CHAPTER 3

KEY ISSUES

3.1 Most evidence received by the committee expressed in-principle support for the general direction of the Bill. However, concerns were raised in relation to the following matters, which are discussed in turn below:

- internal review of registration decisions (proposed sections 190E and 190F);
- amendments relating to PBCs (Schedule 3);
- defects in authorisation processes;
- determinations for part of an area (section 87A);
- alternative state regimes; and
- other issues.

Internal review of registration decisions (proposed sections 190E and 190F)

3.2 Item 107 of Schedule 1 would provide for internal review of registration decisions by the Native Title Registrar (or his or her delegate) in addition to the existing provision for review by the Federal Court. In particular, proposed section 190E provides that where a claim is not accepted for registration under section 190A, the applicant may apply to the Registrar to reconsider the claim.

3.3 The National Native Title Tribunal (NNTT) submitted that a Member of the Tribunal, rather than the Registrar, should conduct a reconsideration under proposed section 190E. The NNTT explained:

> …the ramifications of not being accepted for registration are now potentially greater than they were prior to the amendment of s. 190D by the *Native Title Amendment Act 2007*. Not being accepted for registration because of a failure to meet one or more of the merit conditions of the registration test may lead to dismissal of the application by the Federal Court pursuant to ss. 190D(6) and (7) of the *Native Title Act 1993*.[1]

3.4 The NNTT stated that:

> Having the reconsideration under s. 190E conducted by a Member would ensure that the reconsideration is undertaken by a statutory office holder who is independent of the Registrar and could give the applicant greater confidence that the application was considered afresh without regard to the previous decision.[2]

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1 *Submission 4*, p. 1.

2 *Submission 4*, p. 1.

3.5 In evidence to the committee the Registrar explained further:

> As a matter of practice, most of my delegates are located in one office. They are in Sydney. We are not a large organisation. We only have 230 full-time equivalent employees, unlike Centrelink or Immigration, where you can have internal review officers in other parts of the organisation because the volume of matters being reviewed is far greater. We do not have the huge office and employee infrastructure to do that...The advantages of that are that you get a collegiate atmosphere, and given this is a particular area—a peculiar area of the law, in a sense—you get a common understanding developing over time amongst those people who have the job of carrying out the registration test.[3]

3.6 Mr Martin Dore of the North Queensland Land Council supported the proposal for internal review of registration test decisions and the NNTT's submission that reviews should be conducted by a member:

> I would support that, as long as the member had a legal background. The registration test has turned out to be—due to various court decisions and interpretations of the tribunal delegates themselves—highly technical, highly legalised and, unfortunately in my opinion, far from what it set out to be originally.[4]

3.7 In its submission, the National Native Title Council (NNTC), while noting its opposition to the dismissal of claims that do not pass the registration test,[5] pointed out that section 190F 'does not clearly indicate that applicants can first seek internal reconsideration of a registration decision and then, if not satisfied, apply to the Federal Court for formal review'. The NNTC concluded that this proposed provision should be clarified.[6]

3.8 The Carpentaria Land Council similarly observed that proposed sections 190E and 190F need to be clarified. For example, the Carpentaria Land Council pointed out that 'there is nothing to stipulate that an application cannot be made to the Federal Court while an application is also with the Native Title Registrar'.[7] The Carpentaria Land Council further suggested that:

> It would be helpful if wording was inserted either in s 190E or in a note under that section referring to s 24FE(b)(ii). This is important to alert practitioners that for s 24FA protection to occur, reconsideration of an

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3 *Committee Hansard*, 2 May 2007, p. 14.

4 *Committee Hansard*, 2 May 2007, p. 2.

5 This issue was raised in the committee's inquiry into the provisions of the Native Title Amendment Bill 2006. See also Mr Martin Dore, North Queensland Land Council, *Committee Hansard*, 2 May 2007, p. 2.

6 *Submission 5*, p. 3.

7 *Submission 7*, pp 4-5.

