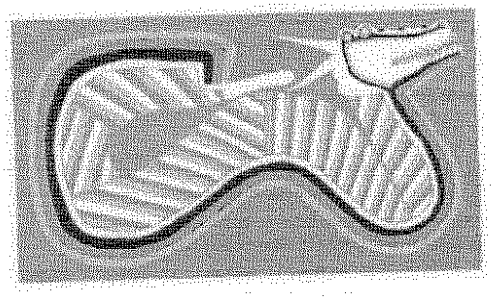

Parliament of Australia

Senate

Legal and Constitutional Affairs Committee

Native Title Amendment Bill 2006

Northern Land Council Submission

30 January 2007

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
NATIVE TITLE AMENDMENT BILL 2006
30 JANUARY 2007

1. Introduction

The Northern Land Council (NLC) welcomes the opportunity to provide a submission regarding the *Native Title Amendment Bill 2006*.

This submission primarily addresses proposals regarding the functions of the Federal Court, the National Native Title Tribunal, and the Native Title Registrar.

In short it is submitted that these proposals are fundamentally flawed on legal and policy grounds, particularly because they confuse the relationship between mediation and litigation, and that between the Tribunal and the Court.

The result at least is that while its object is to remove potential duplication (second reading speech, 7 December 2006, p 16), the provisions relating to native title reviews and native title application inquiries encourage the Tribunal to investigate questions that must ultimately be determined by the Court - in other words to engage in duplication.

Some other proposals are briefly addressed at the end of the submission.

2. Claims resolution review (schedule 2): exclusive mediation and additional Tribunal powers

The Bill proposes that the capacity and function of the Court to properly control, manage and determine its cases, including by means of directions, dismissals, conferences, mediation and alternative dispute resolution, be considerably curtailed.

Concomitantly, expanded powers and functions of a quasi-judicial nature are to be bestowed upon the Tribunal and Registrar - bodies which are not judicial and which are simply public officers performing administrative functions.

These proposals, on legal and policy grounds, are both surprising and fundamentally flawed.

The proposals are surprising because the Court's performance since 1994 regarding native title case management, including resolving issues and applications by agreement, is widely recognised as being comprehensive, focused, innovative, efficient and exemplary - particularly in the Northern Territory where the Court has successfully implemented a range of initiatives which have then been applied and adapted elsewhere.

In that regard the NLC considers that the suggestion in the claims resolution review (para 4.109) conducted by Dr Ken Levy and Graham Hiley QC that the efficient conduct of claims in the Northern Territory derives from the existence of experienced stakeholders and practitioners from land claims under the *Land Rights Act*, rather than from Court initiatives, and could not easily be replicated elsewhere, is both incorrect and unfair to the Court.

In fact, as explained in the Federal Court Registrar's submission, the Court has proactively implemented initiatives and obtained important efficiencies both in the Northern Territory and elsewhere.

Importantly the Court's performance has evolved and improved over time, particularly since the 1998 amendments which increased the Court's role and restricted that of the Tribunal (in accordance with the High Court's decision in *Brandy*).

There is every reason to be confident that the Court will continue to evolve and develop its initiatives in this complex area of law, thus promoting efficiency and agreed outcomes.

By contrast the Tribunal's mediation performance, at best, has been patchy. Mostly it has been cumbersome, onerous, inefficient and ineffective. It has rightly been described by an experienced legal practitioner as a "Bureaucratic Albatross"[1] which, despite the claims of its proactive propaganda arm, delivers few outcomes and is an unjustifiable drain on scarce taxpayer funds.[2]

The Tribunal's failure to meet, or even approach, the Court's exemplary standard is not, as Dr Ken Levy claims, caused by lack of powers (or "teeth") to compel compliance with Tribunal directives, but rather by a deep seated incapacity to provide an efficient, focused and relevant mediation service.

Faced with this experience, and given that choice presently exists, it is no surprise that where appropriate both the Court and parties have successfully chosen to resolve issues other than through the Tribunal. Indeed the Tribunal's own statistics accept this fact - the majority of development agreements, for example, are negotiated without any assistance from the Tribunal.

