reasons of a kind mentioned in section 44. In these cases, money paid to the grant recipient or his or her legal practitioner becomes a debt owed to the Commonwealth.

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Part 8 What assistance can be authorised

Division 8.1 Assistance to a group representative

47 The provision of assistance may be authorised for a group representative to act as an agent for a party in an inquiry, mediation or proceeding, or in the negotiation of an ILUA or an agreement about rights conferred under subsection 44B (1) of the Act.

48 The provision of assistance may be authorised for a group representative to act as an agent for a party in an inquiry, mediation or proceeding in relation to an ILUA or an agreement about rights conferred under subsection 44B (1) of the Act, or in resolving a dispute about rights conferred under subsection 44B (1) of the Act.

49 The provision of assistance may be authorised for a group representative in respect of the costs of obtaining instructions and providing advice on resolving native title matters that affect persons who are, or who intend to become, parties to:

(a) an inquiry, mediation or proceeding related to native title; or

(b) an ILUA or an agreement about rights conferred under subsection 44B (1) of the Act.

50 The provision of assistance may be authorised to a group representative for photocopying, telephone, facsimile, search and postage expenses incurred. This assistance is limited to the amount of the expense incurred. However, the expense is taken to be $0.275 per page for photocopies and $2.20 per page for facsimiles.

51 The provision of assistance may be authorised for executive or managerial staff of a group representative for work on native title matters for which the provision of assistance has been authorised. The maximum amount payable in respect of executive or managerial staff is $55 per hour to a maximum of $440 per day. However, this assistance may not be available if the provision of assistance is authorised for the remuneration of a native title officer engaged by the group representative.

52 For the purpose of streamlining procedures, and subject to paragraph 90 (a), the Attorney-General may make advance payment of the approved legal costs and related expenses of a stage, by way of a lump sum or instalments, to the group representative.

Division 8.2 Native title officer

53 If a group representative engages a native title officer, the provision of assistance for the remuneration of the native title officer may be authorised. The duties of the native title officer must be approved by the Attorney-General.

Division 8.3 Costs of legal services

Subdivision 8.3.1 Solicitor

54 The provision of assistance in respect of a solicitor's fees may only be authorised for reasonable costs, which are to be determined as follows:

(a) by reference to the document titled the Assessment of Costs in Native Title Matters, that is to be published, and periodically updated, by the Department, and paid:

(i) in accordance with the scale of costs set out in Schedule 2 to the Federal Court Rules; or

(ii) at 90% of the quarter hourly rate under item 31 of that scale of costs;

(b) without any uplift for care, skill and responsibility;

(c) at a maximum rate of $27.50 per hour for administrative staff;

(d) at a maximum rate of $66 per hour for a paralegal or articled clerk who is not a legal practitioner.

Subdivision 8.3.2 Counsel

55 The provision of assistance in respect of counsel's fees is to be determined as follows:

(a) counsel will only be funded in a matter if the Attorney-General considers that the case warrants the engagement of counsel;

(b) counsel's fees will be allowed in accordance with the following scale:

(i) for junior counsel — a rate of $189.20 to $249.70 per hour to a maximum of $1 513.60 to $1 997.60 per day;

(ii) for senior counsel — a rate of $249.70 to $466.40 per hour to a maximum of $1 997.60 to $3 731.20 per day;

(c) if the hearing or preparation is of lengthy duration, fees may be paid as a lump sum or at agreed rates that do not exceed the scale mentioned in paragraph (b);

(d) counsel's memorandum of fees must be provided with a solicitor's bill of costs.

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Division 8.4 Travel costs

56 The reasonable travel costs of a legal practitioner may be authorised for the purpose of obtaining instructions, attending a hearing, or attending a negotiation.

57 The reasonable travel costs of a group representative, a native title officer or a witness may be authorised if the Attorney-General considers that the travel is necessary.

58 If travel by air has been approved, airfares are payable at economy rates. Other travel costs of a legal practitioner or a native title officer will be reimbursed up to the maximum applicable to the Senior Executive Service of the Department at the time of travel. Other travel costs of a group representative or a witness will be reimbursed at non-Senior Executive Service rates at the time of travel.

59 Payment for time spent travelling by a legal practitioner or a group representative may only be authorised if the attendance was more than 50 km from the legal practitioner's office or the group representative's office. Payment for the attendance will be made at the rate of $165 per hour for a legal practitioner and $27.50 per hour for a group representative (not including a native title officer).

60 Tax invoices and receipts for all travel costs must be provided with a request for reimbursement.

Division 8.5 Disbursements generally

61 Payment will not be advanced in anticipation of a disbursement unless the Attorney-General is satisfied that special circumstances warrant payment in advance.

62 Prior approval is required to incur a cost exceeding $500 for any 1 disbursement. This requirement cannot be avoided by having the service provider split the work over a number of invoices.

63 The maximum amounts payable in respect of an anthropologist or other expert's fee are $110 per hour and $880 per day.

64 Tax invoices and receipts must be provided for all non-travel related disbursements over $100.

Division 8.6 Costs of an unrepresented applicant

65 If a legal practitioner is not engaged by the applicant, only reasonable disbursements can be authorised. The provision of assistance does not cover the costs of an applicant's time or loss of earnings in preparing a case.

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Division 8.7 Costs that cannot be paid

66 The provision of assistance cannot be authorised for costs of a kind incurred in relation to the making of an application for the provision of assistance, or in relation to the review of a decision regarding the provision of assistance.

67 The provision of assistance cannot be authorised for any legal or other costs incurred between the date on which an application was made and the date on which the Attorney-General made a decision to refuse the provision of assistance.

68 The provision of assistance cannot be authorised for the cost of attendances on, and correspondence with, the Legal Assistance Branch of the Department.

69 The provision of assistance cannot be authorised for the cost of preparing an invoice.

70 The provision of assistance cannot be authorised for the payment of any costs that an applicant is ordered to pay to another party.

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Part 9 Conditions of assistance

Division 9.1 General conditions

Subdivision 9.1.1 Consent to the obtaining and disclosure of information

71 By making an application, the applicant:

(a) acknowledges that the Department may obtain information about the application or the provision of assistance (including a legal opinion obtained about the matter for which the application is made) from other government or industry bodies or from the applicant's legal practitioner; and

(b) consents to the Department obtaining the information.

72 By making an application, the applicant (the ***consenting applicant***) consents to the Department disclosing to another applicant that the consenting applicant has made an application, only for the purpose of deciding whether to authorise the provision of assistance to the consenting applicant as an individual or as a member of a group.

Subdivision 9.1.2 Agreement to pay contribution

73 By making an application and accepting the provision of assistance, the applicant agrees to pay any contribution determined by the Attorney-General in accordance with these Guidelines.

Subdivision 9.1.3 Acceptance of directions by the Attorney-General

74 Approval to provide the legal services determined by the Attorney-General to the applicant in this matter involves acceptance by the legal service provider that the Attorney-General directs the legal service provider what services have to be provided and the terms and conditions applicable to those services.

75 In the exercise of these terms and conditions, the Attorney-General will, in the grant of assistance or from time to time afterwards, specify the nature or ambit of the legal services the legal service provider is to provide to the applicant and the terms and conditions on which those services are to be provided.

Subdivision 9.1.4 Compliance with Guidelines and directions

76 The Attorney-General may issue a direction, on any issue in relation to the authorisation of the provision of assistance, that is consistent with the Act, regulations made under the Act and these Guidelines.

77 An applicant must comply with these Guidelines and any direction issued by the Attorney-General.

Subdivision 9.1.5 Legal practitioners prohibited from demanding payment from an applicant

78 Except with the prior written approval of the Attorney-General, a legal practitioner must not demand or receive payment other than a contribution determined in accordance with these Guidelines, from an applicant or from any person on behalf of an applicant, in respect of services for which the provision of assistance was authorised.

Division 9.2 Accountability requirements

Subdivision 9.2.1 Notice of changes

79 An applicant must notify the Department, within 14 days, of anything that could reasonably affect the initial or ongoing provision of assistance. Examples of such things include the following

(a) a change in the applicant's financial circumstances;

(b) withdrawal or discontinuance by the applicant or any party;

(c) a significant reduction or increase in the services required;

(d) a change in the native title claim or a development in the law so that the applicant's interests are no longer significantly affected;

(e) a change in the strategy for resolving the claim;

(f) a change in respect of any of the matters listed in sections 17 and 20.

80 An applicant who is not represented by a group representative must also notify the Department of any change in the applicant's financial circumstances that could reasonably affect the initial or ongoing provision of assistance.

Subdivision 9.2.2 Reporting

81 By accepting the provision of assistance, the applicant agrees to disclose to the Department the terms of any settlement in relation to the matter for which the provision of assistance has been authorised.

82 A report must be provided in the form required by the Department at the conclusion of a stage, or upon settlement of the matter.

83 Reports at the conclusion of a stage must contain information about:

(a) what has happened during a stage or since the last report; and

(b) what is anticipated to happen in the next stage; and

(c) what issues are still in contention and the reason why they are still in contention; and

(d) how it is proposed to resolve those issues; and

(e) whether agreement is likely in respect of those issues; and

(f) what legal advice has been provided about the prospects of reaching agreement on those issues.

Subdivision 9.2.3 Invoicing requirements

84 A legal practitioner must not invoice the Department more frequently than at 3 monthly intervals, unless fees and disbursements exceed $1 000 or the matter or stage has concluded.

85 Before payment of a legal practitioner's invoice will be made, the legal practitioner must submit sufficient information for an assessment to be made as to the reasonableness of the fees.

86 If a disbursement exceeds $100, a copy of the tax invoice for the disbursement must be provided with the legal practitioner's invoice.

87 If a legal practitioner is requested to have a bill of costs assessed by an independent costs assessor, the legal practitioner must pay the cost of the assessment.

88 The amount of any contribution to be made by the applicant will be deducted from the amount of an invoice before payment by the Department.

Subdivision 9.2.4 Provision of a legal practitioner's file

89 A legal practitioner must provide his or her file, or any part of his or her file, in a matter for which the provision of assistance was authorised, to the Department if requested to do so by the Department.

