NATIONAL NATIVE TITLE TRIBUNAL

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9 February 2007

Ms Jackie Morris
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Morris

Inquiry into the Native Title Amendment Bill 2006

Please find attached the submission from the National Native Title Tribunal for the inquiry into the Native Title Amendment Bill 2006.

The submission addresses some of the issues raised in written submissions and oral evidence provided to the Committee.

This submission is not intended to constitute a comprehensive response to each and every point raised in submissions and evidence to the Committee concerning the amendments contained in Schedule 2 (Claims resolution review) of the Bill. Rather, it addresses those submissions which deal with the capability and capacity of the Tribunal and some other issues relating to the Tribunal to which a specific response is warranted.

Should the Committee wish the Tribunal to respond to any issues other than those raised in this submission, please contact the Native Title Registrar, Mr Chris Doepel, on (08) 9268 7259.

Yours sincerely

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Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the Native Title Amendment Bill 2006

Submission of the National Native Title Tribunal

Introduction

Following the public hearings conducted by the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) in Sydney on 30 January 2007 into the Native Title Amendment Bill 2006 (the Bill), the National Native Title Tribunal (the Tribunal) determined to make a submission to address some of the issues raised in written submissions and oral evidence provided to the Committee.

This submission is not intended to constitute a comprehensive response to each and every point raised in submissions and evidence to the Committee concerning the amendments contained in Schedule 2 (Claims resolution review) of the Bill. Rather, the Tribunal will only address those submissions which deal with the capability and capacity of the Tribunal and some other issues relating to the Tribunal to which a specific response is warranted.

Questions about legislative drafting, the policy implications of specific items in the Bill and constitutional questions about the Bill should be directed to the relevant Department.

Should the Committee wish the Tribunal to respond to any issues other than those raised in this submission, please contact the Native Title Registrar, Mr Chris Doepel, who will make the necessary arrangements.

At the outset, the Tribunal indicates its support for the broad thrust of the amendments contained in Schedule 2. It is submitted that the amendments have the potential to significantly improve the operation of the native title system, and offer the best chance of achieving improvements in performance within the current legislative framework.

The current scheme is in need of improvement, and *all* system participants need to address the way in which they operate so that more efficient and effective outcomes are achieved. The legislative changes to the institutional framework are only part of the answer. The behaviour of participants needs to be such that, where agreement can be reached, agreement is reached in a timely way. Accordingly, many of the

legislative and administrative reforms are aimed at improving participants' behaviours. The Bill, together with those other changes, is a significant step in ensuring that the significant public monies invested in the native title system achieve reasonable outcomes within reasonable time frames.

Capability and capacity of the Tribunal

Various criticisms or adverse comments about the Tribunal were made in some of the written submissions and oral evidence in the course of this inquiry. The main criticism emanated from private lawyers engaged by native title representative bodies or from those bodies either individually or collectively (through the National Native Title Council).

Previous inquiries into the performance of the Tribunal: In assessing those criticisms and comments, regard should be had to the extensive inquiries and findings of:

- the consultants (Mr Graham Hiley QC and Dr Ken Levy) in the course of their Native Title Claims Resolution Review (the Hiley/Levy Review);
- the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (the PJC) in its 2003 inquiry into the effectiveness of the Tribunal; and
- independent client satisfaction research commissioned by the Tribunal (noted below).

After its wide-ranging inquiry, the PJC noted that the Tribunal operates in 'a widely variable environment'[i] with a range of 'external variants which can cause unpredictability in the native title process'.[ii] The PJC concluded that:

> In this environment the NNTT has developed practices and procedures that are virtually without precedent. It would be understandable if it merely had clung to the rigours of the law and the legislation that underpins their work. However there have been demonstrable efforts by the NNTT to pursue the statutory objectives placed on the conduct of their duties.[iii]

The PJC made the following positive general comments about the Tribunal:

- The PJC 'frequently heard evidence supportive of the professional and helpful manner of the members and staff' of the Tribunal[iv]
- The Tribunal had demonstrated its 'willingness to address the emerging issues during the inquiry' process and had 'used the inquiry process to gain feedback on its performance and to respond to these issues', not just to the PJC but also to those who raised concerns[v]

- Although 'for many involved in the native title process there is still a perceptible level of frustration with the process', the 'sense of frustration and, at times, injustice was rarely attributable to the manner in which the NNTT performs its functions'[vi]
- 'The NNTT has been important in the service of the legislation. The functions it has performed have been demanding yet it has sought to develop co-operative approaches to the emerging issues'[vii]
- 'While some expressed concern about the fairness of the role played by the NNTT in mediation, others testified that in their experience in mediation the NNTT had proved to be "extremely fair, extremely helpful and very competent … they are there to assist all parties and they do it well"'[viii]
- 'The work of the NNTT is clearly demanding, with a number of competing interests. [I]n the 10 years since its establishment it has pursued its functions in a manner that has been fair, just and objective'.[ix]

Mr Hiley and Dr Levy concluded, among other things, that:

> 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.[x]

They formed that view having received written submissions from (inter alia) five native title representative bodies, one prescribed body corporate, five State and Territory Governments, nine Commonwealth departments, agencies and tribunals, the Federal Court and pastoral and mining interests. Of particular importance was the written submission received from the Law Council of Australia. Further, the consultants had face-to-face meetings with (amongst others) six prescribed bodies corporate, ten representative bodies, four State and Territory Governments as well as the Western Australia Chamber of Minerals and Energy and the Indigenous Land Corporation.[xi]

Although the Tribunal is aware of the need to improve its performance in aspects of its work and is taking steps to do so (see below), it contends that the conclusions quoted above, as well as examples of the Tribunal's work noted below:

- refute or put in context the criticisms made to the Committee, and
- demonstrate that the Tribunal is capable of performing its current statutory functions and those proposed under the Native Title Amendment Bill 2006.

As stated at the outset, the performance of *all* system participants requires improvement, not just the Tribunal. The reforms before the Parliament are aimed at improving the performance of all participants.

Qualifications, competence and capacity of Tribunal members: Some submissions to, and questions from, the Senate Committee have raised issues about the qualifications, competence and capacity of Tribunal members to mediate claimant applications. Some have submitted that the Tribunal is ineffective in mediation, and hence should not be given additional powers.

Qualifications of members: The *Native Title Act 1993* sets out the qualifications of members of the Tribunal as:[xii]

- Presidential members: a Judge of the Federal Court, a former judge, or a person enrolled for at least five years as a legal practitioner of a superior Australian court
- Non-presidential members: a person (other than a Judge or former judge) who has special knowledge in relation to Aboriginal or Torres Strait Islander societies, or land management, or dispute resolution, or any other class of matters with substantial relevance to the duties of a member.

The duties of a member include:

- mediating between parties to native title applications and future act negotiations (e.g. about exploration or mining)
- assisting people to negotiate Indigenous land use agreements (ILUAs), and
- arbitrating various matters in the future act scheme (usually proposed exploration or mining).