> adverse registration test decision must be applied for within 28 days of the s 190D(1) notice.[8]

Department response

3.9 On the issue of whether reconsideration of registration decisions should be conducted by the Registrar or a Member of the NNTT, a representative of the Attorney-General's Department noted that the Department was still considering the issue, but was inclined to the view that the Registrar and his delegates should carry out reviews given their considerable experience in dealing with registration decisions.[9] The Department further explained:

> Other measures in the bill also seek to maintain a separation between members and the information that is held by the tribunal in relation to its various functions and the information that can be passed to members in the claims resolution or mediation function. So we think, consistent with that, there are some sound reasons to keep the members primarily involved in the mediation function rather than in the administrative functions…that the registrar carries out.[10]

3.10 The Attorney-General's Department also submitted that the interaction between proposed sections 190E and 190F was clear:

> We think that the provisions are sufficiently clear: a party has the choice of seeking internal review by the registrar or of going directly to the court. If a party does seek internal review by the registrar, it can then go to the court if it chooses. So there are two paths, and we believe that that is sufficiently clear. But, of course, if the committee is of the view that it is not sufficiently clear then we can consider whether a note should be inserted in the legislation.[11]

Amendments relating to PBCs (Schedule 3)

Fees for services

3.11 Several submissions commented on proposed sections 60AB and 60AC which deal with fees for services provided by PBCs, and the giving of opinions about those fees by the Registrar of Aboriginal Corporations (see item 7, Schedule 3).

3.12 The NNTC regarded the proposal for a fee regime for PBCs as 'discriminatory' and 'uncertain'.[12] The NNTC submitted that PBCs can already charge

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8 *Submission 7*, p. 4. Note that the Carpentaria Land Council also raised objections to the dismissal of claims on the basis that they have not passed the registration test.

9 *Committee Hansard*, 2 May 2007, pp 25-26.

10 *Committee Hansard*, 2 May 2007, p. 26.

11 *Committee Hansard*, 2 May 2007, pp 21-22.

12 *Submission 5*, p. 5.

fees for services which they provide, just as any other incorporated body can. The NNTC therefore argued that the proposed fee regime in reality therefore only restricts the ability of PBCs to charge fees, rather than enabling them to do so.[13] Similarly, the North Queensland Land Council gave evidence that:

> [PBCs] are registered corporations and there is no reason, in my opinion, why they cannot charge for their services now. To impose a statutory regime, in fact, controls and constricts them rather than gives them some freedom to act.[14]

3.13 However, it is noted that the PBC Report explained that:

> Under the existing legislative regime, PBCs are not able to seek reimbursement from or charge third parties for costs and disbursements expended or incurred (or estimated to be expended or incurred) by the PBC in performing its functions under the NTA [Native Title Act] or the PBC Regulations. Essentially, this is because a fee may only be charged for the performance of a statutory duty or function if the statute provides for such a charge either expressly or by necessary implication. While this would probably not prevent the PBC from applying moneys obtained through an agreement to offset its negotiation costs, it would be preferable to provide clear authority for PBCs to recover the costs incurred in performing its functions.[15]

3.14 The NNTC further objected to what it described as 'intrusive' provisions enabling the Registrar of Aboriginal and Torres Strait Islander Corporations to give binding opinions on whether fees are or are not payable in any given situation.[16]

3.15 The Minerals Council of Australia (the Minerals Council) recognised the need for adequate resourcing and funding of PBCs. It also supported the 'Bill's formalisation of existing practice where industry pays additional commercial costs associated with specific [PBC] activities.'[17] However, the Minerals Council strongly opposed the ability of PBCs to charge a fee for fulfilling their core statutory responsibilities. The Minerals Council argued that funding for these core statutory functions should be provided by government. It therefore recommended that proposed section 60AB be amended so that a PBC may only charge a fee for additional costs incurred directly in relation to specific commercial negotiation. The Minerals Council further recommended the deletion of subsection 60AB(2) (which allows regulations to provide for a PBC to charge certain persons a fee for costs incurred in performing other functions specified in the regulations).[18]

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13 *Submission 5*, p. 5.