Subdivision 9.2.5 Payment in advance to a group representative

90 If the Attorney-General approves a payment in advance to a group representative under section 52 for the purpose of the payment of approved legal costs and related expenses of a stage:

(a) money paid in advance to the group representative must be deposited to an account with a financial institution maintained by the group representative solely for that purpose; and

(b) the group representative must account to the Department for any interest earned on money paid in advance; and

(c) if the payment is made by instalments — the payment of each instalment is subject to the group representative satisfying the reporting requirements in these Guidelines; and

(d) an extension cannot be authorised unless any payment made in advance has been acquitted to the satisfaction of the Department; and

(e) any money paid to the group representative that is not expended in payment of the costs for which assistance was authorised must be repaid to the Commonwealth.

91 For paragraph 90 (b), a person cannot use any interest earned without the express approval of the Attorney-General. The Attorney-General will only approve the expenditure of interest for purposes within the terms of the original authorisation of the provision of assistance.

Division 9.3 Repayment of assistance

Subdivision 9.3.1 Costs recovered must be paid to the Commonwealth

92 If an applicant is paid costs (in respect of a matter for which the provision of assistance has been authorised), the applicant must pay to the Commonwealth, within 28 days of receipt of payment of those costs, the lesser of the amount of costs received or assistance provided.

93 By acting for an applicant in a matter for which the provision of assistance has been authorised, a legal practitioner accepts that the Commonwealth is to be paid first from costs recovered from another party.

94 Failure by an applicant to take reasonable steps to recover and pay costs to the Commonwealth may result in a reassessment of the provision of assistance to the applicant.

Subdivision 9.3.2 Settlement

95 If a matter (in respect of which the provision of assistance has been authorised) is settled by a payment to the applicant, the applicant must pay to the Commonwealth, within 28 days of receipt of payment of the settlement sum, the lesser of the amount received or assistance provided.

Subdivision 9.3.3 Irrevocable licence to use intellectual property

96 By accepting the provision of assistance, the applicant and the applicant's legal practitioner grant to the Commonwealth an irrevocable licence to use, adapt and exploit the intellectual property in any ILUA or agreement drafted or concluded with that assistance.

97 The Attorney-General retains the right to waive the requirement mentioned in section 96. However, the Attorney-General will not waive the requirement if the party who objects to the requirement is receiving Commonwealth funding in relation to native title.

98 The licence granted to the Commonwealth does not extend to confidential material such as sensitive personal, cultural or financial information.

Division 9.4 Special conditions

99 The Attorney-General may impose special conditions on the provision of assistance, that are consistent with the Act, regulations made under the Act and these Guidelines.

Part 10 Right of review

Division 10.1 Internal review

100 Reasons must be provided to an applicant if an application for the provision of assistance is refused, varied, terminated or made subject to special conditions, including a requirement for the applicant to pay a contribution towards the cost of assistance.

101 An applicant may seek an internal review of the following decisions:

(a) refusal to authorise assistance;

(b) variation of assistance;

(c) termination of assistance;

(d) imposition of special conditions on assistance, including a requirement for the applicant to pay a contribution towards the cost of assistance.

102 An applicant may only seek an internal review of a decision on the payment of an invoice in relation to the provision of assistance if the amount under dispute is at least equal to the greater of the following:

(a) 15% of the original invoice;

(b) $100.

103 A request for internal review must be received by the Department within 28 days of the date of the letter notifying the applicant of the reasons why the provision of assistance was refused, varied, terminated or made subject to special conditions, including a requirement for the applicant to pay a contribution towards the cost of assistance.

104 The review must be conducted by a decision maker other than the original decision maker.

105 A decision maker who conducts an internal review of a decision on the payment of an invoice in relation to the provision of assistance may only vary the decision if the amount of variation is at least equal to the greater of the following:

(a) 15% of the original invoice;

(b) $100.

Division 10.2 Information regarding avenues for redress

106 A letter from the Department advising an applicant of a decision in respect of an application must include information regarding the right to internal review under these Guidelines.

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Part 11 Transitional arrangements

107 The provision of assistance authorised by the Attorney-General before these Guidelines commenced is unaffected until completion of the stage or services for which the provision of assistance was authorised, with the exception of matters in which the provision of assistance authorised has not been used since 1 January 2006. In such a case, the applicant must submit a new application for the provision of assistance.

108 Applications that were received, but not determined, before the commencement of these Guidelines will be decided under the guidelines applicable at the date the application was received by the Department.

Part 12 Further information for applicants

109 Telephone inquiries should be directed to (02) 6250 6770. Written inquiries should be directed to:

Assistant Secretary
Legal Assistance Branch
Attorney-General's Department
National Circuit
BARTON ACT 2600.

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Technical amendments to the *Native Title Act 1993*

Discussion Paper

Introduction

On 7 September 2005 the Attorney-General announced a package of reforms to the native title system. One element of the package is a suite of minor and technical amendments to the *Native Title Act 1993* (the Act) to improve existing processes. The amendments are designed to enhance the operation of the Native Title Act and address issues which have emerged in practice. They are not designed to wind back native title rights.

Your comments are sought on the proposals set out in this paper. The Australian Government would also welcome your suggestions for other minor or technical amendments to the Act. In making suggestions for further amendments, you should include clear examples illustrating the nature of the problem and the way in which the proposed solution will address it.

The proposals in this paper do not reflect the final views of the Australian Government. An exposure draft of the technical amendments will be released early in 2006 for final comment before introduction into Federal Parliament.

If you would like to make a submission, please forward it no later than 31 January 2006 to:

The First Assistant Secretary
Legal Services and Native Title Division
Attorney-General's Department
National Circuit
BARTON ACT 2600

Submissions may also be e-mailed to native.title@ag.gov.au, or sent by facsimile to (02) 6250 5553.

Please note that any suggestions may be forwarded to other relevant Australian Government agencies and Departments for their consideration. Unless you request otherwise, information you provide may also be used in consultations and any explanatory documentation prepared in relation to the Bill.

List of Acronyms

ILUA	Indigenous Land Use Agreement
NNTT	National Native Title Tribunal
NTA	*Native Title Act 1993*
NTRB	Native Title Representative Body
PBC	Prescribed Body Corporate
RNTBC	Registered Native Title Body Corporate

Proposed amendments

A: Amendments to the Future Act Regime

Subsection 24AA(3): amend the overview of ILUA provisions

Section 24AA provides a general overview of future act provisions in the NTA, including an overview of future act validity under an ILUA (subsection 24AA(3)). Essentially, subsection 24AA(3) states that where parties to an ILUA consent to an act being done, that act will be valid.

However, even where the parties have consented, a future act is not valid until the ILUA has been registered (see sections 24EB and 24EBA). Whilst any conflict between the overview provision and operational provisions would likely be resolved in the latter's favour, it would be useful to amend the overview to align it with the substantive provisions. Accordingly, it has been proposed that subsection 24AA(3) be amended to make clear that a future act will be valid if the parties consent to the act being done *and* the agreement is registered.

Sections 24BB and 24CB: enabling body corporate and area agreements to be framework agreements

Currently an alternative procedure agreement can be about providing a framework for the making of other agreements about matters relating to native title rights and interests – these are known as 'framework agreements'(see paragraph 24DB(e)). However, there is no similar ability for a body corporate or area agreement to also be a framework agreement.

There is nothing in the nature of body corporate or area agreements prohibiting framework agreements. ILUAs are designed to be an adaptable and flexible mechanism, and given the limited availability of alternative procedure agreements, enabling all types of ILUAs to be framework agreements is desirable.

Accordingly, it has been proposed that sections 24BB and 24CB be amended to incorporate a provision similar to paragraph 24DB(e), enabling body corporate and area agreements to be framework agreements.

Sections 24BF, 24CF and 24DG: clarify use by the NNTT of information provided or obtained when providing assistance to parties in the negotiation of an ILUA

Sections 24BF, 24CF and 24DG provide that any party to negotiations for an ILUA may seek assistance from the NNTT in those negotiations. Concern has been expressed about what use the Registrar of the NNTT may make of information gained by or disclosed to the NNTT during the provision of that assistance, when he or she is later dealing with an application to register the ILUA.

These provisions can be contrasted with the provisions regarding mediation conferences (Part 6, Division 4A). The latter provisions prohibit the use of information obtained during mediation in court proceedings without the consent of parties, and also provide for the NNTT member who presides over or assists a

mediation not to take any further part in the proceeding without the consent of the parties (see subsection 136A(4)).

It is likely that concerns are not limited to use of information by the Registrar in the ILUA registration process, but may extend to the NNTT or the Registrar using information in other contexts, such as the mediation of a subsequent native title claim.

To ensure that information is not used inappropriately, and to provide comfort to parties who seek assistance from the NNTT in ILUA negotiations, it has been proposed that the NTA be amended to clarify that information provided by a person seeking assistance under sections 24BF, 24CF and 24DG is not to be used by the NNTT for any other purpose without the consent of the person.

References to the NNTT would include references to an alternative State or Territory body recognised under the NTA.

Section 24BI: provision for notification day for body corporate agreements

When a party or parties apply to the NNTT Registrar to have an ILUA registered, the Registrar must give notice of that application to a range of persons or bodies who are not parties to the agreement.

Notice given in relation to area agreements and alternative procedure agreements must specify a notification day. Prior to the notification day, persons claiming to hold native title in the area the subject of the agreement may object to that agreement being lodged. Limited other applications and activities can also occur within this period.

However, there is no similar 'notification day' provision for body corporate agreements. This is most likely because the only persons or bodies able to object to the registration of the agreement are the parties to the agreement. In limited circumstances, non party NTRBs can also prevent registration. Section 24BI provides that the Registrar of the NNTT must register the agreement unless there is an objection, or advice from the NTRB, within one month from notice of the agreement being given.

As notices are sent to a range of bodies and can conceivably be sent on different dates, and public notification is generally done by advertisement in relevant newspapers (which may not be published daily), there has been some confusion about when the Registrar gives notice, and hence when the one month starts to run. This confusion may be exacerbated by the fact that parties to the agreement – who are the only bodies able to object to the registration – are not required to be notified.

In order to clarify these provisions, it has been proposed that section 24BH (which provides for the giving of notice) be amended to require the NNTT to write to parties at the same time notice is given, advising them of the notification period. The notification period of one month would be specified to run from the date the notification is sent or, if notice is to be given on different dates, from the latest date notification is to be given.

In addition, it has been proposed that the NTA be amended to provide that where notice is given to a non-party NTRB, that notice must set out the notification date to

ensure that body can provide any relevant advice to the Registrar with the one month period.