The current 13 Tribunal members (ten full-time, three part-time) have a wide range of backgrounds and qualifications including in law (eight members), Aboriginal societies, land management and valuation, dispute resolution, government (Federal and state), public administration, anthropology, business (including in the rural and resources sector) and education.[xiii]

For example, one member (Professor Laurence Boulle) is a world acknowledged expert in mediation, lectures at Bond University, is the author of standard texts on mediation and previously chaired NADRAC. Another (Ruth Wade) has had extensive experience in negotiating in the pastoral industry, while others have had extensive experience in either the resources (Neville MacPherson) or seafood (Bardy MacFarlane) industries. Three members (John Sosso, Graham Fletcher and John Catlin) have headed native title units in State Government departments and had extensive experience in negotiating native title agreements. The President (Graeme Neate) has extensive experience in the administration of Indigenous affairs and policy development at a federal and state level, and established two state tribunals to hear and determine Indigenous land claims. One Deputy President (Hon Fred Chaney) was Minister for Aboriginal Affairs during his long parliamentary career, and the other deputy President (Hon Christopher Sumner) has extensive cross-cultural and ministerial experience as a state Attorney-General.

Two members are of Indigenous descent and bring their personal insights as well as contributions based on high level academic study and administrative experience (Dr Gaye Sculthorpe) and many years service in the public administration of Indigenous affairs (Bob Faulkner). Another member (Dan O'Dea) was the principal legal officer of a large native title representative body in Western Australia and spearheaded innovative native title agreements in that jurisdiction.

Each member brings to the work of the Tribunal a different combination of academic qualifications, employment history, personality traits and other experiences – including years of experience in high level native title and commercial or public sector negotiations. They can be deployed as appropriate to mediate particular applications or other proposed agreements.

As Mr Hiley and Dr Levy stated:

> 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 available to conduct mediations. For some mediations the President of the NNTT will appoint two members, one with legal skills and one 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.[xiv]

Parties sometimes request that particular members be appointed to mediate certain types of matters because of their *substantive* knowledge and experience, not just their *procedural* knowledge of mediation.

Mediation qualifications and training: Questions have been asked about the mediation qualifications of Tribunal members.

As noted above, the Native Title Act includes as *one* criterion for non-presidential membership that a person has 'special knowledge in relation to … dispute resolution'.[xv]

Neither the Native Title Act nor successive governments have required Tribunal members to have formal qualifications or accreditation as mediations. Some bring formal mediation qualifications and experience to the Tribunal (e.g. Professor Laurence Boulle).

It should be noted that there is no national mediation accreditation scheme, either in relation to mediation generally or in specialist fields such as native title. In May 2006 the National Mediation Conference resolved to support a Draft National

Accreditation System based on a national mediation standard. There will initially be one level of accreditation with advanced or specialised forms of accreditation later. The Tribunal is represented in the process to develop such a system. NADRAC also has a role to advise the Attorney-General on minimum standards, training and qualifications for ADR. Tribunal member Dr Gaye Sculthorpe is a member of NADRAC.

Unlike for general mediation skills, there is no generally available training course in mediating native title applications.

In that context and for those reasons, the Tribunal assists members to perform their mediation role by:

- providing detailed induction into the work of the Tribunal
- paying for the member to obtain appropriate basic mediation training (e.g. LEADR courses) and periodic advanced training or accreditation, as well as attendance at relevant seminars external to the Tribunal
- providing *Native title agreement-making in Australia: a guide to National Native Title Tribunal practice* (a 241 pages overview of relevant mediation theory and the issues that are likely to arise, with practical check lists for the various phases of native title mediation) prepared by the Tribunal as an internal working document, and the associated *Pocket guide for agreement-making teams*
- in the case of current members and relevant employees, providing one week intensive course (prepared by external consultants) on mediating native title applications
- providing an intranet Practitioners Forum in which members and employees identify issues in native title mediation for assistance or share experiences and learning in mediation practice
- convening periodic practitioners workshops involving members and relevant employees in considering aspects of native title agreement-making practice.

The Tribunal has been actively involved in assisting the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) in its Indigenous Facilitation and Mediation Project.

The Tribunal is currently developing a scheme for professional development and appraisal of members.

It should be emphasised that some of the criticism raised at the Senate Committee hearing was that the Tribunal was not good at 'punching deals' or 'cracking heads together' or proactively encouraging and directing parties towards comprise and reaching a mutually acceptable agreement. For example, Mr Vincent[xvi] gave evidence that mediation is a skill and that to be a mediator 'you have to be more proactive. You have to be imaginative. You have to have an understanding of what options are

available and what might work in the region and generally at law. You have to be able to give confidence to representatives and to their clients, not only native title claimants but pastoralists, graziers and mining representatives. You have to have a management approach and crunch the deal.' [xvii] In comparison, Mr Vincent submitted that Tribunal members 'are described as "merely a post office".'[xviii] Similar views were expressed during the Hiley/Levy Review.

Two points should be made.

- The thrust of the criticism is not that Tribunal members are bad mediators, rather that they are not sufficiently directive and engage too much in classic mediation techniques.
- The Bill aims at arming the Tribunal with additional powers to be more directive and to go beyond classical mediation, so that the Tribunal can achieve the results that representative bodies claim that they want.

Examples of creative approaches to mediation under the existing scheme are noted below.

Agreement-making teams: Although the President of the Tribunal directs which member is to conduct mediation in a particular proceeding,[xix] a member does not operate alone. Sometimes two or more members are appointed to mediate a particular claim (with one being designated the lead member).

Members lead agreement-making teams that include case management staff and those with specialist input as appropriate. The Hiley/Levy Review report noted that the Tribunal performs a number of roles that can contribute to achieving mediated outcomes, such as mapping, legal services, publications, information workshops and training. The Tribunal also produces research reports about particular claims at the request of individual members. The consultants 'were very impressed' with the sample that they were shown[xx] and recommended that greater use be made of the Tribunal's research and other capacity in mediation.[xxi]

For example, an innovative use of Tribunal research in overlap mediation in South Australia led to a Deed of Cooperation between two groups with overlapping claims.[xxii]

Examples of Tribunal mediation assistance in resolution of claims: There are numerous examples of the Tribunal mediating between parties with the result of a consent determination of native title, sometimes accompanied by a suite of related agreements (including ILUAs). Instances in recent years include:

- consent determination of native title and associated agreements involving various claimant groups and more than 400 respondent parties in the Wimmera region of Victoria[xxiii]
- consent determination in favour of the Mandingalbay Yidinji people near Cairns in North Queensland[xxiv]
- consent determination in relation to the combined claims of the Ngaanyatjarra lands in Western Australia[xxv]
- the Githabul claim in New South Wales that is scheduled to be resolved by agreement soon.

Some claims are withdrawn following resolution of the application by an outcome that does not involve a determination of native title. For example, the Tribunal mediated non-native title agreements in relation to:

- Aboriginal reserves near Dubbo in New South Wales[xxvi]
- pony club land at Coonabarabran in New South Wales.[xxvii]

Factors influencing the pace and progress of mediation: Some criticism of the capacity of the Tribunal is based on figures set out at paragraph 4.15 of the Hiley/Levy Review report showing that most of the claims currently in the native title system were lodged over four years ago. The inference apparently being urged on the Senate Committee is that those delays demonstrate that the Tribunal is incapable of mediating claimant applications in a timely and effective way.

As the Tribunal noted (in some detail) in its submission to the Hiley/Levy Review, there are numerous factors that influence the pace and substantive progress of mediation. These include:

- the state of readiness of the application (e.g. some applications will need to be amended significantly, or connection reports or comparable information will have to be prepared, before a negotiated outcome can be reached)
- whether claimants want a determination that native title exists (e.g. some claims are lodged to secure procedural rights, and the claimant may not want to proceed to a determination of that claim or mediate the claim at that time)
- the number of parties (often scores, sometimes hundreds), and the range of interests and variety of issues involved
- the willingness of the parties to participate in the process (e.g. some parties will be reluctant participants and may resent the process or claim)
- the capacity of parties (and their representatives) to participate in the process (e.g. the financial, professional and other resources available to them, and the priority they give to claims relative to each other and relative to future act and ILUA negotiations)
- the extent to which parties participate personally in the process

- different government policies (between jurisdictions, and within a jurisdiction when governments change)
- the predictability or consistency of the parties' approach to the mediation
- the resolution of threshold issues (e.g. disputed overlapping claims)
- external time constraints or deadlines (e.g. court orders)
- changes in the external environment (e.g. major judicial decisions or legislation)
- the operation of state or territory laws.