14 Mr Martin Dore, *Committee Hansard*, 2 May 2007, p. 4.

15 PBC Report, p. 25.

16 *Submission 5*, p. 5.

17 *Submission 8*, p. 3.

18 *Submission 8*, p. 3.

3.16 Ergon Energy agreed with the 'thrust of this amendment' noting that:

> Usually, a native title agreement (including an ILUA) is sought by a person (other than in a claims resolution context), for a purpose which relates to advancing the interests of that person (for example a new mine, land development project etc). In those circumstances, where a Registered Native Title Body Corporate ("RNTBC") is asked to expend its time and resources on negotiating an agreement to enable the project or activity to proceed, it is reasonable that the RNTBC's costs be recovered from the person seeking the benefit.[19]

3.17 However, Ergon Energy suggested that the same rationale does not apply where the person is seeking a native title agreement for the purposes of providing a benefit solely or primarily to the PBC (or the native title holders which the PBC represents). Ergon Energy stated that an example of this would be where a native title agreement was required in order to construct a remote area power station which would provide electricity primarily to the native title holders. Ergon Energy therefore proposed that an additional exemption be included in proposed section 60AB to cover these circumstances.[20]

Department response

3.18 A representative of the Department of Families, Community Services and Indigenous Affairs (FaCSIA) explained that the purpose of these amendments was to ensure PBCs had the power to charge a fee for the performance of their statutory functions:

> It has been put to you that PBCs are no different from any other incorporated body, they should be able to charge essentially whatever the market can bear and there is no need for any form of legislation in this area. I respectfully disagree, because it would appear to us [that] PBCs, where they are performing a statutory function, may lack the legal power to do so. It is accepted as a matter of law that a fee can only be charged for the performance of a statutory duty or function if the statute provides for such a charge, either expressly or by necessary implication.[21]

3.19 FaCSIA also advised:

> There may be some confusion about the non-statutory costs of the PBCs, which have been an issue that I know the Minerals Council has made a submission to this committee about before. The government is addressing that by agreeing that it will be considering funding for the operational costs of PBCs on a case-by-case basis in the future. As a result of the combination of clarifying that the PBCs have the power [to] charge for their

19 *Submission 3*, p. 3.

20 *Submission 3*, p. 4; see also Mr Neil Webley, Ergon Energy, *Committee Hansard*, 2 May 2007, pp 7-8.

21 *Committee Hansard*, 2 May 2007, p. 16.

> statutory functions and of a change in policy in relation to the operational costs of the PBCs and other changes which arose out of the PBC report…it will now be on a much clearer, firmer footing than has been the case.[22]

3.20 In relation to the proposal from Ergon Energy for an exemption preventing a PBC from charging a fee where the sole or primary beneficiary of the agreement is the native title holders, a representative from FaCSIA noted:

> ... if it is a proposal that is to the benefit of the native title holders clearly it is something that native title holders can themselves take into account as to whether they charge any fee at all, and it may not be appropriate to put in place a legislative ouster.[23]

Default PBCs

3.21 The Human Rights and Equal Opportunity Commission (HREOC) was concerned about two aspects of the amendments relating to default PBCs.[24] Its first concern related to the proposed provisions allowing regulations to prescribe not only the kinds of body corporate that may be determined as a trust PBC or an agent PBC, but also the actual body corporate that will be the trust or agent PBC (items 1, 2, 5 and 6 of Schedule 3).[25]

3.22 In particular, HREOC objected to the notion that regulations might be used to 'dictate' to native title holders the body that will hold their native title and/or act as their exclusive agent in relation to the protection and management of their native title. HREOC described this as a 'radical shift' in the current legislative policy, because the choice of body would not be made by the Court (having regard to the wishes of the native title holders), but by the regulations. HREOC also observed that there had not been any consultation on this proposal with native title holders, claimants or representative bodies.[26]