In these circumstances the proposal that the Court's mediation and case management function be curtailed in favour of the Tribunal is extraordinary, cannot be justified, and is a fundamental policy error.

Likewise:

- the proposal that the Tribunal duplicate the Court's function by conducting parallel enquiries as to the existence of native title is inherently inefficient - it will divert resources, engender legal challenge, and not assist or enhance the Court's judicial function;
- the proposal that the Tribunal have formal power (with the 'without prejudice' privilege in mediation being removed) to report its belief to the Court, Governments, Law Societies, or in its annual report that a party or legal representative has not acted in good faith in a mediation will inevitably engender legal challenge, and thus divert resources and promote inefficiency.

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[1] Paul Hayes *National Native Title Tribunal: Effective Mediator or Bureaucratic Albatross? A User's Perspective* Indigenous Law Bulletin 2002 ILB 40, copy attached.

[2] In which regard see previous NLC submissions to the Parliamentary Joint Committee on Native Title regarding Indigenous Land Use Agreements and the Effectiveness of the Tribunal. In these submissions the NLC opposed mandatory mediation of native title applications by the Tribunal.

But there is more. The NLC's preliminary advice from counsel is that the proposals may well be unconstitutional in that they purport, in effect, to vest judicial functions in an administrative body. That this is intended is clear from the Hiley/Levy review (para 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."

The proposition, inherent in this quotation, that it would as of ordinary practice be a proper exercise of the Court's judicial function to simply adopt the belief of a Tribunal member (ie a public officer, who need not even be a legal practitioner, and who is not under the control of the Court) performing administrative functions regarding complex issues of property law is, with respect, startling.

Likewise case management (including mediation) functions are performed by all Courts in Australia on a daily basis, and are fundamental to the proper performance of a Court's judicial functions.

That this is the case is readily apparent from a job advertisement in the Weekend Australian dated 27 January 2007 for the position of Registrar of the Supreme Court of Tasmania (copy attached). The advertisement stated:

> "The Registrar is responsible to the Chief Justice [not an external body] for the judicial administration and alternative dispute resolution functions of the Court".

It may be observed, in passing, that any attempt by the Tasmanian Parliament to vest such "judicial administration and alternative dispute resolution functions" in an external body reporting to the Government would be roundly rejected as an inappropriate and unacceptable interference in judicial functions.

This serious concern regarding constitutionality is confirmed by a submission from the Registrar of the Federal Court, and was (as stated therein) also raised privately by the Registrar in legislative steering committees.

Nonetheless this important issue was not raised let alone addressed in the Hiley/Levy review, the explanatory memorandum, the Attorney-General's second reading speech, or his Department's submission to this Committee.

This omission, with respect, of itself is extraordinary.

It is reasonable to assume that the Attorney-General has received the same legal advice as provided to the NLC by counsel, and as identified by the Registrar of the Federal Court - namely, that serious legal doubt exists as to the constitutional validity of the proposals that case management, mediation, coercive and quasi-determinative functions be vested in an administrative body.

In these circumstances the proposals will not deliver certainty and efficiency. Rather they are a recipe for litigation (including likely High Court appeals), expense, delay and uncertainty.

On this basis alone the proposals should be carefully reconsidered.

Some additional observations may conveniently be made.

First, while the explanatory memorandum says that participation in a Tribunal review or inquiry will be voluntary (paras 4.248 and 4.278), the Bill does not so state, and given each can only occur when a mediation is on foot the new coercive powers for mediation conferences could be used indirectly and taken advantage of in a review or inquiry.

Secondly, the Tribunal is given power to report its belief that a party or a party's legal representative has not acted in good faith during mediation to the Court, Governments, Law Societies, or in its annual report, with the 'without prejudice' privilege of statements made in mediation being removed. The Tribunal's report, however, is protected by privilege.

The duty to act in good faith is to be imposed by new s.136B(4) – schedule 2, item 46. The explanatory memorandum says that the making of reports and their prescribed content (para 4.239):

> "... will facilitate the person receiving the report to determine if the allegation of bad faith should be pursued further."

As observed in the Federal Court Registrar's submission, any such report will likely (if not invariably) be the subject of judicial review by aggrieved parties or representatives seeking to defend their reputation from reports made by administrative officials under protection of privilege.