Those factors are outside the control of the Tribunal.

In addition, as Mr Chalk informed the Committee ,'[t]here is really not an incentive to settle for some parties'. He cited the Hiley/Levy Review report to the effect that 'there are many claims where the parties have no interest in seeing the matter moved to resolution; they are happy to sit there enjoying certain procedural rights without ever wanting to be tested'.[xxviii]

Experience shows that even those claims with adequate resourcing and good will from all parties which conclude with a consent determination usually take many years to resolve.

The Tribunal has publicly stated that many of the claimant applications referred to the Tribunal for mediation are not being substantively mediated because much work remains to be done in relation to them before mediation with respondent parties will occur.[xxix]

Proposed reforms to the native title system (including the legislative changes to the claims resolution process and the administrative changes to respondent funding) will assist the Tribunal to take more control of the process and focus parties on seeking negotiated outcomes. The Federal Court will continue to supervise the mediation process and the Tribunal will report to the Court. The two institutions will work closely in prioritising and progressing the resolution of claims.

Examples of Tribunal's assistance in resolution of other matters: The focus of the reforms being considered by the Senate Committee (and hence the submissions to it) is on the claims resolution process. It should be noted, however, that:

- some claimant applications are resolved in ways other than determinations of native title
- where appropriate, the Tribunal encourages parties to explore non-native title determination outcomes in addition to or in place of determinations, and provides substantive assistance in relation to the options

- the Tribunal has extensive experience in mediating and arbitrating future act matters (primarily to do with proposed exploration and mining), often within statutory time frames and commercial constraints.

The Tribunal has assisted (or is assisting) parties to negotiate a wide range of agreements including:

- pastoral agreements, such as the Headingly pastoral access agreement involving an Australian Agricultural Co property in the central west of Queensland,[xxx] the Ewamian MOUs[xxxi] and the Western Yalanji consent determination[xxxii]
- the award winning north Queensland gas pipeline ILUA[xxxiii]
- agreement between the Warlpiri people and a uranium explorer[xxxiv]
- the sea sponges ILUA which could create commercial enterprise opportunities for the people of Palm Island in Queensland[xxxv]
- national park ILUAs at Byron Bay in New South Wales[xxxvi] and the Vulkathunha-Gammon Ranges National Park in South Australia[xxxvii]
- major commercial ILUAs and other agreements such as the Argyle Diamond Participation ILUA in the east Kimberley of Western Australia,[xxxviii] the western Cape York Comalco ILUA, a major agreement in relation to development on the Burrup Peninsula in Western Australia (negotiated concurrently with Tribunal arbitration between the parties)[xxxix], and the proposed agreement in relation to the expansion of BHP Billiton's Olympic Dam project in South Australia
- local government ILUAs including with Mildura Council in Victoria,[xl] four local councils and the Narungga people in South Australia[xli] and in the Kimberley region of Western Australia,[xlii] as well as framework and other agreements such as with Flinders Shire in north-west Queensland[xliii]
- an ILUA for the creation of a new industrial estate at Hughenden in north-western Queensland.[xliv]

The same people who have provided assistance in those successful (and often complex) negotiations also mediate native title claims and bring to those mediations the same skills, knowledge and experience.

Assessment of Tribunal members' performance: As noted above, agreement-making teams led by a Tribunal member are responsible for the mediation of claimant applications. The composition of teams varies between applications or clusters of applications or regions.

The Tribunal's performance is assessed by reference to:

- the estimates of outputs (including ILUAs, native title agreements and related agreements, future act agreements) identified each year in the Portfolio Budget Statement (PBS)
- the Key Performance Indicators set out in the Tribunal's *Strategic Plan 2006-2008* (some of which are measured by reference to PBS outputs)
- qualitative research conducted in relation to some outcomes reached within each financial year
- periodic client satisfaction surveys conducted by consultants engaged by the Tribunal.

Client satisfaction surveys (results of which are published in the Tribunal's Annual Reports)[xlv] have shown generally high levels of satisfaction, and reducing levels of dissatisfaction with the Tribunal. The surveys have identified areas for improvement and which the Tribunal seeks to address.[xlvi]

Qualitative measures of the Tribunal's output, tested by research conducted in April 2006 with clients who had been party to completed agreements in 2005-2006, showed that in all cases the majority of people surveyed found the Tribunal had met or exceeded their expectations for each criterion.[xlvii] Mediations were seen in the main to be conducted fairly and to be effective in delivering an outcome.[xlviii] In particular, the clients surveyed were highly satisfied with the mediators' conduct and their experience of the process and its fairness.

The research also indicated that clients were concerned about the cost of the process and effort required by parties to reach agreement. Some clients felt that the Tribunal needed to take more control of agreement-making processes. The amendments contained in the current Bill are a significant step towards increasing the Tribunal's capacity to control proceedings.

The Tribunal's performance was also assessed by the PJC in its reports on the Tribunal's Annual Reports, and its specific inquiries on topics such as the effectiveness of the Tribunal (referred to above).

Each member's performance is assessed informally by their peers in the context of regional planning, and by the President in the allocation or reallocation of applications to individual members as well as in periodic meetings with individual members.

Consistently with the practice in other tribunals (such as the AAT), the Tribunal is currently developing a more systematic program of member appraisal and practice development.

Tools being developed: As part of ongoing efforts to improve its practice, and in light of the foreshadowed reforms to the native title scheme, the Tribunal is:

- finalising a national case flow management scheme to monitor each application in Australia for the purpose of planning, prioritising and resourcing (having regard to regional factors) and enhance the Tribunal's capacity to identify and report on trends in the system
- developing a professional development and appraisal scheme for members
- developing practice documents to ensure consistency and quality in the Tribunal's implementation of the reforms (e.g. the conduct of inquiries by the Tribunal, appearances before the Federal Court, reporting to the Federal Court)
- developing various levels and forms of communication with the Federal Court.

At their next meeting, Tribunal members are scheduled to consider the criticisms of Tribunal practice made during the Hiley/Levy Review and to the Senate Committee. The Tribunal will use that information to review and, if necessary, revise aspects of its mediation practice.

Specific criticisms of the Tribunal

Although there were generalised criticisms of the performance of the Tribunal by several witnesses, only a few specific examples were provided of alleged deficiencies which, it was submitted, cast some doubt on the desirability of some of the reforms contained in Schedule 2. However, it was suggested specifically that:

- the Tribunal does not recommend the cessation of mediation of matters referred to it by the Federal Court
- applications remain with the Tribunal for inordinately long periods
- Tribunal members are inexperienced or not qualified to exercise coercive powers
- Tribunal directions may impact upon the exercise of government functions.

In order to properly weigh the criticisms, and thus the desirability of the relevant proposed provisions, responses to those specific issues are required.

The Tribunal does not recommend cessation of mediation: One criticism raised by both Mr Chalk[xlix] and Mr Levy[l] was that the Tribunal rarely, if ever, recommends cessation of mediation thereby moving the application back into proactive supervision and disposition by the Federal Court.