3.23 HREOC's second major concern was that items 1, 2 and 6 of Schedule 3 authorise regulations allowing another person or body, instead of the Federal Court, to determine the PBC that will replace the PBC originally determined by the Court. HREOC argued that 'this is another radical departure from the existing legal policy by which the determination of the trust or agent PBC is exclusively within the jurisdiction of the Court'. HREOC further expressed its view that:

> The Court is the appropriate body to determine which body corporate will hold the native title and/or perform the agency functions in relation to the

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22 *Committee Hansard*, 2 May 2007, p. 19.

23 *Committee Hansard*, 2 May 2007, p. 16; see also Mr Martin Dore, North Queensland Land Council, *Committee Hansard*, 2 May 2007, p. 4.

24 See discussion in Chapter 2 of this report.

25 *Submission 10*, pp 8-9.

26 *Submission 10*, p. 9.

> native title. It is not appropriate that power to re-determine that body corporate be potentially vested in a Commonwealth (or State or Territory) public servant. This is particularly so where that public servant could be determining a request by the native title holders to "transfer out" of a Commonwealth sponsored prescribed default PBC.[27]

3.24 HREOC therefore recommended that items 1, 2 and 6 of Schedule 3 not be enacted to the extent that they authorise regulations:

- to prescribe the particular body corporate that may be determined as a PBC; or
- that would allow a person or body other than the Court to determine a PBC.[28]

3.25 The NNTC suggested in relation to the appointment of default PBCs that proposed subsection 59(1) should restrict the regulation-making power by stating that bodies that may be PBCs must not be bodies that have members who are not Indigenous.[29]

Department response

3.26 A representative of FaCSIA advised that the Australian Government's intention was that the Court would continue to determine PBCs:

> Practically speaking…we cannot currently foresee circumstances in which a body other than a court might determine the body. But we thought it useful to put a little bit of scope in this regulation-making power, in case that should prove necessary.[30]

Defects in authorisation processes

3.27 The NNTC and Carpentaria Land Council raised concerns with the proposed amendments relating to authorisation processes for native title applications.[31]

3.28 More specifically, the NNTC opposed the amendments contained in items 72 and 76 of Schedule 1 of the Bill. Item 72 amends section 62 of the Native Title Act. It would require the applicant to include a statement (in the affidavit accompanying the application) setting out details of the decision-making process which authorised the applicant to make the claimant application.[32] Item 76 would make a similar amendment to the requirements for making a compensation application.

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27 *Submission 10*, p. 11.

28 *Submission 10*, pp 10-11.

29 *Submission 5*, pp 4-5.

30 *Committee Hansard*, 2 May 2007, p. 25.

31 See also National Indigenous Council, *Submission 2*, pp 1-2.

32 This includes indicating whether the decision-making process complied with section 251A or 251B of the Native Title Act: see EM, p. 42. Note that the EM refers to paragraphs 251(a) and 251(b). The committee presumes this should refer to sections 251A and 251B.

3.29 The NNTC felt that these amendments were 'unnecessary' and would 'only add yet another layer of complexity for native title claimants to an already legally complex process'. The NNTC argued that:

> Clarification of authorisation is already provided for in s190C of the NTA [Native Title Act] through the certification process or through proof of authorisation. Schedule R of the current application form ("Form 1") already requires that proof of authorisation be comprehensively set out.[33]

3.30 Mr Martin Dore of the North Queensland Land Council gave evidence of the practical difficulties associated with applicants being required to provide evidence of authorisation:

> Sometimes that information is best put by someone other than the applicants. An example might be that someone is appointed to be one of the applicants by being nominated for authorisation at a meeting out of respect for their position as a senior elder in the group who may not even be at the meeting but who may have previously indicated their consent to so act. For them to then have to swear an affidavit about matters that they have no direct knowledge of seems somewhat contradictory.[34]