This concern is fortified when considered against the background of Commonwealth funding arrangements. Native title applicants almost invariably resourced by representative bodies, which are subject to strict Commonwealth funding conditions which specify whether assistance may be provided regarding particular matters. Many respondents are also subject to strict Commonwealth funding conditions.

It may be expected that an adverse report as to lack of good faith will be relied on by the Commonwealth to withdraw funding. The result will be that the Commonwealth, in reliance on reports by Commonwealth appointed public officers performing administrative functions (ie the Tribunal), may through withdrawal or alteration of funding arrangements substantially influence the course of litigation before the Court.

Thirdly, while the importance of parties and their representatives acting in good faith may be readily recognised, its application in property law is questionable. The Hiley/Levy review suggested (para 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."

No examples were provided to justify or illustrate this suggested lack of good faith which, with respect, is somewhat surprising given that proving lack of good faith is notoriously difficult (parties are accorded reasonably wide latitude when defending their interests). Nor is any explanation provided as to the basis whereby it is "reliably" accepted that there is a "growing tendency", in native title mediation, for parties not to act in good faith.

Precisely why property owners in native title litigation should be subject to a good faith requirement when property owners in other litigation are not so subject is not explained. It may be assumed, for example, that the late Kerry Packer would never have agreed to such a constraint on his capacity to negotiate regarding his property interests, and neither would any other property owner. A question arguably might arise as to whether such a requirement is discriminatory, and thus that the Bill impliedly repeals the *Racial Discrimination Act 1975*.

The Hiley/Levy review seeks to justify the imposition of a good faith requirement by reference to s 34A of the *Administrative Appeals Tribunal Act 1975* (Cth) (para 4.39). This reference is not to the point. Applications under this Act involve disputes as to whether Commonwealth officers have properly made administrative decisions under statutes. They do not concern the rights of property owners to do as they wish, and negotiate as they wish, regarding their property, nor is any distinction drawn whereby only administrative decisions involving Indigenous people are subject to the requirement.

For these reasons the NLC submits that no proper basis exists for imposing a good faith requirement regarding mediation in the class of property disputes which involve native title.

Fourthly, the proposed s 94B (schedule 2, item 36) requires the Federal Court, when deciding whether to make an order relating to a native title application, to take into account any report relating to the progress of a mediation. While the explanatory memorandum (para 4.189) says that this may be relevant to pre-trial programming orders, as drafted the new requirement may relate to the making of final orders by way of a native title determination or a determination for compensation. In other words the Bill apparently provides that Tribunal mediation reports may have a considerably greater impact than has otherwise been suggested. Presumably this is an unintended consequence.

Further, order 78 rule 21 presently requires a Court to obtain and consider a Tribunal report before ceasing mediation (with a one month time limit on provision of the report). The Court, however, retains a discretion under order 1 rule 8 to dispense with compliance with order 78 rule 21 where appropriate. Consequently the requirement is not mandatory, and a Court retains capacity to properly perform its judicial functions as it sees fit.

The proposal that there be a statutory requirement that the Court must always consider and take into account the Tribunal's mediation report goes further than the current orders. No justification has been provided as to why such a statutory requirement is necessary, or as to why the current orders are insufficient. Arguably, in the context of this Bill, this requirement may involve an interference in the Court's judicial functions as to the manner in which it conducts cases.

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Weekend Australian 27 January 2007

National Native Title Tribunal: Effective Mediator or Bureaucratic Albatross? A User's Perspective

by Paul Hayes

The National Native Title Tribunal ('the NNTT') performs a range of functions under the Native Title Act 1993 ('the NTA').[1] This paper focuses on the mediation functions of the NNTT.[2] It considers how effective the NNTT has been in carrying out those functions and asks whether the NNTT's role as a mediator is consistent with its other functions.[3]

The NTA encourages parties to mediate native title claims to reach consent determinations, and establishes the NNTT as the mediating body. The Federal Court usually refers all native title claims at first instance to mediation by the NNTT.[4] The mediation functions of the NNTT are carried out under the auspices of the presiding Member with the assistance of relevant case management staff.