Mr Chalk said:

> In the early days of the tribunal, particularly where there were Federal Court judges appointed as members, they would quickly look at a matter, assess

> whether there was any real prospect for settlement and move it back into the court stream if they felt that was not the case. More recently, there are very few, if any, instances that I am aware of where the tribunal have actually recommended to the court: "No, this matter is unlikely to be settled. We suggest that mediation should cease and it should be back in your hands."[li].

Mr Levy added: 'The great difficulty with the tribunal is that when you go into mediation you never come out of it.'[lii]

The implication flowing from these submissions is that requiring all matters to be referred to the Tribunal will result in the system being stymied with matters remaining in mediation for an unduly long period of time with attendant cost and delay implications.

In reality, Tribunal members do recommend that the Federal Court order that mediation is to cease pursuant to section 86C of the *Native Title Act 1993*. For example, one Member recently carried out an audit of his mediation reports in the period since January 2003 and ascertained that he had recommended the cessation of mediation in 12 separate applications over the past four years in two states, involving five Federal Court Judges and one Federal Court Registrar. The President and other members have recommended the cessation of mediation on various occasions.

It is incorrect to suggest that the Tribunal does not make a sensible and practical assessment of matters in mediation and recommend cessation when necessary and desirable. It is for the Federal Court then to decide (in light of the Tribunal's report and recommendation and any submissions from the parties) whether to order that mediation is to cease and possibly make programming orders for trial. In relation to the 12 matters referred to above, the Federal Court determined *not* to cease mediation in five instances.

Applications in mediation for lengthy periods: A further criticism, somewhat related to the first, was that mediations continue for inordinately long periods of time. The National Native Title Council submitted[liii] that Tribunal mediation was ineffective, and claimed that this was borne out by the statistics provided in the Hiley/Levy Review report. This point was re-iterated by Mr Vincent during his oral evidence to the Committee.[liv] .

As noted above, there are many reasons why some applications are not substantively mediated for some years or take years to resolve. Two other critical points need to be made.

- First, although the Court refers applications to the Tribunal for mediation, the Tribunal cannot of its own instance cease mediation. The Tribunal can and does recommend to the Court that mediation cease pursuant to section 86C,

but the Court is only required to consider the Tribunal's recommendation,[lv] it is not obliged to adopt it. Where the Court determines *not* to accept a recommendation for the cessation of mediation, the Tribunal is required to continue to mediate. In one matter the Tribunal recommended on at least four occasions for the cessation of mediation in an application, and in each instance the Court declined to order that mediation cease. Eventually mediation ceased when the Applicant withdrew the application.

- Second, the Federal Court *must* order the cessation of mediation if an application for cessation is made by the native title applicant or the Commonwealth, a state or a territory - unless the Court is satisfied that mediation is likely to be successful.[lvi] The Court may make such an order on the application of any other party.[lvii] The clear remedy for the problems outlined by several witnesses is contained in the Act, namely the making of an application for cessation of mediation. If native title or government parties want to abandon mediation they have a number of options available to them, including the direct path of making an application to the Court. If there are so many 'stale' applications in mediation with the Tribunal, and the solution to the problem is their disposition through a non-mediated process, why have been so few applications under section 86C(3) by applicants until earlier this month?

Despite some oral evidence to the contrary, there should be no embarrassment in making well founded applications. Mr Vincent said to the Committee:

> Certainly they [the Federal Court] can, if you like, sack the Native Title Tribunal, but the court has to make a finding that it is not likely to be resolved in the Native Title Tribunal. It is an embarrassing finding that a court has to make initially when it says, "Sorry tribunal, you're out of it and we're going to take over now."[lviii]

The Tribunal understands, for example, that the Northern Land Council made application in the Federal Court in Darwin on 6 February 2007 for the cessation of mediation in a number of applications and, in relation to those where there is no mediation, an order that there be no mediation.[lix] The effect of such orders would be that the Tribunal would have few matters to mediate in the Northern Land Council's region.

The reality is that so many matters have remained with the Tribunal for mediation because both the native title and government parties have not wanted to move them into the litigation stream.

The powers proposed by the Bill will ensure that a strategy of 'warehousing' applications in mediation will be less readily able to be adopted in the future.

Tribunal members are inexperienced or unqualified to exercise coercive powers: The written submission on behalf of the Federal Court raised some specific concerns about the appropriateness of Tribunal members being empowered to make coercive directions, particularly those contained in proposed sections 136BA (directing a party to attend a mediation conference) and 136CA (direct a party to produce documents). It was submitted that Tribunal members are appointed on the basis that their primary function is mediation, and that those members would not necessarily have the experience and qualifications to formulate orders in ways that will make them readily enforceable.

Tribunal experience and performance in other aspects of its work demonstrates that these concerns are unfounded.

Apart from mediating native title applications, the Tribunal is also required to conduct inquiries on a range of matters.[lx] The Tribunal has an extensive arbitral role, and is responsible for arbitrating matters in the 'right to negotiate' scheme (usually in relation to mineral exploration and the grant of mining tenements). In carrying out this function, the Tribunal is empowered to hold hearings[lxi] and take evidence on oath or affirmation.[lxii] Tribunal Members already have the power to summon witnesses to give evidence and to produce documents.[lxiii]

The Tribunal has to deal with hundreds of expedited procedure objection applications and future act determination applications every year. The Tribunal makes directions in most matters and conducts inquiries including, on occasion, 'on country', where witnesses are called and give evidence and produce documents. Decisions of the Tribunal are regularly reported in the *Federal Law Reports.*

The last instance of a Tribunal determination being overturned on appeal to the Federal Court was in 1999. Appeals against Tribunal decisions to the Federal Court were dismissed in 2001 and 2005.

The Tribunal is also already empowered to make some directions in its mediation practice that are readily enforceable. Section 136F empowers a member to direct that information given or documents produce at a mediation conference not be disclosed absolutely or conditionally. A breach of such a direction renders a person liable to a maximum penalty of 40 penalty units.[lxiv] The Tribunal is not aware of any challenge having been made to direction made by a Tribunal member under section 136F.

As noted above, many Tribunal members have legal qualifications and all members can obtain advice from the Tribunal's legal section about the appropriate orders. Members are also assisted by the submissions of legal representatives of the parties.

Accordingly, the concerns expressed by the Registrar of the Federal Court are unfounded.

Tribunal directions may impact upon the exercise of government functions: Another concern raised by the Federal Court was that directions made by a Tribunal member with respect to a government party would raise 'legal and perhaps even constitutional issues, by compromising its [the government party's] ability to act in accordance with its policies'.

The relevant state or territory minister is usually the first respondent to each native title application[lxv] and clearly has a significant role in whatever outcome is achieved. Every government has policies, but in its capacity as a party in litigation it is subject to the rule of law. Courts and tribunals regularly make orders and directions that impact upon the policies of governments. Every time the Federal Court makes a ruling in a native title matter (or a migration, trade practices or copyright matter), there is the potential for that ruling to impact upon a government in the exercise of their governmental functions.