Subsections 24CI(2) and 24DJ(2): clarify other use of information provided or obtained by the NNTT when providing assistance to parties in the negotiation of an objection to an ILUA

Section 24CI enables persons claiming to hold native title in the relevant area to, in certain circumstances, object to the proposed registration of an area agreement ILUA. Objections must be made in writing to the Registrar of the NNTT (subsection 24CI(1)), and the parties to the ILUA may request assistance from the NNTT to negotiate with the person who made the objection, with a view to having the objection withdrawn (subsection 24CI(2)). Where an objection is not withdrawn, the Registrar will determine whether or not the objection will be upheld (see subsection 24CK(2)).

A similar procedure applies to registration of an alternative procedure agreement ILUA (see sections 24DJ and 24DL). However, where an objection to an alternative procedure agreement is not withdrawn it is the decision of the NNTT (not the Registrar) as to whether or not the objection should be upheld.

The involvement of the NNTT and Registrar in the objection process could give rise to concerns about the use of information gained through the objection negotiations in any later decision by the Registrar (area agreement) or inquiry by the NNTT (alternative procedure agreement) about that objection.

It has been suggested that information obtained or provided during objection negotiations should not be able to be used during a later decision by the Registrar or inquiry by the NNTT without the consent of the parties. Similarly, an NNTT member who attempts to negotiate the withdrawal of an objection to an alternative procedure agreement should be prohibited from being involved in a subsequent inquiry into the objection unless the parties consent is obtained.

Accordingly, it has been proposed that the NTA be amended to make clear that information provided and/or obtained in the course of providing assistance in objection negotiations cannot be used by the NNTT or Registrar in a subsequent inquiry or decision about that objection, without the consent of the parties to the negotiations.

In addition, it has been proposed that the NTA be amended to provide that an NNTT member who provides assistance in negotiations to withdraw an objection to an alternative procedure agreement is prohibited from participating in any subsequent inquiry, without the consent of the parties.

Subsection 24MD(6B): amend to allow non-native title parties to request an independent hearing

Subsection 24MD(6B) of the NTA provides that, where certain types of acts are proposed over land or waters (namely, compulsory acquisitions by governments for the benefit of third parties, or the creation or variation of a right to mine for the sole purpose of constructing an infrastructure facility associated with mining) any native title claimant or PBC in relation to the relevant land or waters may object to the doing of that act to the extent that it affects their registered native title rights and interests. Paragraph 24MD(6B)(f) provides that where an objection is made, and the objector requests, the relevant Government party must ensure that the objection is heard by an independent person or body.

This provision has been interpreted to mean that the independent person or body can only hear the objection if the objector requests this. Where no such request is made, resolution of the objection, and therefore the proposed act, may be delayed.

Accordingly, to avoid the potential for extensive delays in resolving objections made pursuant to subsection 24MD(6B), it has been proposed that this subsection be amended to enable the relevant government party or the person who requested or applied for the doing of the act to request that the objection be heard by an independent person or body. The relevant government party or person who requested or applied for the doing of the particular act will only be able to request to have the objection heard by an independent person or body after two months from the date of the original objection by the native title claimant or PBC. This will allow time for the consultation required in paragraph (e) to progress, which may alleviate the need for the matter to be referred to an independent person or body.

B: Amendments to the Alternative State Regime provisions

Sections 43 and 43A: clarify resumption of right to negotiate when alternative state regimes cease

Pursuant to sections 43 and 43A of the NTA the Commonwealth Minister may make a determination that alternative State or Territory right to negotiate provisions apply instead of the NTA provisions.

Currently, neither section outlines what happens in the event that an alternative state regime is revoked or otherwise no longer exists. It would be useful to clarify this. Accordingly, it has been proposed that the NTA be amended to provide that following the revocation of a section 43 or section 43A determination, or the repeal by a State or Territory of the laws providing for an alternative state regime, the relevant NTA right to negotiate provision will resume application. The resumption of NTA processes would take effect immediately following the revocation or repeal coming into effect.

C: Amendments to the Prescribed Bodies Corporate provisions

Section 57: consent of agent PBCs to manage native title rights and interests

Where the native title holders want a PBC to hold the native title rights and interests on trust, they must nominate that PBC and provide to the Federal Court the written consent of that PBC. However, where the native title holders want a PBC to manage the native title rights and interests as their 'agent', there is no requirement that they provide the Federal Court with the written consent of the PBC.

This appears to be an unintended discrepancy. It has been proposed that section 57 be amended to provide that an 'agent' PBC must consent to being nominated to manage the native title.

D: Amendments to the Application and Registration Test provisions

Subsection 62(1): amend affidavit requirements about entries on the National Native Title Register

The NTA requires an application seeking to have native title recognised to be accompanied by an affidavit sworn by the applicant which, amongst other things, includes a statement that the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register (see sub-paragraph 62(1)(a)(ii)).

This provision is designed to ensure that a new native title claim does not cover an area where native title has already been finally determined. Entries in the National Native Title Register are governed by subsection 193(1) of the NTA, which in addition to requiring details of determinations by the High Court, Federal Court and any State or Territory court, also required details of any 'other determinations of, or in relation to, native title in decisions of courts or tribunals'. This has the capacity to include a very wide range of native title related decisions which are not determinations of native title, and should not necessarily impede a native title claim being lodged over that area. For example, a State Supreme Court decision which may only have a lesser, *in personam* operation that a native title determination, would currently prevent an application being made over the area.

It has been proposed that the requirement in subsection 62(1) be modified to refer only to approved determinations of native title and not also those decisions entered under paragraph 193(1)(c). Such an amendment would not result in new claims being lodged where a determination of native title has already been made, as this is expressly prohibited by other parts of the NTA (subsection 61A(1) and 13(1)).

Paragraph 62(2)(c): searches carried out about non-native title rights and interests

Paragraph 62(2)(c) forms part of the requirements which an application to have native title recognised must meet. The provision requires that the details of all searches carried out to establish certain things be included in the application. As currently drafted it is not clear whether it refers to searches carried out by the applicants, or searches carried out by anybody.

The clear policy of the provision is that it is limited to searches carried out by the native title claim group. It has been proposed that paragraph 62(2)(c) be amended accordingly.

Subsections 62(2) and 62(3): amend information requirements for compensation application according to circumstances leading to application

A compensation claim may be made either by a RNTBC or a compensation claim group (section 61). A claim by a RNTBC will follow a determination that native title exists. However, a claim by a compensation claim group could be made in two circumstances – where no determination of native title has been sought, or where a determination has been sought and native title has not been recognised. It is possible that native title might not have been recognised because it was extinguished by acts which may be compensable under the NTA.

Where a compensation application is made by a compensation claim group, some information required in applications for a determination of native title must also be included in that compensation application (paragraph 62(3)(b)). That information includes a description and map of the relevant area, details and results of searches about non-native title rights and interests, and a description of the native title rights and interests and the basis on which it is asserted they exist.

Provision of this information ensures that where necessary the Federal Court can make a determination of native title at the time it determines compensation. (Subsection 13(2) provides that if at the time the Federal Court is making a native title compensation determination, there is not an approved determination of native title in relation to the whole or part of the area to which a native title compensation application relates, then the Federal Court must also make a current determination of native title at that time.)

However, where the compensation group has already sought a determination of native title, and that determination has resulted in native title not being recognised, provision of material under paragraph 62(3)(b) could be unnecessary. Accordingly, it has been proposed that paragraph 62(3)(b) be amended to require the provision of additional information only in circumstances where there is a material difference between the nature of the group, the rights and interests claimed, or the land and waters covered by the compensation claim and the native title claim. Such compensation claimants would still need to meet the authorisation and other requirements in subsection 62(3). An additional provision in section 62(3) would require the applicants to also provide material identifying the previous claim.

Further, the note to subsection 13(2) states that where a claim for compensation is made, and there has previously been no application for a determination of native title, the compensation claimants must include certain information in their claim pursuant to subsection 62(3). However, as noted above, a compensation claim may be made following an unsuccessful native title claim. It has been proposed that the note also be amended to reflect the amendments to paragraph 62(3)(b).

Sections 64 and 87: enabling an application to be split to facilitate resolution

Under the NTA an application can be split, to facilitate a consent determination over part of an area, for example where most parties consent to a determination and the parties who do not consent do not have an interest in the proposed determination area. However, this requires going through the registration test again which discourages applicants from taking up this option.

Accordingly, it has been proposed that the NTA be amended to enable applicants to apply to the Federal Court for a consent determination over part of a claim area and authorise the Federal Court to make such a determination. The application could only be made where the Federal Court is satisfied that all parties whose interest in the claim falls (either partly or solely) within the area proposed to be split off for the purposes of the partial determination would consent to a determination of native title.

It has also been proposed that this change be accompanied by consequential amendments requiring the Registrar of the Federal Court to review the party list after the split part of the claim has been resolved with a view to identifying parties who no longer have an interest in the claim. The Federal Court would be provided with the discretion to remove parties so identified by the Registrar from the remainder of the claim.

Sections 64 and 190A: amendments to applications and the registration test

Subsection 64(4) requires the Registrar of the Federal Court to provide a copy of all amended applications to the Native Title Registrar, who is required to consider the application and apply the registration test (section 190A). There are no exceptions to this process.

Registration of a claim is important as it confers procedural rights under the further acts regime, such as the right to negotiate. However, it has been the experience of many stakeholders that many claimants with registered claims do not, or are reluctant to, amend their claim to take into account changes in the law or to improve the quality of the claim, in case their claim loses its registered status. This is not conducive to timely mediation or litigation of claims.

The ability to amend the claim to remove particular areas without going through the registration test may also provide incentive for claimants and respondents to agree on some areas being excluded – and therefore some respondents being able to withdraw from the proceedings.

This could be resolved in part by providing that some amendments to applications no longer trigger the registration test. It has been proposed that section 190A be amended to provide that amendments to claims to reduce the area covered by the claim, to remove the name(s) of deceased claimants from the application, or to make purely procedural changes such as changing the address for service, will not trigger the registration test.

Under this proposal section 190 would also be amended, to provide that the details on the Register of Native Title Claims of applications which are amended but are not

required to go through the registration test again are updated, to ensure all parties are aware of any changes.