The effectiveness of the NNTT as a mediator varies greatly depending on the particular Member who has carriage of the matter.[5] However, to the extent that generalisations can be made, the track record of the NNTT in mediating claims suggests that many of its Members and staff are ill equipped to effectively carry out their mediation functions.[6] There are a number of specific areas of constructive criticism that might be made in relation to the NNTT's mediation functions.

Impartiality

All too often, NNTT mediations involve:

- sessions where an array of parties discuss what action they will take before the next mediation session;
- the next mediation session involving the same parties discussing why they have not met any of their commitments;
- a further flurry of commitments then being made for the next session which will be equally unfulfilled;
- the NNTT after each session circulating a reasonably content free report on the 'outcomes' of the last session; and
- an array of lawyers then billing their respective clients.

This inefficiency results in part from misplaced concern for the requirement of impartiality. While a mediator does not have an adjudicative role nor powers of compulsion, that does not mean that they should simply engage in pleasantries with parties and not use their position to press parties to progress matters.

While it is important to understand what obligations impartiality positively imposes, it is also of some import to note what impartiality does not demand. It does not prevent the giving of frank advice from time to time where it is warranted. Nor does it demand that a mediator only ever tell the parties what they want to hear nor encourage mediators to avoid difficult questions which might cause offence.

An example of these points occurred during the mediation of claims in the Torres Strait.[7] One party to the mediation, which had no interest in the matter that would justify its continuation as a party, was seeking to use the native title processes to generate non- Indigenous rights that did not otherwise exist in law. All other parties had settled upon the terms of a consent determination. The presiding NNTT Member was unable or unwilling to frankly advise the party of the untenable nature of its stance. When the claimant group commenced a strike out motion, the NNTT went to great lengths to advise against taking this course of action as it had the potential to upset the 'good naturedness' of the negotiations.

At a directions hearing, the Federal Court was happy to render the advice to the party that the NNTT seemed incapable of rendering. The Federal Court triggered its own mediation jurisdiction and referred the matter to the relevant Deputy District Registrar who then explained to the party that its position was unsustainable. The party was told it was facing the prospect of being struck out if it did not rapidly reach agreement with the claimant group. The matter then settled very quickly. The Federal Court was able to make frank comment both from the bench and through the Registry's mediation without sacrificing its impartiality.

Mediation and other functions

It is also important to note that people who are unhappy with decisions of the NNTT in the performance of its other functions, may have some difficulty accepting the NNTT as an impartial mediator. For example the NNTT is responsible for applying the registration test to applications for determinations of native title.[8] Due to the novelty of the law in this area, the application of the registration test by the NNTT has been an issue of some controversy.[9] To its credit, the NNTT has sought to address the issue by ensuring that NNTT officers with carriage of mediation have little involvement in the application of the registration test.[10] However, this action has not always been successful in addressing a perception of bias. In a number of instances, a controversial registration decision has had a significant and retardant effect upon the Member's capacity to progress mediation.

It is noted that this issue does not necessarily amount to criticism of the NNTT but is more criticism of the legislative structure that vests adjudicative powers in a mediating body. This dual role is problematic.

Another difficulty has arisen when the NNTT has had a dual mediation role. An example is where the NNTT is mediating both intra-Indigenous issues on a claim and an agreement arising from right to negotiate dealings.[11] When the NNTT does not make a clear and obvious distinction between the two processes, its intimate involvement in the conclusion of one matter in controversial circumstances, clearly has the potential to adversely impact upon its mediation services in the other. This has most recently occurred in the context of a western New South Wales claim where the same NNTT officers were involved both in the primary mediation of intra-Indigenous issues relating to the progress of the claim, and also in the mediation of a mining agreement. The controversies involved in the mining agreement had prejudicial implications for the NNTT's role in successfully progressing the mediation between various intra-Indigenous parties.