Indeed the Federal Court has previously ruled on aspects of the respective roles of a state government and the Tribunal in native title proceedings. In *Frazer v Western Australia*, the Federal Court heard submissions from a state about its practice and policy in relation to the resolution of native title applications (including the way the state set priorities for progressing applications) and about the process of mediation and the role of the Tribunal. Justice French rejected some aspects of those submissions and described 'the central role' of the Tribunal in the mediation process. His Honour expressed the view that the referral of an application to the Tribunal gives the Tribunal:

> the responsibility, pursuant to that referral, to undertake mediation of all aspects of the application relevant to the purposes defined in s 86A. This includes the development of detailed negotiation protocol, the exchange of information between the parties, the identification of issues to be resolved and times and venues of conferences under the Act in the furtherance of the mediation process. … It is appropriate that within a particular region timetables may be staggered to reflect priorities within that region. It is not open to any party, *be it the state* or a native title representative body or any other respondent, unilaterally to announce priorities for a particular region. This is an aspect of the mediation process.[lxvi]

While the making of directions by the Tribunal, or orders of the Federal Court, in native title proceedings may lead to the mediation or litigation process 'being burdened with second order litigation by governments seeking to protect their own prerogatives', that is simply in the nature of litigation and raises no novel constitutional, legal or policy issues.

Case study of alleged Tribunal ineffectiveness: Some of the written submissions and witnesses compared Tribunal mediation unfavourably with case management and trials in the Federal Court. Most submissions were expressed in general terms.

Mr Ron Levy on behalf of the Northern Land Council (NLC), however, drew unfavourable parallels between Tribunal mediation and quicker outcomes by utilising the Court process, in relation to the Newcastle Waters application.

A careful reading of his testimony highlights why his criticism is misplaced. While he started by saying that 'they [the Tribunal] do a pretty reasonable job'[lxvii], he went on to point out that the Tribunal convened a couple of mediation conferences between the NLC and pastoral parties. Attempts were made to build relationships and there was an exchange of information. Mr Levy said that he did not need mediation for that, but failed to highlight that mediation conferences are private and without prejudice,[lxviii] and gave protection to both his clients and the pastoralists to engage in a frank exchange of views to determine if a settlement was possible. Ordinarily lawyers will not meet and exchange documents or agree to compromise unless they are protected by the 'without prejudice' nature of mediation.

As it turned out, as Mr Levy states, the pastoral parties and the Northern Territory Government wanted certain legal issues clarified, so mediation was suspended while the case was prepared for trial. Deputy District Registrar Edwards then structured the case for trial. It is not the role of the Tribunal to structure cases for trial, and as Mr Levy highlights, Ms Edwards did so pursuant to directions by the trial judge.

The Newcastle Waters case does not demonstrate that Tribunal mediation was unsuccessful. Rather, it is a classic illustration of the use of the Tribunal and the Court strategically. The Tribunal was used in an endeavour to see if compromise could be reached and a negotiated settlement of the claim could be achieved. The parties used the opportunity of mediation to discuss their respective positions, and a decision was made to go to trial. The next stage of the process was then activated, and, as Mr Levy highlights, DDR Edwards then prepared in her usual very professional and competent manner, to list the matter for trial.

To suggest that somehow this is an example of how mediation is a waste of time or that Tribunal mediation is ineffective, is, with due respect to Mr Levy, misconceived. Indeed the mediation process in that case identified extensive common ground between the parties and resulted in a narrowing of the issues to be argued before the Court, and hence contributed to a speedier disposition of the matter at trial.

Further, there is not much history of Tribunal mediation in the Northern Territory, particularly in the Northern Land Council region. (The particular factors operating in the Northern Territory are discussed below). Of all of the Land Councils in Australia, it is possible that the NLC is the one with the least experience of Tribunal

mediation. Rather the NLC has sought to avoid the referral of matters to the Tribunal, advocating that matters not be referred for mediation at a particular time or seeking orders that there be no mediation (most recently on 6 February 2007). In the case of some matters that were referred to the Tribunal for mediation, the NLC advised that it and its clients lacked resources to participate in mediation and were not prepared to engage in mediation. It asked the Tribunal to report to the Court that mediation could not be progressed and recommend that mediation cease. The NLC's submissions that are so critical of the Tribunal's mediation capacity should be considered against that background.

Litigation of native title claims

Some of the witnesses appeared to support a process much closer to conventional litigation than mediation.

Cost and consequences of litigation: The cost of native title litigation is graphically set out in the Hiley/Levy Review report at pages 18 to 19. There has been some suggestion that the cost and length of Federal Court trials is decreasing now that key test cases have been settled by the High Court and Full Federal Court.

For example, the early non-Northern Territory native title trials were both lengthy and costly, with *Yorta Yorta* lasting 114 sitting days and *Ward* 83 days. In comparison the early Northern Territory trials were much shorter: *Croker Island* 23 days and *Hayes* 35 days.

Much of the material before the Committee which suggests that the trial option can be cost effective, or at least reasonably efficient, focuses almost exclusively on matters in the Northern Territory. For example, the Hiley/Levy Review report refers[lxix] to the *Blue Mud Bay* (14.5 hearing days) and *Timber Creek* (18 hearing days) cases.

However, a degree of caution needs to be exercised when considering these matters. The Northern Territory has 30 years of history of land rights legislation.[lxx] In that period numerous inquiries have been conducted throughout the Northern Territory, and critical baseline data has been collated and evidence tested. Three decades of land rights research and proceedings have resulted in the ability of parties to accept certain evidence and agree to a radical streamlining of native title litigation. In some native title trials in the Northern Territory the parties have consented to the tendering of voluminous documentary and other evidence, leaving only the giving of evidence-in-chief and cross examination.[lxxi]

The same extensive baseline data and history of litigation is absent throughout much of the rest of Australia. To use the experience of the Northern Territory as a test for

the success or failure of mediation or litigation for the rest of Australia is, at best, problematic.

In fact, the history of Federal Court native title litigation in the rest of Australia over the past five years shows no significant improvements in terms of costs or length of trial time.

The most recent single judge decision provides a graphic example of the difficulties that can occur with native title litigation. Justice Lindgren delivered his decision on the Wongatha claim in Western Australia[lxxii] on 5 February 2007. His Honour said:

> "8. The hearing has been long and complex. This is indicated by the following statistics. (The figures do not include submissions on extinguishment, which I do not need to consider):
>
> | | |
> |---|---|
> | Number of pages of transcript: | 16,926 or 16,928 |
> | Number of days on which the Court sat (often for extended hours): | 99 or 100 |
> | Average daily number of pages of transcript: | 169.28 or 170.97 |
> | Number of witnesses who testified orally: | 149 |
> | Number of affidavits read without the deponent being called: | 43 |
> | Number of exhibits: | 265 |
> | Number of volumes of experts' reports: | 34 |
> | Number of pages in experts' reports: | 2,817 |
> | Number of lists of objections to experts' reports: | 77 |
> | Number of objections to experts' reports: | 1,426 |
> | Number of documentary submissions or volumes of submissions: | 97 |
> | Number of pages of written submissions (including appendices and annexures: | 8,087 |
> | Number of pages of appendices and annexures included in the written submission: | 3,708 |
> | Number of pages of written submissions excluding appendices and annexures: | 4,379" |

In his summary of the case, his Honour made the following observations about the mediation of the claim:

> Several times during the hearing I encouraged the parties to attempt to find a solution by mediation. I was given to understand that mediation had previously taken place but without success. Apparently mediation continued, even following the hearing. In fact, I arranged for another Judge of the Court to be available to the parties to assist, if they thought this possible, in connection with the progress of their mediation, and he did make himself available to them. Finally, however, mediation came to nothing and the

> parties informed me that a decision would be required. I do not know or wish to know why mediation failed. I will only say that it is to my mind sad that the matter has had to be resolved by an imposed solution.