Subsection 190A(2) and section 24MD: extend the NNTT Registrar's obligation to consider claim within appropriate timeframes

Section 190A prescribes how the NNTT Registrar is to consider native title determination claims. Subsection 190A(2) provides that if notice is given under section 29 about a proposed future act which would affect land or waters within the claim area, the Registrar must endeavour to finish considering that claim within four months. That timeframe reflects paragraph 30(1)(a), which provides that a person who four months after notice is given under section 29 is a *registered* native title claimant over relevant land or waters will be a party to negotiations about the proposed future act.

Section 29 forms part of the right to negotiate provisions. Currently, the obligation in section 190A(2) does not extend to acts covered by State or Territory alternative right to negotiate regimes, or to other acts where procedural rights can arise.

Alternative state regimes

It has been proposed that section 190A(2) be amended to extend the Registrar's obligation to also cover where he or she is given notice of a future act under a relevant State or Territory alternative right to negotiate regime. The timeframe within which the Registrar would need to endeavour to finish considering the claim will reflect the time within which an objection to a future acts can be made under the State or Territory's alternative regime.

Section 24MD

It has been proposed that section 190A(2) be amended to also extend the Registrar's obligation to cover where notice is given by the Commonwealth, State or Territory under subsection 24MD(6B) about a proposed future act.

Section 24MD sets out how certain acts, which could be done in relation to land or waters whether there is native title or ordinary title over that land or waters, can be done. For example, section 24MD covers compulsory acquisition where both native title and non-native title interests are acquired and the native title holders are not caused any greater disadvantage than the non-native title holders.

Some types of acts covered by section 24MD – compulsory acquisitions which confer rights on persons other than the Commonwealth, State or Territory, and the creation or variation of a right to mine solely to enable construction of a mining related infrastructure facility – will give rise to procedural rights. Notice of such an act must be given by the Commonwealth, State or Territory to any registered native title claimant, native title body corporate, and relevant NTRB (paragraph 24MD(6B)(c)). A claimant or body corporate may then object to the act being done within two months of the notification.

It has been proposed that where notice is given by the Commonwealth, State or Territory about the proposed future act, the Registrar be obliged to use his or her best

endeavours to finish considering any native title claim within two months of that notice. The two month period reflects the time in which a claimant may currently object to the doing of an act which affects their *registered* native title rights and interests.

A consequential amendment to paragraph 24MD(6B)(c) would also be required to ensure that the Registrar is given notice of the proposed future act, as currently notice is only given to claimants, PBCs and any NTRB.

E: Miscellaneous Amendments

Section 78: clarify the scope of the Registrar's ability to provide assistance pursuant to this provision

Section 78 provides that the Registrar may give assistance to people in the preparation of applications, and may assist people (at any stage of a proceeding) in matters related to the proceeding. Section 78 is located in Part 3 of the NTA, which is about applications to both the Federal Court and the Registrar.

Whilst the Registrar can clearly provide assistance to people for some parts of the future act process – for example, in preparing an expedited procedure application – it is not clear whether assistance could be provided to a person applying to register an ILUA. It would improve the efficiency and effectiveness of the native title system if it were clarified that the Registrar can assist a person applying to register an ILUA. Accordingly, it has been proposed that section 78 be amended to enable the Registrar to give assistance to persons applying to register an ILUA.

Paragraph 139(d): provide for the NNTT to make a determination following an inquiry under paragraph 139(d)

Where a person claiming to hold native title in relation to land or waters covered by an alternative procedure agreement objects to the registration of that agreement, and that objection is not withdrawn, the NNTT must determine whether or not the objection should be upheld and registration prevented (see sections 24DJ and 24DL). The NNTT decides this matter through an inquiry, pursuant to paragraph 139(d).

Section 139 also provides for inquiries to be held in relation to right to negotiate applications and 'special matters'. Where the NNTT holds an inquiry into a right to negotiate application, section 162 prescribes that the NNTT must make a determination about the matters covered by the inquiry, and must state any findings of fact upon which the determination is based. When the NNTT holds an inquiry into a special matter, section 163 provides that the NNTT must make a report about the matters covered by the inquiry and report any findings of fact upon which it is based. Section 164 provides that determinations and reports referred to in section 162 and 163 respectively must be in writing and published by the Tribunal.

To ensure consistency, the requirements that apply to an inquiry to a right to negotiate application and a special matter should also apply to an inquiry under paragraph 139(d). Accordingly, it has been proposed that the NTA be amended to provide that where the NNTT holds an inquiry into a matter referred to in paragraph 139(d) they

must make a report about the matters covered by the inquiry. The report would include any findings of fact upon which it is based, be in writing and, be given to all parties.

Technical amendments to the *Native Title Act 1993*

Second Discussion Paper

Introduction

It is proposed a Bill to amend the *Native Title Act 1993* (NTA) incorporating technical amendments be introduced to Parliament early in 2007. Other drafting commitments will not enable exposure draft legislation to be prepared in time to allow effective consultation and introduction in the Autumn 2007 Parliamentary sitting. This further discussion paper is released to ensure stakeholders have ample opportunity to comment on proposed technical amendments.

On 22 November 2005 the Attorney-General released a discussion paper setting out proposals to fine tune the operation of the NTA. All stakeholders were invited to comment on the proposals and to suggest other amendments of a minor and technical nature. In light of that consultation, this further discussion paper incorporates:

- proposals in the first discussion paper that will not be pursued
- proposals in the first discussion paper that have been modified, and
- additional proposals to make minor or technical amendments to the NTA.

This paper should be read in conjunction with the first discussion paper, given most of those proposals received broad support. While many suggestions have been incorporated in this discussion paper, a common reason for not advancing other suggested proposals from stakeholders was their capacity to unduly or substantively affect the balance of rights under the NTA.

The Australian Government welcomes you to make comments on the modified and additional proposals outlined in this second discussion paper.

If you would like to make a written submission, please forward it no later than 22 December 2006 to:

The First Assistant Secretary
Legal Services and Native Title Division
Attorney-General's Department
National Circuit
BARTON ACT 2600

Submissions may also be e-mailed to native.title@ag.gov.au, or sent by facsimile to (02) 6250 5553.

Any suggestions may be forwarded to other relevant Australian Government agencies and Departments for their consideration. Unless you request otherwise, information you provide may also be used in consultations and any explanatory documentation prepared in relation to the amending Bill.

Proposals which will be not be included in the technical amendments to the NTA

1. Two proposals from the first discussion paper will not be included as amendments to the NTA.

Proposed amendments to subsection 62(2) and 62(3) – information requirements for compensation applications

2. The discussion paper suggested amendments to reduce requirements for information to accompany compensation claims. In summary, it proposed the information should not be required if such information had previously been given to the Court in support of a native title claim, provided there was no "material difference" between characteristics of the two claims, such as the nature of the group, or the rights and interests claimed.

3. Some stakeholders expressed concerns about establishing the extent to which any differences between the claims would be "material", and questioned the need for such an amendment. Establishing "material" differences would necessarily involve subjective judgments, and the proposed amendment was likely to generate uncertainty in the processing of compensation applications. To the extent information provided in relation to the native title claim is capable of being used in support of a compensation claim, compensation claimants are currently able to adapt the material as appropriate. The onus should remain on claimants to ensure such information remains accurate for the purposes of the compensation claim. The original proposal will therefore not be pursued.

4. The discussion paper pointed out the note to subsection 13(2) does not reflect the current situation. In light of the above considerations, it should be amended to make clear the relevant information must be provided in relation to all compensation applications.

Proposed amendments to sections 64 and 87: splitting applications to facilitate resolution

5. The discussion paper suggested amendments to authorise the Court to make a consent determination over part of a claim area and to remove parties who do not have an interest in that part of the area from the proceedings. Although this proposal received support from some stakeholders, the objectives behind the proposal will now be considered in the context of implementation of recommendations 18 and 20 of the Native Title Claims Resolution Review. Those recommendations contemplate more substantive measures which would enable the removal of parties which do not have a relevant interest in the proceeding, and limiting the right of participation of non-government respondent parties to issues relevant to their interests. Accordingly, the original proposal will not be pursued in the context of the technical amendments to the NTA.

Modifications to proposals in the first discussion paper

Amendments to the Future Act Regime

Proposed amendments to sections 24BF, 24CF, 24DG, 24CI(2) and 24DJ(2): clarifying use of information obtained by the NNTT

6. The discussion paper suggested amendments to ensure information provided to the NNTT or Registrar for the purpose of securing assistance will not be used for other purposes (e.g., registration or mediation) without the consent of the parties. These proposals received broad support among stakeholders. One stakeholder suggested that, in the interests of consistency, the restrictions should apply to use of information obtained under other provisions enabling the NNTT to assist parties on request. It was also noted responsibility for consenting for further use of the information should rest with the party which provided that information.

7. Accordingly, the proposal has been modified to restrict the NNTT and Registrar from disclosing or using information which has been provided to the NNTT for the purpose of securing assistance under the following provisions: 24BF, 24CF, 24CI(2), 24DG, 24DJ(2), 31(3), 44B(4), 44F, 86F(2) and 203BK(3). Such information could only be used or disclosed by the NNTT or Registrar for other purposes where the person providing the information consents to this.

Proposed amendment to subsection 24MD(6B): allowing non-native title parties to request an independent hearing in relation to objections over certain acts

8. The discussion paper proposed amendments to subsection 24MD(6B) to enable government parties or future act proponents to request an independent hearing in relation to an objection to certain acts. Currently, only the native title party which made the objection can seek an independent hearing. This proposal received support from a number of stakeholders, although some concerns were raised about how the amendment would be drafted to ensure certainty of operation. One NTRB opposed the proposal on the grounds it would effectively reduce the available consultation period to two months, which could make it impossible to conduct effective consultations. It also raised concerns that other parties would have no incentive to act in good faith in consultations.

9. In light of these concerns, the proposal has been modified to include the following safeguards:

(a) the independent person or body will not be authorised to make a determination unless it is satisfied that the relevant party has consulted in good faith (compare subsection 36(2) of the NTA, which imports a similar requirement)

(b) the power for non-native title parties to refer a matter to an independent hearing will be confined to government parties, given under the NTA it is a matter for the Commonwealth, State or Territory government to arrange for the objection to be heard by an independent person or body (the relevant government may arrange to refer the matter on request by a third party)

(c) the government may only refer the matter to an independent hearing after five months have elapsed from the notification day for the act – this effectively provides for a *minimum* consultation period of three months

(d) if a Commonwealth, State, or Territory Minister decides that the independent determination shall not be complied with under paragraph 24MD(6B)(g), the Minister will be required to provide written reasons for this – such a requirement will provide greater transparency in relation to any such decisions.