Innovative mediation

The NNTT adopts a fairly formulistic approach to mediation, and has shown a reluctance to respond innovatively to the varied situations that come before it. In one intra-Indigenous matter, a native title representative body ('NTRB')[12] sought the assistance of the NNTT to engage an anthropologist, at the cost of the NTRB. One of the Indigenous parties had a concern about the NTRB being the principal contractor of the anthropologist. The NTRB, with the consent of both the Indigenous parties, sought to address that concern by inviting the NNTT to perform that role. However, the NNTT's approach appeared to be that the novelty of the suggestion almost created a prima facie assumption that the NNTT should not perform this role. An excessively narrow and legalistic approach was taken to the matter even though numerous provisions of the NTA enable the NNTT to perform that role.[13] This legalistic approach prevents the NNTT from imaginatively and flexibly dealing with difficulties that arise.

Is a mediation service necessary?

In the marketplace, most negotiations proceed and succeed without the need for a mediating body. Usually the assistance of an independent mediator is only sought if the parties hit a bottleneck or adopt unnecessarily extreme positions. There is no reason why this approach cannot apply in the native title context.[14] This is especially the case where all parties involved are skilled in the negotiation process and represented by capable people.

Admittedly, usually the Federal Court has referred the matter to the NNTT,[15] and the NNTT must therefore keep an eye on the progress of negotiations and report to the Federal Court as directed. It is therefore important that the NNTT is kept informed of the progress the parties are making. However, there is no inherent reason why the NNTT must be more involved in a process that is otherwise proceeding smoothly. Often the meetings and conferences convened serve no purpose other than to inform the NNTT of what is going on. On other occasions, its convening of meetings has actually been detrimental to the progress of negotiations. The NNTT processes take on a life of their own, rather than being a positive contribution to difficult negotiations.

The NNTT's role as a mediator often duplicates functions performed by other bodies. Such unnecessary duplication is a poor use of limited resources. In intra-Indigenous mediations the relevant NTRB is often better equipped to perform the mediation role. NTRBs are Indigenous bodies and will generally have a sounder understanding of the context of intra-Indigenous issues. NTRBs also have professional expertise such as in-house anthropologists. In the case of Indigenous/non-Indigenous disputes, mediation could be just as or more effectively carried out under the auspices of the Federal Court mediation services.[16]

It should be noted that the majority of states and territories now have a range of land rights schemes in place, but none of these schemes has an equivalent of the NNTT. This raises the question of whether the scheme established by the NTA benefits from the NNTT performing such a formal mediation role.

Confidentiality

Confidentiality is another concept that is important in mediation but misunderstood by the NNTT. While the NTA has quite clear provisions as to confidentiality in mediation proceedings,[17] the NNTT in many mediations has exhibited an unhelpful obsession with the issue in circumstances where the parties themselves were not particularly concerned in keeping the negotiations confidential. An obvious example has been where the wider community has been keenly interested in the progress of a native title claim. Unnecessary concern for confidentiality has created an equally unnecessary public perception of secrecy. So often in the public mind, secrecy equals conspiracy.

In the intra-Indigenous context, the NNTT has occasionally fallen into the trap of seeking to exclude

Indigenous persons with legitimate interests on the basis of a faction within the group promoting tenuous theories about the 'true traditional owners'. Confidentiality was given as the reason why such persons should be excluded from meetings.

The obligations of confidentiality and the purposes served by those obligations need to be carefully understood by all parties. In instances where no purpose is served (and this is surprisingly often) and it is appropriate for the information to be disseminated, the parties should be encouraged to break free of confidentiality constraints.

Misunderstandings about confidentiality have also infected the substance of the NNTT's progress reports to the Federal Court. Such reports are an invaluable tool for the NNTT to keep the Federal Court informed of the progress of the matter. Regrettably, the authors of such reports have often construed the constraints of confidentiality as obliging them to reduce their reports to vacuous puffery. Such reports do little to assist the Federal Court to make informed directions regarding the case management of a matter.