The imposed solution in this matter was not an approved determination of native title,[lxxiii] but the dismissal of each of the native title proceedings. Consequently, at the end of a trial process that commenced on 19 February 2002 and was not concluded until almost five years later, there was no final resolution of native title. If persons claiming native title over all or part of the area under consideration wish to assert their rights and interests (an outcome expressly contemplated by Justice Lindgren), then new proceedings will need to be initiated and the process started again.

As is clear from the Hiley/Levy Review report, the costs of this trial have been crippling to all concerned, with the representative body involved (the Goldfields Land and Sea Council) running out of funds at one stage during the course of the trial.

During the course of his testimony to the Committee Mr Ron Levy said:

> The Federal Court is not fighting a turf war; it is voting with its feet with the aim of settling as much as it possibly can: first running test cases to test the rules to allow more settlements and then prosecuting them. Either native title exists or it does not.[lxxiv]

Unfortunately, the outcomes of the litigation process not as straightforward as Mr Levy seems to suggest. As the *Wongatha* case highlights, at the end of very costly litigation there may be a decision but no finding whether native title exists. A recent test case in the Northern Territory also highlights this. In *Jango v Northern Territory*,[lxxv] applicants sought a determination of compensation as a result of extinguishment of native title over land in the town of Yulara. The proceedings were commenced on 12 June 1997. His Honour Justice Sackville found that the applicants had not, on the evidence presented, acknowledged and observed the laws and customs pleaded. Consequently the claim was dismissed. In the summary of his judgment his Honour said:

> My finding does not necessarily imply that none of the indigenous witnesses could make out a case that she or she is ngurraritja (traditional owner) for sites in the Uluru-Kata Tjurta area under laws and customs currently observed by people of the Western Desert. My finding it that the applicants have not made out the particular laws and customs that they have chosen to plead and rely on when presenting their case. (paragraph 11)

In short the case was dismissed, even though his Honour acknowledged that if the case had been pleaded in a different manner, a different result may have eventuated.

Again in this matter, there was arguably no final decision on compensation payable, rather a decision to dismiss the application made in 1997.[lxxvi]

There are circumstances when a litigated outcome to native title proceedings is required. It is also the case that successive High Court decisions have clarified much of the law. Nonetheless, it would be incorrect to assume, that a clarification of certain legal principles will necessarily result in short trials. As *Wongatha* and *Jango* highlight, issues in dispute will often concern factual questions about whether particular native title claimants can establish connection to land and waters and can demonstrate that they have a functioning normative society. These can be very difficult matters to determine, requiring the expenditure of considerable time and resources in a trial environment. Even in the Northern Territory, there is no guarantee that a native title trial will be disposed of in an expedited manner if there are contentious factual issues at the heart of the litigation.[lxxvii]

The *Wongatha* case also highlights that mediation, whether conducted by the Tribunal or the Court, may not be the appropriate vehicle to get an outcome.

Some of the criticism of Tribunal (or indeed any other) mediation provided to the Committee is sustainable. That is why the Bill proposes significant changes. The prospects of mediation succeeding will be enhanced if the powers contained in the Bill are vested in the Tribunal. Currently, the success or otherwise of Tribunal mediation is largely dependent on the good will of the parties. It is entirely consensual.

Agreement-making still offers the best hope for enduring native title outcomes. The powers conferred by the Bill will provide greater incentives for parties to compromise and reach agreements. However, it is not a panacea, and the Bill correctly recognises that mediation is just one option. In some cases there will continue to be a need for litigated outcomes.

Ultimately, the manner in which native title matters are resolved is in the hands of the parties. Agreements will only be reached if parties approach each other with good will and put options for settlement on the table. In light of the circumstances of each case, such options could include determinations of native title and or other non-native title determination components[lxxviii] that will lead to an acceptable outcome.

Requirement to act in good faith

The Tribunal strongly supports the provisions in the Bill requiring parties and their representatives to act in good faith in relation to the conduct of a mediation.

One key means of improving the success of agreement-making is addressing the behaviour of parties. The obligation to act in good faith will provide an incentive to improve behaviour and to focus the attention of the parties and their representatives on the seriousness of the mediation process and the need to approach mediation in a professional manner and with a spirit of good will.

It is conceded that the insertion of an obligation to act in good faith is not a 'silver bullet' that will immediately turn around all mediations.

As was properly pointed out during the hearings, there are instances where some parties will refuse to mediate on the basis that there are points of law requiring clarification or that the claim itself is fundamentally flawed. It is not a failure to act in good faith to refuse to mediate if there is a legitimate basis for doing so. However, the party refusing to mediate should explain their position.

During the course of the hearing a number of criticisms were made of the good faith provisions and, for the sake of completeness, the Tribunal provides information to the Committee about:

- the current good faith requirement in the Native Title Act
- requirements to mediate in good faith in other Australian legislation
- the content of the good faith obligation
- the obligation and legal representatives.

Current good faith requirement in the Native Title Act: The inclusion of a good faith requirement in relation to native title proceedings is not new. The Native Title Act already requires, in the context of the right to negotiate regime, all negotiation parties (the government party, the native title party and the grantee party) to negotiate in good faith.[lxxix] The Tribunal is regularly required to rule on whether parties have negotiated in good faith in order to ascertain if the Tribunal has jurisdiction to arbitrate in relation to the dispute.[lxxx]

The content of the obligation to negotiate in good faith in that context has been the subject of numerous Federal Court decisions and Tribunal determinations. The most significant Federal Court decisions are: *Risk v Williamson* (1998) 87 FCR 202, *Strickland v Minister for Lands (WA)* (1998) 85 FCR 303, *Walley v Western Australia* (1999) 87 FCR 565 and *Brownley v Western Australia (No 1)* (1999) 95 FCR 152.

As early as 1996 the Tribunal outlined indicia for guidance in determining if a party was negotiating in good faith,[lxxxi] namely:

- unreasonable delay in initiating communications in the first instance;
- failure to make proposals in the first place;

- the unexplained failure to communicate with the other parties within a reasonable time;
- failure to follow up a lack of response from other parties;
- failure to attempt to organise a meeting between the other parties;
- failure to take reasonable steps to facilitate and engage in discussions between the parties;
- failure to respond to reasonable requests for relevant information within a reasonable time;
- stalling negotiations by unexplained delays in responding to correspondence or telephone calls;
- unnecessary postponement of meetings;
- sending negotiators without authority to do more than argue or listen;
- refusing to agree on trivial matters e.g. a refusal to incorporate statutory provisions into an agreement;
- shifting position when agreement is in sight;
- adopting a rigid non-negotiable position;
- failure to make counter-proposals;
- unilateral conduct which harms the negotiation process, e.g. issuing inappropriate press releases;
- refusal to sign a written agreement in respect of the negotiation process or otherwise; and
- failure to do what a reasonable person would do in the circumstances.

The indicia of good faith for the mediation of claimant applications have yet to be developed. Some of those indicia may be different from the indicia in relation to shorter, more targeted commercial negotiations with respect to high impact exploration or the right to mine. Nonetheless, the concept of acting in good faith has been embedded in the Native Title Act since its commencement, and practitioners operating in the native title system would, or should, be aware of the concept of good faith. The requirement to act in good faith in claim mediation is simply the extension of a well settled and accepted concept in the right to negotiation scheme.

Requirement to mediate in good faith in other Australian legislation: The requirement to negotiate or mediate in good faith has increasingly been inserted in legislation at both a Commonwealth and state level.