Amendments to the Application and Registration Test provisions

Proposed amendment to sections 64 and 190A in relation to application of the registration test to amended claims

10. The discussion paper suggested that certain types of amendments to claimant applications (namely those to reduce the area covered, to remove the names of deceased applicants or to make purely procedural changes) should not trigger the registration test. This proposal received broad support, although a number of stakeholders suggested modifications. In particular, some stakeholders suggested there was confusing overlap between the amendment procedures in section 64 (which requires re-application of the registration test) and those in section 66B (which appears to enable the Court to order replacement of the applicant without going through the registration test). The application of the registration test to amended claims was also considered by the Native Title Claims Resolution Review, which recommended (Recommendation 12) that amendments be made to avoid the requirement for all amended applications to undergo the registration test if the application has already passed the registration test. The Australian Government agreed that recommendation 12 should be further considered in the context of the technical amendments process.

11. The Claims Resolution Review made the following specific suggestions under recommendation 12:

(i) An amended application should not be subject to the registration test, unless the Court orders otherwise, where a claimant application is amended to:

- reduce the area of land or waters covered by the application
- reduce the list of asserted native title rights and interests, or
- remove the name of a deceased applicant where other applicants remain.

(ii) Where a claimant application is amended to replace a deceased person as applicant, the amended application is not to be subject to the registration test if the Native Title Registrar is satisfied that:

- the amendment has been certified by the relevant representative body, or
- the amended application was accompanied by an affidavit sworn by the new applicant stating that the new applicant is authorised by the other

persons in the native title claim group to deal with matters arising in relation to the application and stating the basis on which the new applicant is so authorised (see subsections 64(5) and 190C(4)).

(iii) Where an amendment is made which is not to be subject to the registration test, the Native Title Registrar must amend the Register to reflect that amendment as soon as possible.

12. This proposal is supported, subject to limited modifications as a consequence of removing the overlap between subsection 64(5) (which sets out a requirement to file an affidavit in a particular form for amendments to change the applicant, and generally requires re-imposition of the registration test) and section 66B (which deals with replacement of the applicant in specific circumstances, and is not expressed to require re-imposition of the registration test). It would be appropriate to ensure that all changes to the applicant may be dealt with under one provision. In summary, this will mean that in relation to proposal (ii) above, the question of reapplying the registration test will not require a certificate or affidavit regarding authorisation to be provided to the Native Title Registrar. Given the Court would need to be independently satisfied that the new applicants are properly authorised before an amendment may be made, this additional step is unnecessary and would not add anything to the process.

13. Accordingly, and in order to give effect to the objectives of recommendation 12 of the Claims Resolution Review, it is proposed the following amendments will be made to the NTA. First, section 66B will set out a broader range of circumstances in which the Court may agree to replace the applicant, enabling amendment to the Register without imposing the registration test. In addition to the current circumstances (replacement on the basis the current applicant is no longer authorised, or on the basis the current applicant has exceeded his or her authority), applications may be made to replace the applicant if one or more persons currently named as applicant are deceased, incapacitated, or have consented to their removal or replacement. The Court will need to be satisfied in every such case that the members of the native title claim group seeking to replace the applicant are authorised by the claim group to make the application and to deal with matters arising in relation to it. This means the procedural requirement for an affidavit under subsection 64(5) will not be required, and that provision may be removed. Where the Court agrees to amend a registered application to replace the applicant under section 66B, the registration test need not be applied (see subsection 66B(4)).

14. Second, and as outlined in the discussion paper, section 190A will be amended to provide that amendments to registered claims to reduce the area covered by the claim or to make purely procedural changes (e.g, changing the address for service) will no longer trigger the registration test. In addition to such amendments, and as recommended by the Claims Resolution Review, amendments to reduce the list of claimed native title rights and interests will no longer trigger the registration test.

15. Third, and as recommended by the Claims Resolution Review, section 190A will also be amended to make clear that if an amendment is made that does not require re-application of the registration test, the Registrar is still required to amend the Register of Claims to reflect this as soon as practicable.

Additional proposals following consultations

Amendments to the future act provisions

Subdivisions B and C of Division 3: enable amendment of ILUAs

16. Indigenous Land Use Agreements (ILUAs) are a mechanism through which native title holders and other parties may conclude binding arrangements in relation to acts affecting native title. Once an ILUA is registered, it operates to bind all native title holders in the relevant area, even if they are not parties to the agreement. Accordingly, the NTA provides that ILUAs must be subject to an extensive notification and objection process. The NTA does not make any provision for the amendment of ILUAs. In practice, this means any changes to the ILUA, including minor changes, need to go through the same process as applied in relation to the original agreement. A number of stakeholders have suggested it would be desirable to have provisions which allow for the amendment of ILUAs in appropriate circumstances. Such provisions would be very useful in ensuring that ILUAs are flexible and adaptable. However, given that ILUAs can bind all native title holders, it would be necessary to include some limitations on the amendment provisions.

17. There are two types of ILUAs which are currently used widely. Body corporate ILUAs only apply where there are prescribed bodies corporate (PBCs) for the whole of the area concerned, and all the PBCs must be parties to the agreement. Given that native title over the agreement area has been determined, it should be sufficient to allow for amendments to such agreements to be registered if all parties to the existing agreement (which must include the PBC itself, relevant Governments if extinguishment or validation issues arise, and may include NTRBs and third parties) consent. Accordingly, it is proposed the amendments to the NTA should provide that if the Registrar is satisfied that all of the parties (and any proposed new parties) agree to an amendment to the body corporate ILUA (and subject to conditions to ensure that the amended ILUA fits within general requirements for body corporate agreements – for example, an amendment cannot go beyond the areas for which native title has been determined) the Registrar should be required to register the amendment. The result of this is that the amended ILUA will not need to go through the normal notification procedures, and may therefore be registered more quickly.

18. As a safeguard, the existing one month cooling off period would be retained for amendments (see 24BI(2)), as well as the requirement to inform NTRBs (24BD(4)). There would also be provision for notification to State/Territory, Commonwealth, and local governments. These would assist in promoting transparency, without slowing the process down to any significant degree. In the event determined native title holders had concerns about an amendment to an ILUA, this would be addressed through the regime governing prescribed bodies corporate, by ensuring native title holders are consulted about and consent to any amendments.

19. Different considerations arise with regard to amendments to area ILUAs, given it is possible an amendment to an area ILUA will affect the native title rights and interests of persons who are not parties to the agreement (see paragraph 24EA(1)(b)). It would be appropriate to allow for amendments to be made with the agreement of all existing parties provided that the amendments would not affect native title in any way beyond that already contemplated under the original ILUA. Thus, provided the

amendment does not relate to any of the matters covered under paragraphs 24CB(a) to (e) of the NTA, and subject to the additional conditions set out above for amendment to body corporate ILUAs, the Registrar would be required to register the amendment.

20. The above proposals would also enable amendments to assign third party obligations under ILUAs, provided all parties to the original ILUA (as well as the proposed assignee) agreed to this.

Subsection 24BH(1)(b): remove requirement for public notice of body corporate ILUAs

21. The Native Title Registrar is currently obliged to notify the public of body corporate Indigenous Land Use Agreements before such agreements may be registered. Given such agreements may only be made in relation to land over which native title has already been determined to exist, and since members of the general public do not have any procedural or other rights in relation to registration of the agreement, the obligation to notify the general public in advance is unnecessary. From a practical perspective, the provision of each notice currently costs an average of $6,000, and the NNTT has never received a response to any public notices in respect of the 21 body corporate ILUAs registered to date.

Subsections 24CH(2) and 24DI(2): provide greater flexibility in public notification of area ILUAs and alternative procedure ILUAs

22. The current provisions for notification of area ILUAs and alternative procedure ILUAs require the notice to 'describe the area covered by the agreement'. The NNTT currently interprets this as requiring a detailed description including full coordinates, which leads to notices of inordinate length, complexity and expense. Accordingly, the NTA will be amended to provide the Registrar with the discretion to describe an area covered by an area ILUA or alternative procedure ILUA by way of a map instead of a detailed description.

23. The provisions also require notices to set out certain statements which are included in the ILUA (i.e., any statements of a kind mentioned in paragraphs 24EB(1)(b), (c) or (d) of the NTA). These statements are frequently complex and difficult to understand. It is proposed the NTA will be amended to provide the Registrar with the discretion to include a 'plain English' summary of such statements in public notices, rather than the actual detailed statements as set out in the ILUA.

24. The amendments will require that any public notice using a map of the area covered or a summary of the statements include information to enable further details to be obtained from the NNTT (compare paragraph 22H(2)(g)).

Subsection 24DJ(1): clarify relationship with section 77A

25. One State Government suggested subsection 24DJ should expressly require that persons objecting to the registration of an alternative procedure ILUA provide reasons for the objection. This obligation already exists under paragraph 77A(c), which requires that applications for objection 'state reasons why it would not be fair and reasonable to register the agreement'. In the interests of clarity, a note will be included in section 24DJ referring to the obligations in section 77A.

Section 24IC: Permit combination of two or more leases, licences, permits or authorities under a single renewal

26. Section 24IC provides that a future act will be a 'permissible lease etc renewal' if it is the renewal, regrant, remaking or extension of the term of a valid lease, licence, permit or authority and meets additional specific criteria. Section 24IC(2) makes it clear that the grant of two or more leases, licences, permits or authorities in substitution for a single lease etc is still a 'renewal' for the purposes of the provision. It has been suggested section 24IC should also provide for a permissible 'renewal' where two or more leases, licences, permits or authorities are substituted by a single lease etc. It is proposed the amendments to the NTA will include such a provision, which will make clear that all of the additional specific criteria conditional on renewal of leases etc will continue to apply.