Membership of the NNTT — Creating a culture

Some generalisations can be made about the 14 current members of the NNTT. The great majority are non-Indigenous. The great majority are male. The great majority are lawyers by training. The great majority are from the *big end of town*. The early days of the NNTT, which had a number of imaginative appointments, seem to have passed us by. It is possible that the present make-up of the membership of the NNTT has engendered a culture that is, in the author's view, excessively legalistic and bureaucratic. This culture manifests itself in numerous ways often antithetic to the appropriate recognition of native title rights and interests. An example of this is the NNTT's initial *Guidelines on Acceptance of Expedited Procedure Applications* released in May 2001. These guidelines outlined an approach to expedited procedures certainly not required by the NTA and arguably contrary to it.[18]

Conclusion

The NNTT has not turned out to be the body it was intended to be. In part, this was forced upon it by the *Brandy* decision,[19] and the NTA amendments,[20] which transferred all native title proceedings to the Federal Court. As a result of this reduction in the NNTT's role we are left with an unnecessarily bureaucratic and often gratuitous mediation body, whose mediation services could be performed by other more appropriate bodies. Appropriate legislative reform would see the removal of the mediation functions of the NNTT, and appropriate resourcing of NTRBs and the Federal Court to provide mediation as and when it is needed.

The NNTT could be a much more streamlined body performing more focused functions such as the application of registration tests, an educative role, and the provision of central mapping and research services. Some of its existing adjudicative roles might also remain.

A more bold reform would be to establish an inquisitorial Native Title Court to deal with all claims from lodgement to mediation to contested hearing. This approach would free up the Federal Court to deal with areas of law which are part of its more traditional jurisdiction. It would also recognise the unique nature of native title as a discrete area of law and would prevent a considerable amount of the duplication that presently occurs. There are precedents for courts with such specific jurisdictions, such as the Family Court of Australia. Given the problems with the current regime, perhaps a bold move is the best way forward.

Paul Hayes is a solicitor who has been working in native title for several years in the Northern Territory and Queensland, and now New South Wales. The views expressed in

this article are his personal views and not those of any organisation with which he might be associated.

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[1] *Native Title Act 1993* (Cth) ('the NTA') s 108.

[2] NTA s 108(1A) and Part 6, Division 4A.

[3] I have been mindful not to breach the confidentiality of past or present native title mediations in writing this article. Accordingly, while I have given some specific examples, I have not given specific examples when I thought it would be inappropriate.

[4] NTA s 86B(1).

[5] For example, of the eight consent determinations in the Torres Strait, the NNTT's role varied greatly from substantial and positive (*Kaurareg People v State of Queensland* [2001] FCA 657; *Saibai People v State of Queensland* [1999] FCA 158) to minimalist and counter-productive (*Masig People v State of Queensland* [2000] FCA 1067; *Dauan People v State of Queensland* [2000] FCA 1064).

[6] A scientific statistical analysis of successful outcomes, be they consent determinations or Indigenous Land Use Agreements ('ILUAs'), is difficult given the varying role that the NNTT may have played in any particular outcome. Any generic observations about the lack of consent determinations or ILUAs to date would be unfair on the NNTT, as the lack of outcomes may often be attributable to the negotiating parties rather than the mediator.

[7] These mediations eventually resulted in consent determinations over several islands in the Torres Strait, made on 6 and 7 July 2000.

[8] NTA ss 190A-190C.

[9] Some also argue that the controversy is due to the inconsistent approach the NNTT has taken in the application of the registration test. See Greg McIntyre, David Ritter and Paul Sheiner 'Administrative Avalanche; The Application of the Registration Test under the *Native Title Act 1993* (Cth)' (1999) 4(20) *Indigenous Law Bulletin* 8.

[10] In practice the registration test is applied by a delegate of the Registrar.

[11] NTA Part 2, Division 3, Sub-Division P; and see NTA s 31(3) for NNTT involvement.

[12] NTA Part 11.

[13] NTA ss 108 (2), 131A and 132. This matter was resolved with the Indigenous parties eventually agreeing to the NTRB being the principal contractor of the anthropologist.

[14] Useful comment in support of this point can be found in the Northern Land Council, *Submission to the Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Fund Inquiry into Indigenous Land Use Agreements* (July 2001).

[15] NTA s 86B(1).

[16] Although it can be argued that the administration of native title matters by the Federal Court has not been unproblematic.

[17] For example, see NTA ss 136A(4), 136E and 136F.

[18] This issue is dealt with in further detail in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (2001) 16-24.

[19] *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245.

[20] *Native Title Amendment Act 1998* (Cth) usually referred to by the misnomer 'the Wik Amendments'.