For example, the *Industrial Relations Reform Act 1993* (Cth) inserted enterprise bargaining provisions that mandated that parties negotiate agreements in good faith (see section 170QK). This provision was interpreted by the Full Bench of the Australian Industrial Relations Commission in *Public Sector, Professional Scientific, Research Technical, Communications, Aviation and Broadcasting Union v ABC* AILR 419 (No 372).

More recently, the *Administrative Appeals Tribunal Act 1975* was amended[lxxxii] by inserting a requirement that when a matter is referred for alternative dispute resolution 'each party must act in good faith in relation to the conduct of the alternative dispute resolution concerned'.[lxxxiii]

In almost every Australian state there were provisions in industrial relations and other legislation requiring good faith negotiating. There is also a requirement to mediate in good faith in the New South Wales *Farm Debt Mediation Act 1994.*

Of more significance is the requirement for good faith mediation which has been a feature of the New South Wales Supreme Court since 1994. In that state a Judge, if he/she considers appropriate, may refer any proceedings for mediation by a mediator. It is the duty of each party to participate in good faith in the mediation.[lxxxiv] The relevant provisions in the New South Wales legislation have been the subject of extensive judicial interpretation.

Accordingly, there is an increasing trend to require parties (and their representatives) to act or negotiate in good faith when a matter is referred to mediation by a court. The proposal in the Bill is not unique, and should be evaluated in the context of what appears to be a trend in both Australia and overseas to mandate compulsory mediation and then place obligations on the parties to act in good faith.[lxxxv]

Content of the obligation: The Bill does not define what constitutes 'good faith'. The Attorney-General's Department is currently working on a proposed Code of Conduct. The Tribunal will cooperate with the Department in the preparation of such a Code . The Tribunal considers that if there is to be an obligation to act in good faith, the parties and their representatives should be provided with guidance of what will be expected of them.

In addition to any Code that may be developed, the President of the Tribunal will consider developing a Practice Note pursuant to section 123 of the Native Title Act that will give guidance to Tribunal members on the protocols to be adopted before reporting an alleged breach of good faith pursuant to new sections 136GA and 136GB.

The Tribunal will adopt transparent practices aimed at ensuring a consistency of approach amongst members and in a manner that will ensure that all parties and their representatives are accorded procedural fairness. Importantly, the Tribunal sees the insertion of an obligation to act in good faith as bolstering the chance of a successful mediation. Accordingly, the reporting of a breach of this obligation will be taken a serious step to be taken only when necessary to preserve the integrity of the mediation process.

Should the obligation extend to legal representatives?: The Tribunal considers that if the obligation to act in good faith is to work, then it must apply to all persons who participate in mediation conferences.

In many mediation conferences, and perhaps the majority, the only persons present are the legal representatives of the parties. The Tribunal relies on those representatives to have obtained instructions, to articulate in a fair and accurate manner those instructions and to generally negotiate in a proper manner.

If the obligation to act in good faith could be sidestepped by lawyers, there would be a major loophole in the legislation and some poor practices that have developed would not be addressed.

Any lawyer appearing at a Court ordered Tribunal mediation conference should be able to clearly and properly articulate their client's position. If they are not in such a position they should say so and explain why they have not, or cannot, obtain instructions.

To suggest, as the National Native Title Council did that their lawyers 'would not be able to participate, on an ethical basis, in the mediation process'[lxxxvi] is not only surprising but also raises questions about the practice of such lawyers rather than the provisions in the Bill.

Conclusion

It is not disputed that the Tribunal needs to improve its performance. However, it is not just the Tribunal requiring improvement but all participants in the native title system.

After considering the written and oral submissions, Dr Levy observed:

> 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.[lxxxvii]

Until now the Tribunal has been restricted by a paucity of powers that has resulted in mediations only succeeding if there is goodwill by the parties participating. As noted above, Mr Chalk stated in evidence that 'There really is not an incentive to settle for some parties…there are many claims where the parties have no interest in seeing the matter moved to a resolution'. [lxxxviii]

The aim of the amendments is to create a more transparent process and to ensure that a spotlight is directed towards the mediation performance of *all* concerned

thereby providing some incentive to move matters forward. The approach set out in the Bill is less radical than making all mediations open to the public. [lxxxix]
The history of long and expensive litigation (some of which has resulted in the insolvency of some native title representative bodies) informs the need for a more rigorous agreement-making regime.

The Bill offers, possibly, the last hope for the native title system under the current structures being able to produce results for all system participants. A primarily litigious approach, as apparently suggested by some witnesses including the representative bodies, is not economically or socially feasible.

If the current reforms fail, then a more radical reform option will need to be considered.

Endnotes

[i] PJC, *Effectiveness of the National Native Title Tribunal,* December 2003, para 2.28.
[ii] PJC, *Effectiveness of the National Native Title Tribunal,* December 2003, para 2.59, see also paras 2.63, 2.79, 3.59, 6.1.
[iii] PJC, *Effectiveness of the National Native Title Tribunal,* December 2003, para 6.2.
[iv] PJC, *Effectiveness of the National Native Title Tribunal,* December 2003, para 6.3.
[v] PJC, *Effectiveness of the National Native Title Tribunal,* December 2003, para 6.6.
[vi] PJC, *Effectiveness of the National Native Title Tribunal,* December 2003, para 6.16.
[vii] PJC, *Effectiveness of the National Native Title Tribunal,* December 2003, para 6.18.
[viii] PJC, *Effectiveness of the National Native Title Tribunal,* December 2003, para 3.42.
[ix] PJC, *Effectiveness of the National Native Title Tribunal,* December 2003, para 3.95.
[x] G Hiley and K Levy, *Native Title Claims Resolution Review,* 31 March 2006, para 4.33.
[xi] G Hiley and K Levy, *Native Title Claims Resolution Review,* 31 March 2006, Appendix 2.
[xii] *Native Title Act 1993* s 110.
[xiii] Information about each Tribunal member is on the Tribunal's website at www.nntt.gov.au/about/members.html
[xiv] G Hiley and K Levy, *Native Title Claims Resolution Review*, 31 March 2006, para 4.27
[xv] *Native Title Act 1993* s 110.
[xvi] Mr Vincent appeared on behalf of the National Native Title Council and the Goldfields Land and Sea Council.
[xvii] Senate Standing Committee on Legal and Constitutional Affairs, *Proof Hansard,* 30 January 2007, p 11.
[xviii] Senate Standing Committee on Legal and Constitutional Affairs, *Proof Hansard,* 30 January 2007, p 17.
[xix] *Native Title Act 1993* s 123(1)(b). A mediation conference must be presided over by a member of the Tribunal: *Native Title Act 1993* s 136A(2).
[xx] G Hiley and K Levy, *Native Title Claims Resolution Review,* 31 March 2006, para 4.25.
[xxi] G Hiley and K Levy, *Native Title Claims Resolution Review,* 31 March 2006, paras 4.82-4.91, Recommendations 10, 11.
[xxii] See 'Case study: Research assistance for overlapping claims' in National Native Title Tribunal, *Annual Report 2005-2006,* p 53.