Section 24KA: Specify automatic weather stations as facilities for services to the public

27. Section 24KA is intended to ensure that services to the general public can be provided unimpeded by native title. Subsection 24KA(2) comprises a list of such facilities, including roads, navigation markers, street lighting, pipelines and communications facilities, as well as other facilities 'similar' to these. It is not clear whether automatic weather stations operated by or on behalf of the Australian Bureau of Meteorology are covered by section 24KA. Given such facilities are provided by Government in order to benefit to the general public (including members of rural communities), it is proposed to specify them in the list of facilities in subsection 24KA(2). The additional safeguards in subdivision K would continue to apply in relation to such facilities. This means compensation would be payable to affected native title holders, and that native title holders and registered claimants would be subject to the same procedural rights as ordinary title holders. In addition, the non-extinguishment principle will apply to the act.

Section 24KA: Clarify application to 'mixed purpose' infrastructure

28. Section 24KA validates future acts relating to facilities such as water, electricity and gas which are operated 'for the general public'. The construction or operation of such facilities will be validated if it is done by or on behalf of a Government authority. The provision does not clearly address circumstances where the purpose of the infrastructure may have a 'private' element. For example, the facilities may be used partly for the operations of a private company and partly for consumption by other business and domestic uses. It has been claimed some State authorities have declined to process future acts which were proposed on this basis, and that this creates impediments to the roll-out of infrastructure in remote communities. Mining companies are often the largest suppliers of electricity to the general public in remote areas. It has therefore been suggested that section 24KA should be amended to state that it may apply in circumstances where the relevant act has an element of private benefit.

29. The NTA will be amended to make clear that section 24KA extends to facilities that are operated primarily for the general public on behalf of a Government authority. Thus, the public element will remain the dominant criterion, and private companies

seeking the benefit of this provision must still be operating the facility in relation to the general public on behalf of Government.

Section 24LA: allow government bodies to continue to carry out certain acts for community benefit or public safety following a determination of native title

30. Section 24LA permits certain future acts which have a minimal effect on native title to be done without the need to comply with any procedural requirements. Section 24LA(2) relevantly allows excavation or clearing undertaken for the protection of public health or safety, or for environmental protection, to be carried out as a low impact future act. However, such acts may not be carried under the authority of this provision after a determination native title exists over the land. It has been suggested the authority to conduct such acts for public health or environmental protection should continue to apply after a native title determination has been made. This is considered preferable to requiring parties to conclude an Indigenous Land Use Agreement, which will take considerable time and may not be practicable in urgent circumstances.

31. The proposed amendments to the NTA will include an amendment to allow such acts to be carried out by or on behalf of Government authorities for reasons of public health or safety or environmental protection, but only in circumstances where the determined native title holders do not have exclusive rights over the relevant land. Where the native title holders have exclusive rights (akin to those of freehold owners or exclusive lessees) then the relevant government bodies should be required to consult the native title holders through the prescribed body corporate before undertaking such activities on the land. Where the relevant rights are not exclusive, authorities should remain able to conduct activities necessary for public health or safety and for protection of the environment.

Subsection 24MD(6B): amend note to clarify operation

32. A State Government has raised concerns about the interaction between paragraph 24MD(6B)(a) and subparagraph 26(1)(c)(iii)(A) of the Act. In summary, these concerns arise because the explanatory note in subsection 24MD(6B) is poorly expressed. The note currently states that certain acts are not covered by Subdivision P. The note should instead make clear that those relevant acts are only covered by subsection 24MD(6B) if they are acts to which Subdivision P does not apply. The cross-referencing of provisions in the note should also be amended, and a consequential amendment should be made to the note in subparagraph 26(1)(c)(iii). These amendments will assist in ensuring the notes (which have no force of their own) reflect the legislation more accurately.

Subsections 24KA(8) and (9), 24MD(7) and (8), 24NA (9) and (10): clarify future act processes pending establishment of a PBC

33. The above provisions contemplate differential processes for notification of future acts in circumstances where there has been no approved determination of native title in the area. In essence, the notification processes and other procedural rights may be satisfied in such circumstances through dealing with relevant NTRBs and registered claimants. As noted above, however, there are circumstances in which there has been an approved determination of native title but there is no registered native title body corporate to deal with the determined native title rights. It has been suggested that the

NTA should include clear procedures for giving valid future act notices after native title is recognised but before the PBC is established. Accordingly, it is proposed the above provisions will be amended to provide that the differential processes for notification etc should apply unless a registered native title body corporate has been established in relation to the area.

Section 29: enabling Government notices to cover more than one act

34. Section 29 requires Government parties to give notice of future acts to specific persons or groups as well as to the general public. Subsection 29(8) provides that the public may be notified of two or more acts in the one notice, but there is no equivalent provision with respect to notification of specific persons or groups. It has been suggested that the implied requirement for an individual notice in relation to each future act is inefficient, and that it would be preferable to expressly allow for a single notice to cover more than one act. The other specific requirements in relation to Government future act notices will remain applicable.

Section 32: Align right to negotiate with lodgement of objections to expedited procedure

35. In giving notice of a proposed future act, the Government party may state it considers the act attracts the 'expedited procedure', essentially on the grounds the act is not likely to have a substantial impact on the land concerned or sites of particular significance, or upon the conduct of community and social activities by native title holders and claimants. Native title parties are able to lodge an objection against the statement. If the objection is upheld, the Government party and the future act proponent must then negotiate with all parties with a view to obtaining the agreement of all native title holders and claimants in relation to the act. A proposed act (e.g., a mining tenement) may cover land or waters in more than one native title claim area. Even if only one claim group lodges an objection to the expedited procedure, all of the groups in the area need to participate in negotiations subsequent to a successful objection.

36. It has been suggested this creates significant and potentially unnecessary delays since it requires negotiations with groups who chose not to object to the expedited procedure. Accordingly, an amendment should be made to provide that if an objection to the expedited procedure is upheld, the Government need only negotiate with those native title parties which had lodged an objection to the procedure.

Section 43: Clarify scope of alternative regimes

37. Section 43 enables a State or Territory to establish right to negotiate procedures which operate to the exclusion of the NTA provisions where the Attorney-General is satisfied that the alternative provisions meet certain statutory criteria, which are set out in subsection 43(2). Concerns have been identified regarding the extent to which the current provision allows alternative regimes to include a similar range of mechanisms to those which are currently provided for by the right to negotiate system under the NTA. In particular, it is not clear the alternative regimes may include provision for:

(a) application of an 'expedited procedure' (compare sections 32 and 237 of the NTA), and

(b) 'conjunctive agreements' covering several stages of a proposed development (compare subsection 26D(2) of the NTA).

38. Although the alternative regimes provisions have not been widely used, it is appropriate to ensure that the existing regimes are on a secure legal footing, and to make clear that future regimes may include the full range of mechanisms available under the Commonwealth right to negotiate. Accordingly, the amendments to the NTA will include a provision to confirm the validity of the current schemes, and to put beyond doubt that State and Territory provisions which allow for an expedited procedure and conjunctive agreements may be determined under section 43.

Paragraphs 36C(5)(b), 41(3)(b), 42(5)(b) and section 52: A more flexible scheme for payments held under right to negotiate processes

39. The above provisions provide that an arbitral body or minister may, upon application, determine that a future act can be done subject to conditions, including that a certain amount of money be paid and held in trust in accordance with the regulations. Section 52 prescribes circumstances under which that money should be paid out of trust. Parties to such arbitrations have only sought conditions of this kind on a limited number of occasions to date, and no regulations have yet been made enabling holding of the relevant money in trust. Consultation on draft regulations was initiated in April 2004 with the approval of the Attorney-General. Those consultations highlighted a number of potential difficulties under the scheme.

40. It has been suggested that it would be preferable to amend the relevant provisions to provide for a bank guarantee regime instead of a trust regime. This would mean that the arbitral body or Minister, when making a future act determination, would be able to determine the act be done on condition that a certain amount of money be assured by way of bank guarantee, instead of through the payment of money on trust. The general conditions set out in section 52 relating to when the funds could be called upon or distributed would be retained. The key advantage of this approach is that proponents would not need to pay the full amount of money into trust, and would therefore be able to continue to use the amount guaranteed unless and until the guarantee is called upon. The bank guarantee would offer adequate security, without tying up funds for lengthy periods of time until compensation is finally determined. The amendments to the NTA will include appropriate provisions to give effect to this proposal. This should also include an amendment to section 43 to ensure that alternative state regimes may provide for a bank guarantee regime instead of a trust regime.

Amendments to provisions governing native title determination applications

Subparagraph 62(1)(a)(v): clarify to ensure that native title claimants identify basis of authorisation

41. Subparagraph 62(1)(a)(v) requires claimant applications to be supported by an affidavit stating 'the basis upon which the applicant is authorised' to bring the application and to deal with matters arising in relation to it. The authorisation

requirements are defined in section 251B, which contemplates (a) compliance with a process of decision making under traditional laws and customs or – in the absence of such a process – (b) a process agreed to and adopted by the persons in the relevant group.

42. One State Government stated the affidavits often provide little or no information setting out the basis of authorisation, and often only include the date upon which a meeting was held. This limits the utility of the process. Accordingly, it is proposed the provision be clarified to require the applicant to briefly describe the process of decision making through which the applicant was authorised, including whether the process followed 251B(a) or (b). Consequential amendments would need to be included for other provisions involving authorisation (e.g., those relating to amendment of the applicant).

Section 62A: clarify scope of applicant's authorisation

43. Section 62A provides that where a claimant application or compensation application has been authorised by the relevant claim group, 'the applicant may deal with all matters arising under [the NTA] in relation to the application'. It has been suggested that some parties mistakenly consider this confers authority on the applicant to enter into ILUAs, whereas such authorisation needs to comply with the specific requirements of section 251A. In the interests of clarity, a note will be included in section 62A referring to the separate authorisation process for ILUAs.

Division 1 of Part 3: clarification of authorisation requirements

44. The Native Title Claims Resolution Review found that resolution of native title claims was impeded by disputes among claimants about questions such as authority to act on behalf of the group, and disputes both within and between groups. It recommended (recommendation 13) that amendments be made to the authorisation provisions in the NTA to remove ambiguities. The Review suggested it would be appropriate to clarify whether:

- a lack of authorisation is fatal to a claim
- authorisation that might have been defective can be later ratified or otherwise cured, and
- the registered native title claimants must be unanimous in giving instructions, executing agreements and otherwise, or whether a majority is sufficient, or whether some other rules should apply, for example, rules similar to those in sections 251A and 251B.

45. The Government agreed to consider this in the context of the technical amendments. A number of other submissions also suggested that the authorisation requirements should be clarified.

46. The question as to whether identified deficiencies in the authorisation process will be fatal to the claim will, if raised, ultimately be determined by the Court, and it would not be appropriate to seek to impose a blanket statutory rule in relation to this requirement. However, to the extent that lack of authorisation may be regarded as

fatal, it would be appropriate to provide an appropriate mechanism through which it may be cured. In particular, this will assist in ensuring the Court will have jurisdiction to determine a claim in which there has been extensive hearings and evidence taken. Accordingly, it is proposed to include a provision which makes clear the Court may make an order to continue to hear a native title determination notwithstanding a defect in the original authorisation process, provided it is satisfied that such an order is necessary in the interests of justice. The Court would be given discretion to make such other orders as are appropriate, including orders dealing with use of evidence received in the proceedings, replacement of the applicants, and notification to other parties.

47. With respect to the final suggestion, it is not considered possible to specify whether the registered claimants, or the named applicants, must be unanimous in giving instructions or executing agreements. The source of authority for the named applicants will ultimately rest on their authorisation in accordance with the rules established in sections 251A and 251B. This is intended to ensure the process complies with either a traditional decision making process or one otherwise agreed to by the relevant group. It would be inconsistent with the nature of native title rights and interests to superimpose requirements of 'unanimity' or majority vote. To the extent that disputes arise in relation to the respective authority of different named applicants, this would need to be resolved in accordance with the provisions for replacing an applicant in section 66B. However, given the concerns identified in the Claims Resolution Review, it would be appropriate to clarify the nexus between section 66B and section 251B. Thus, section 66B should be amended to expressly recognise that section 251B prescribes the decision making process by which authorisation may be withdrawn.

Section 66: Providing greater flexibility in relation to notification

48. The Native Title Claims Resolution Review identified a number of difficulties in relation to the notification requirements in subsection 66(3) of the Act. It noted the existing framework (which contemplates a staged process of notification to various persons) could delay attempts to narrow issues associated with claims (for example, preliminary mediation in relation to overlaps, or clarification of the scope of the claim). It also noted that automatic notification to all parties following application of the registration test may not always be appropriate, particularly where the claim was made primarily for the purpose of securing the right to negotiate.

49. Accordingly, the review recommended, in recommendation 14, that the notification requirements in subsection 66(3) of the NTA be amended to provide the Court with greater flexibility in relation to who should be notified and as to when people are to be notified. In particular, it recommended that.

(i) Section 66 should be amended to allow the Court to order notification of potentially affected interest holders at any time which it considers appropriate.

(ii) The President of the NNTT should be empowered to direct the Registrar not to notify an application under subsection 66(3) of the NTA where:

- a claimant application is lodged in response to a notice under section 29 of the NTA and is registration tested within four months of the notification day (see paragraph 30(1)(a) and subsection 190A(2)), and

- it is apparent that the application is primarily for the purpose of securing the right to negotiate.

If subsequently the President is satisfied that the application should be notified, the President should be required to direct the Registrar to notify the application under subsection 66(3).

50. The NTA will be amended to give effect to this recommendation. With respect to part (i), this will require an amendment to section 66 to enable the Court to make an order that notification may be provided to potentially affected interest holders prior to the completion of the registration test where the Court considers this appropriate, or to order that notification to persons described in paragraphs 66(3)(iv) and (vii) may be deferred following the application of the registration test pending the taking of other steps (such as referral to limited mediation, or requiring particular tenure research to be carried out). This will broaden the Court's existing power to make orders on notification under subsection 66(7). It will also be necessary to make consequential amendments to section 86B to provide that where the Court has made such an order, it may refer the claim to the NNTT for mediation before all persons or bodies identified in subsection 66(3) have been notified. Finally, the amendments will need to make clear that notwithstanding any such order, all persons whose interests may be affected by a determination will have the opportunity to become aware of and the right to become parties to the application before the commencement of substantive proceedings in the Federal Court in relation to the claim.

51. With respect to part (ii), it will be necessary to introduce a provision giving the President of the NNTT the discretion to defer notification of a claim to persons or bodies entitled to be notified under subsection 66(3) where the claim is made in response to a future act notice, and the President is satisfied that such deferral will not adversely affect the interests of the relevant persons or bodies. A future act notice is a notice given under section 29 of the NTA or under the equivalent provision of a State or Territory law. A claim will be deemed to be in response to a future act notice where the claim is filed over all or part of the area covered by the relevant future act notice within four months of the notification day for the future act notice as defined in subsection 29(4). The discretion to defer notification would apply to registered and unregistered claims. The President would be required to direct notification if he subsequently considers that the other persons or bodies should be notified. The amendment should require that all such parties must be notified before the commencement of any substantive proceedings in the Federal Court in relation to the claim.

Subparagraph 66(3)(a)(iv) and subsection 66(5): clarify exceptions for notice of native title applications

52. Subparagraph 66(3)(a)(iv) requires the Registrar to give notice of native title applications to all persons who held a proprietary interest in the relevant area which was registered in a public register at the time the application was filed. It is often difficult or impossible for the Registrar to comply with this in practice, given that in

some jurisdictions the relevant information is not made available for some months, and may not include retrospective information as to proprietary interests as at the time of filing (as opposed to notification).

53. Subsection 66(5) currently provides that the Registrar is not required to give notice to a person under subparagraph 66(3)(a)(iv) if the Registrar considers it would be unreasonable to do so. The NTA will be amended to make clear the exception in subsection 66(5) will apply if the Registrar does not have access to sufficient tenure information in order to give direct notice to all relevant parties. To the extent that the Registrar has some information indicating possible property interests, this should be notified in accordance with paragraph 66(3)(a)(vii) of the NTA. A note will be included to make this clear.

Section 66A: Ensure all relevant parties are notified when a claim is amended to re-include areas previously claimed

54. Subsection 66A(1) obliges the Native Title Registrar to notify parties of amendments to claims which change the area of land or waters covered by 'the original application'. This refers to the application as it stood when the claim was initially lodged. There have been cases where the original claim area has been reduced by way of amendment (e.g., to resolve overlaps) and the claimant group has subsequently decided to revert to the area covered by the original claim. In such circumstances, there is no provision requiring notification of any parties who withdrew from the proceedings after their land was removed from the original claim, or to other persons who acquired an interest during the time between the two amendments to the claim. This appears to have been an unintended consequence of the drafting of this provision. It should be rectified to ensure that persons who agree to withdraw from proceedings following a reduction in the claim area can do so with confidence that they would be informed of any changes to restore the claim to the original size. Section 66A should be amended to ensure that when a change to an application results in the inclusion of land or waters additional to that covered by the claim immediately prior to the amendment, then persons with interests in the additional areas should be notified. A consequential amendment should be made to section 84 to provide that persons who receive such notice have the right to become parties to the amended claim.

Proceedings before the Federal Court

Division 1A of Part 4: Encourage access by parties to hearings through teleconference and other facilities

55. The Federal Court Act 1976 enables the use of video links, audio links and other methods of communication in proceedings, including native title proceedings. However, the Court has not always been prepared to agree to parties' attendance at interlocutory proceedings, such as directions hearings, through such means. When hearings are conducted in regional centres, attendance can be expensive and time consuming for parties, frequently at Commonwealth expense. It is proposed to include a provision encouraging the Court to allow for the use of such communication methods in appropriate circumstances. The provision could require that when considering an application by one of the parties for an order to hear submissions by video link, audio link or other appropriate means, and subject to the requirement of

section 47C of the Federal Court Act (which sets out relevant conditions), the Court must make the order unless it considers it would be contrary to the interests of justice to do so.

Subsection 84(6): clarify respondents' ability to withdraw from proceedings

56. Subsection 84(6) provides that respondent parties may withdraw from proceedings before the 'first hearing' simply by giving notice to the Court. After that time, it is necessary to seek leave from the Court. It has been noted there is some uncertainty about when the 'first hearing' occurs, and that continuing proceedings can take some years before going to trial. The NTA should be amended to make clear that respondent parties may withdraw as of right at any time before the commencement of substantive hearings of evidence.

National Native Title Tribunal

Subsection 136A(4) and section 136G: clarify status of mediation reports

57. Subsection 136A(4) generally prevents evidence being given, or statements made, concerning NNTT mediation conferences in proceedings before the Federal Court. This is intended to encourage parties to be candid during mediation without prejudice to their position in the event mediation fails. However, section 136G requires the NNTT to provide a written report to the Court setting out the results of the mediation. In practice, the NNTT reports provided to the Court do not include confidential information. It would be preferable to make this position clear in the legislation, by specifying that section 136G is subject to subsection 136A(4). An amendment to this effect should be included in the technical amendments with a view to ensuring clarity. The issue will need to be reviewed in light of any substantive amendments to the NTA as a result of the Native Title Claims Resolution Review, to ensure that – in the context of the overall reform package – the proposal does not impede effective reporting by the NNTT to the Court.

Register of Native Title Claims

Section 190 and 190A: Give priority to registration of amendments to claims

58. Concerns have been expressed about the time taken to amend the Register of Native Title Claims after a claim has been amended. As outlined above [paragraph 24], the NTA will be amended to provide that amendments to registered claims which do not need to go through the registration test (e.g., to reduce the size of the claim area) must be reflected on the Register of Claims as soon as practicable [compare existing subsection 190(3), and note this will require an amendment also to section 66B(4)]. However, this will not address circumstances in which the amendment to the claim requires re-application of the registration test. It is also proposed that section 190A be amended to provide that in such circumstances the Registrar is to re-apply the registration test as soon as practicable.

Subsection 190(4) clarify obligation to remove 'finalised' claims from Register

59. Paragraph 190(4)(d) requires the Registrar to remove claims from the Claims Register once the relevant application has been withdrawn, dismissed or otherwise

finalised. The note to this provision states an application may be finalised by a determination of native title. The operation of the provision is unclear in circumstances where a determination of native title has been made but no prescribed body corporate has been nominated in relation to the native title holders.