[xxiii] See National Native Title Tribunal, *Annual Report 2005-2006,* pp 13, 48-49, 63, 121-122; National Native Title Tribunal, *Talking Native Title,* issue 18 March 2006, pp 4-5.
[xxiv] National Native Title Tribunal, *Annual Report 2005-2006,* pp 119-120; National Native Title Tribunal, *Talking Native Title,* issue 19, June 2006, p 1.
[xxv] National Native Title Tribunal, *Annual Report 2004-2005*, pp 52, 53.
[xxvi] National; Native Title Tribunal, *Talking Native Title,* issue 19, June 2006, p 7; "Terramungamine Reserve Agreement, New South Wales" in National Native Title Tribunal, *Negotiating native title in local government,* October 2003.
[xxvii] National Native Title Tribunal, *Talking Native Title,* issue 17, December 2005, p 7.
[xxviii] Standing Committee on Constitutional and Legal Affairs, *Proof Hansard*, 30 January 2007, p 3.
[xxix] See National Native Title Tribunal, *Annual Report 2004-2005* p 9, *Annual Report 2005-2006* p 15.
[xxx] See case study in National Native Title Tribunal, *Annual Report 2004-2005* p 69, also p 65; *Talking Native Title*, Issue 13, December 2003, p 6.
[xxxi] National Native Title Tribunal, media releases 14 March 2004, 5 June 2004, at www.nntt.gov.au.
[xxxii] National Native Title Tribunal, media release and backgrounder, 17 February 2006; Western Yalanji People native title determination – what it means and how it will work (both available on www.nntt.gov.au) and *Talking Native Title*, Issue 18, March 2006, p 1.
[xxxiii] National Native Title Tribunal, *Annual Report 2004-2005,* p 61, *Annual Report 2003-2004*, p 64*; Talking Native Title*, Issue 13, December 2004, p 3.
[xxxiv] See case study in National Native Title Tribunal, *Annual Report 2005-2006*, p 68.
[xxxv] See case study in National Native Title Tribunal, *Annual Report 2005-2006,* p 60; *Talking Native Title*, Issue 16, September 2006.
[xxxvi] National Native Title Tribunal, *Annual Report 2001-2002*, p 48; *Talking Native Title*, Issue 1, December 2001, p 1, Issue 11, September 2003, p 6.
[xxxvii] National Native Title Tribunal, *Talking Native Title,* issue 20, September 2006, p 4.
[xxxviii] National Native Title Tribunal, *Annual Report 2004-2005* pp 10, 58, 59; National Native Title Tribunal, *Talking Native Title,* issue 15, June 2005, p 1.
[xxxix] National Native Title Tribunal, *Talking Native Title*, Issue 6, March 2003, p 1; *Annual Report 2002-2003*, pp 68, 70, 77.
[xl] See National Native Title Tribunal, *Negotiating native title in local government,* October 2003.
[xli] See National Native Title Tribunal, *Annual Report 2004-2005,* p 63; *Talking Native Title*, Issue 14, March 2005, p 1.
[xlii] National Native Title Tribunal, *Talking Native Title,* issue 17, December 2005, p 1.
[xliii] See National Native Title Tribunal, *Negotiating native title in local government*, October 2003; *Talking Native Title*, Issue 13, December 2004, p 5.
[xliv] See National Native Title Tribunal, *Negotiating native title in local government*, October 2003.
[xlv] See National Native Title Tribunal, *Annual Report 2003-2004,* pp 66, 111; *Annual Report 2004-2005,* p 113, *Annual Report 2005-2006,* p 100, also pp 58, 59, 62.
[xlvi] National Native Title Tribunal, *Annual Report 2005-2006,* p 100.
[xlvii] Each was measured against criteria for process, efficiency, empowerment, effectiveness, durability and relationships.
[xlviii] National Native Title Tribunal, *Annual Report 2005-2006,* pp 58-59, 62, 66, 100.
[xlix] Mr Chalk, a partner in Chalk and Fitzgerald Lawyers and Consultants appeared in a personal capacity as a lawyer who works in the area of native title.
[l] Mr Levy is the Principal Legal Officer of the Northern Land Council.
[li] Senate Standing Committee on Legal and Constitutional Affairs, *Proof Hansard,* 30 January 2007, p 3.
[lii] Senate Standing Committee on Legal and Constitutional Affairs, *Proof Hansard,* 30 January 2007, p 47.
[liii] Submission of the National Native Title Council p 8.
[liv] Senate Standing Committee on Legal and Constitutional Affairs, *Proof Hansard,* 30 January 2007, p 11.

[lv] *Native Title Act 1993* s 86C(5).
[lvi] *Native Title Act 1993* s 86C(3).
[lvii] *Native Title Act 1993* s 86C(4).
[lviii] Senate Standing Committee on Legal and Constitutional Affairs, *Proof Hansard,* 30 January 2007, p 11.
[lix] See transcript of Directions – Native Title Hearings 2007, 6 February 2007, p 2. It is apparent that the timing of the applications was influenced by the possible enactment of amendment to the Native Title Act, see Mr Levy at transcript pp 3-4, 11.
[lx] *Native Title Act 1993* Part 6 Division 5.
[lxi] *Native Title Act 1993* s 151.
[lxii] *Native Title Act 1993* s 156.
[lxiii] *Native Title Act 1993* s 156(2).
[lxiv] *Native Title Act 1993* s 176.
[lxv] *Native Title Act 1993* s 84(4)
[lxvi] (2003) 128 FCR 458, 198 ALR 303 at [28], [29], emphasis added.
[lxvii] Senate Standing Committee on Legal and Constitutional Affairs, Proof Hansard, 30 January 2007, p 47.
[lxviii] *Native Title Act 1993* ss 136A, 136E.
[lxix] G Hiley and K Levy, *Native Title Claims Resolution Review,* 31 March 2006, para 4.21.
[lxx] *Aboriginal Land Rights (Northern Territory) Act 1976.*
[lxxi] See e.g. *The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539 at [29].
[lxxii] *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31
[lxxiii] *Native Title Act 1993* s 13.
[lxxiv] Senate Standing Committee on Legal and Constitutional Affairs, *Proof Hansard,* 30 January 2007, p 47.
[lxxv] [2006] FCA 318, (2006) 152 FCR 150 (31 March 2006),
[lxxvi] The judgment has been appealed to the Full Federal Court.
[lxxvii] See e.g. the unsuccessful native title claim to land in Darwin *Risk v Northern Territory* [2006] FCA 404 (13 April 2006). The judgment in that case is on appeal to the Full Federal Court.
[lxxviii] Components that have been included in agreements to date have included grants of title to (or other interests in) parcels of land, roles in the management of areas such as conservation areas and national parks, financial assistance for cultural centres and other enterprises. For many specific examples see National Native Title Tribunal, *Annual Report 2003-2004,* pp 62-63.
[lxxix] *Native Title Act 1993* s 31.
[lxxx] *Native Title Act 1993* s 36(2).
[lxxxi] *Western Australia v Taylor* (1996) 134 FLR 211, at 225,
[lxxxii] The amendment was made by Act No 38 of 2005.
[lxxxiii] *Administrative Appeals Tribunal Act 1975* ss 34A(5), 34B(4).
[lxxxiv] *Civil Procedure Act 2005* (NSW) s 27.
[lxxxv] E.g. see K Kovach, 'Good Faith in Mediation – Requested, Recommended or Required? A New Ethic' (1997) 38 South Texas Law Review 557.
[lxxxvi] Submission of the National Native Title Council, p 9.
[lxxxvii] G Hiley and K Levy, *Native Title Claims Resolution Review,* 31 March 2006, para 6.47.
[lxxxviii] Senate Standing Committee on Legal and Constitutional Affairs, *Proof Hansard,* 30 January 2007, p 3.
[lxxxix] See the suggestion of Mr Chalk, Senate Standing Committee on Legal and Constitutional Affairs, *Proof Hansard,* 30 January 2007, p 8.