60. The NNTT currently proceeds on the basis that the claim is not finalised until the prescribed body corporate has been determined or registered, which ensures that the native title holders may still be notified on any proposed future acts pending registration. However, this approach gives rise to confusion where the determination establishes that native title has been extinguished over parts of the claim area, in so far as the Register will not reflect this (and could suggest that the claimants continue to have procedural rights over those parts). The Note should be amended to make clear that in such circumstances the Register should amend the entry (pursuant to paragraph 190(4)(e)), to reflect the fact that the application has been the subject of a native title determination but no PBC has yet been determined.

Subsection 190A(2): encouraging prompt consideration of claims subject to non-claimant applications

61. The NTA allows persons who do not claim native title to seek a determination of whether native title rights exist in relation to particular areas through a 'non-claimant' application. If there is no 'relevant native title claim' lodged over the land following notification of a non-claimant application, then future acts may be validly done over the land (see sections 24FA and 24FB in particular). A 'relevant native title claim' includes a claim made during the notification period, provided it is subsequently accepted for registration. Thus, the ability for Governments to do future acts over the land will depend on how quickly a decision is taken in relation to registration of the claim.

62. The NTA seeks to ensure that priority is given to consideration of claimant obligations in certain circumstances where the ability to do future acts will depend on whether the claim is accepted for registration. If, for example, a future act notice has been issued under section 29 in relation to the area covered by a claim, subsection 190A(2) requires the Registrar to use 'best endeavours' to finish considering the claim within four months. It has been suggested a similar obligation should apply in relation to claims made in response to a 'non-claimant' application. Accordingly, the NTA will be amended to extend the obligation under subsection 190A(2) so that the Registrar must use his or her use best endeavours to finish considering a claims for registration within four months where a claim has been made over an area which is subject to a non-claimant application. Together with reforms proposed in the earlier discussion paper, this will ensure that greater priority is given to registration decisions in circumstances where timing will be relevant to possible future development of the land.

Paragraph 190C(4)(a): Clarify authority of NTRBs to certify applications

63. Paragraph 190C(4)(a) enables the Registrar to be satisfied as to the identity of the claimed native title holders if the 'application has been certified under Part 11 *by each representative Aboriginal/Torres Strait Islander body that could certify the application* in performing its functions under that Part'. There have been two ambiguities identified in relation to this provision. First, it is not clear whether an

NTRB responsible for only part of the claim area can certify an application if there is no NTRB existing in relation to the remainder of the claim area. The current wording of the provision implies that if one or more NTRBs are not able to certify the application in relation to the entire area, then the Registrar will need to form an independent view in relation to the entire area. Second, it is not clear whether a certificate may be validly relied upon by the Registrar in the event that the NTRB's recognition is withdrawn before the application is registered.

64. The technical amendments will include amendments to subsection 190C(4) to address these issues. In relation to the first issue, the amendment will make clear that to the extent that an NTRB is only able to certify an application in relation to parts of the claim area, then the Registrar need only form an independent view in relation to the remainder of the claim area. In relation to the second issue, the amendment will make clear that the Registrar may rely on any certificate provided the relevant NTRB was authorised to certify the application at the time the certificate was issued.

Section 190D: provide a mechanism for internal review of registration decisions

65. Subsection 190D(2) provides that where the Native Title Registrar [or delegate] refuses a claim for registration the applicant may apply to the Federal Court for review of the decision. Given the expense and time involved in applications to the Federal Court, it has been suggested that it would be useful to provide a mechanism for internal review of such decisions before applying to the Federal Court. The technical amendments to the NTA will include a mechanism to enable the applicant to request review of a decision to refuse registration of a claim upon payment of a prescribed fee. Such applications would be subject to a time limit of 42 days following date of notification of the decision.

National Native Title Register

Paragraph 193(1)(c): clarify the types of determinations which must be included on the National Native Title Register

66. Section 193 sets out the determinations which must be included on the native title register. In addition to approved determinations of native title, paragraph 193(1)(c) requires the Register include 'other determinations of, or in relation to, native title in decisions of courts or tribunals'. The scope of this provision is unclear, and there is no requirement for courts or tribunals generally to inform the Registrar of potentially relevant determinations. The NTA will be amended to provide such determinations need only be included where the NNTT is aware of them, and where it is considered appropriate to do so.

Subsection 199(2): remove prescription of relevant land titles offices

67. Section 199 is intended to ensure State and Territory land titles officers are informed of any native title determination in their jurisdiction. Subsection 199(2) contemplates regulations prescribing the bodies responsible for keeping a register of real estate interests in each jurisdiction. No such regulations have been made, and the NNTT currently advises the relevant land titles office in each State or Territory as a matter of practice. It is considered that subsection 199(2) is unnecessary and impractical, given that the details of relevant land titles offices will continue to change

over time (thereby necessitating new regulations). It would be preferable to delete subsection 199(2), and retain the broad obligation for the Registrar to inform the 'relevant land titles office' in each jurisdiction.

Register of Indigenous Land Use Agreements

Section 199C: clarify powers to remove expired or terminated ILUAs from the Register

68. Subparagraph 199C(1)(c)(i) obliges the Registrar to remove details of an ILUA from the Register if 'the agreement expires', but does not provide any means through which the Registrar may establish that an agreement has in fact expired. Accordingly, the subparagraph should be amended to make clear the Registrar is only obliged to remove such ILUAs if he or she becomes aware that the agreement has expired, and a note should be included to reflect that the Registrar may seek advice from the parties as to whether an ILUA has expired.

69. In addition to this, it would be appropriate for the subparagraph to address situations where the Registrar becomes aware that an ILUA has been terminated in accordance with the terms of the agreement. (Subparagraph 199C(1)(c)(ii) currently only applies where all of the parties advise the Registrar in writing that they wish to terminate the agreement).

Minor and consequential amendments

70. Minor amendments should be made to the NTA as a consequence of earlier legislative changes. The proposed changes will involve:

(a) amendment of references to provisions of the *Commonwealth Authorities and Corporations Act 1997*, which have been repealed and replaced under the *Corporate Law Economic Reform Program Act 1999* (see sections 203EA and 203EB of the NTA),

(b) amendment of the note to subsection 223(3) which refers to a 'permissible' future act, given that the 1998 NTA amendments replaced this concept with a 'valid' future act, and

(c) amendment of the definition of right to negotiate application in section 253 to replace the incorrect reference to paragraph 139(1)(b) with a reference to subsection 139(b).

NATIVE TITLE MINISTERS' MEETING
15 DECEMBER 2006, CANBERRA

Today, the Attorney-General, the Hon Philip Ruddock MP convened the second meeting of Native Title Ministers at Parliament House, Canberra.

Ministers agreed to continue working together to secure better outcomes from the system. All parties including governments, claimants, Native Title Representative Bodies (NTRBs) and non-government respondent parties can contribute to ensuring that claims are resolved and outcomes secured more efficiently and effectively.

Australian Government's package of native title reforms

The Australian Government's package of native title reforms seeks to ensure all key elements of the native title system support native title outcomes. Ministers noted the Australian Government's reforms to the native title system and agreed that all parties, including governments, should build on these.

Communication and transparency

Ministers acknowledged the contribution that good communication and transparent processes can make to the successful and timely resolution of native title claims. All jurisdictions have taken steps to ensure good communication and transparent processes and this is a continuing need.

Ministers agreed that, having appropriate regard to claimants' requests for confidentiality:

- open communication and transparent procedures can build and strengthen effective relationships between all stakeholders
- early information exchange between governments and other parties can contribute to more efficient resolution of native title issues, including by:
    - increasing awareness of native title processes and encouraging other parties to focus on their specific legal interests in native title claims, and
    - providing other parties with the opportunity to understand better the government's views of the basis for proposed determinations.

Ministers noted approaches taken to maintain good communication and clear processes will vary between jurisdictions, having regard to local circumstances.

Native title claims processes

Ministers noted that improved communication and co-ordination of claims management between the Federal Court and the National Native Title Tribunal (NNTT) will assist parties to resolve native title claims. Ministers agreed action should be taken by all stakeholders to:

- maintain open communication between parties, the Federal Court and the NNTT about the prioritisation of claims, and
- review the status of claims, in particular claims that no longer need to be in the system, such as applications filed about future act activity that has been completed, and

- utilise early evidence hearings and other tools, in appropriate cases, to identify areas of common ground and outstanding significant issues.

Ministers noted that although native title claimants, NTRBs and the NNTT are primarily responsible for resolving overlapping claims, governments can also sometimes assist to resolve overlaps.

Prescribed Bodies Corporate (PBCs)

Noting the important role of PBCs in the native title system, Ministers agreed to:

- consider PBC establishment and needs and bring these matters to the attention of all parties as a matter of practice when negotiating consent determinations or future act agreements, and

- encourage a better understanding of the functions, needs and responsibilities of PBCs among other stakeholders in the native title system.

Ministers also noted:

- the possibility of PBCs receiving assistance for broader functions via Shared Responsibility Agreements, and Regional Partnership Agreements, or both, and

- that the Australian Government will consult State and Territory governments on possible measures to enable State or Territory land rights corporations to act as PBCs where the native title holders agree to this.

Other initiatives

Native Title Representative Body Capacity Building

Ministers acknowledged the important role of NTRBs and native title service providers in the native title system and noted the Australian Government has implemented initiatives to build NTRB capacity and performance.

Enhancing outcomes from native title

Ministers noted the positive contribution agreement-making and the use of native title-related outcomes can make to fulfil the broader aspirations of native title claimants. In particular, Ministers noted native title processes are being, and can be, utilised to identify:

- measures that contribute to economic development for Indigenous Australians,

- opportunities for capacity building and other support for Indigenous communities, and

- assistance to secure long term and lasting benefits for Indigenous communities from land.

Ministers acknowledged native title processes can provide opportunities, in appropriate circumstances and having regard to local conditions, for the achievement of broader Indigenous policy objectives.

Attendees

The Hon. Philip Ruddock MP, Attorney-General

The Hon. Jon Stanhope MLA, Chief Minister, Australian Capital Territory

The Hon. Eric Ripper MLA, Deputy Premier, Western Australia

The Hon. Michael Atkinson MP, Attorney-General, South Australia

The Hon. Craig Wallace MP, Minister for Natural Resources and Water, Queensland

Ms Elizabeth Eldridge, Executive Director, Legal and Equity, Department of Justice, Victoria

Mr Philip Boyce, General Counsel, Department of Lands, New South Wales

Ms Anita Kneebone, Director, Aboriginal Land Division, Solicitor for the Northern Territory