3.31 However, the Registrar of the NNTT noted that if the new provision was complied with it would reduce the work of the NNTT in applying the registration test:

> One of the issues that my delegates have to deal with, particularly around authorised applications, is having to sort of peer below the meniscus layer of the application to see what is going on around the claimant group and around the processes of authorisation…
>
> Sometimes we have insufficient information, and we proceed on the basis that we do have some duty to inquire, and we go back to applicants and their representatives and say, 'It is not quite clear what was going on at that authorisation meeting; can you provide some further details?' I have to say that some of the affidavits that come in are very sparing in describing what has been going on in authorisation and the arrangements that were being made, and I think it is fair to say that, historically, information has, in some instances, been light on.[35]

3.32 The NNTC supported aspects of item 88, which would insert proposed section 84D into the Native Title Act. Proposed section 84D seeks to clarify the powers of the Federal Court in relation to authorisation issues. The NNTC supported allowing the Court to hear and determine an application despite a defect in authorisation. However, the NNTC argued that proposed paragraphs 84D(2)(b) and (c), which would allow applications for the production of evidence to be made by any party to the proceeding, or any member of the claim or compensation group, could be open to abuse. The

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33 *Submission 5*, pp 1-2.

34 *Committee Hansard*, 2 May 2007, p. 3.

35 *Committee Hansard*, 2 May 2007, p. 13.

NNTC therefore suggested that the proposed provision require the application for production of evidence of authorisation to show cause to the Court why such an order should be made.[36]

3.33 The Carpentaria Land Council commented that the proposed section 84D provides 'some clarity regarding situations where there are questions surrounding the authorisation of applications'. However, it considered that the proposed section should more specifically address situations where a defective authorisation may be rectified and how this could occur, rather than leaving it entirely to the Court to determine.[37]

Determinations for part of an area: section 87A

3.34 A number of submissions also discussed the proposed amendments to section 87A, contained in item 91 of Schedule 1. Section 87A enables the Court to make a determination over part of a claim area where some, but not all, parties agree to the determination. Section 87A requires the consent of certain parties to the proceeding, including each person who holds a *registered proprietary interest* in the determination area.

3.35 During the committee's inquiry into the Native Title Amendment Bill 2006, concerns were expressed that this provision may exclude persons with significant interests in the determination area, such as owners of infrastructure installed under statutory powers. This would include the owners of telecommunications networks, and electricity and gas distribution systems. Recommendation 9 of the committee's report on that bill therefore recommended that the Australian Government consider amendments to section 87A in the technical amendments to the Native Title Act.[38] Item 91 proposes to repeal and replace subparagraph 87A(1)(c)(v) in response to these concerns.

3.36 In particular, proposed subparagraph 87A(1)(c)(v) would provide that each person who:

(a) holds an interest (*rather than a registered proprietary interest*) in relation to land or waters in any part of the determination area at the time the agreement is made; and

(b) is a party to the proceedings,

must consent before a determination may be made under section 87A.

3.37 The term 'interest, in relation to land or waters' is defined in section 253 of the Native Title Act. According to the Explanatory Memorandum, most parties to the

36 *Submission 5*, p. 3.

37 *Submission 7*, pp 3-4.

38 See Senate Legal and Constitutional Affairs Committee, *Report on the Native Title Amendment Bill 2006 [Provisions]*, February 2007, pp 51-52, 56.

proceeding holding an interest that falls within the determination area will be required to consent to a determination under section 87A as amended.[39]

3.38 Ergon Energy agreed with the proposed amendments to section 87A, but suggested that the amendments could go further. Ergon Energy was concerned that the definition of 'interest in relation to land or waters' in section 253 would not be sufficient to cover its interest in inherited electricity infrastructure where the original legal or statutory basis for the installation of that infrastructure is unclear.[40]

3.39 Ergon Energy suggested that this uncertainty could be addressed by widening the definition of 'interests in relation to land or waters' in section 253 to include 'a legal or equitable interest in, or right to operate, any infrastructure facility on the land or waters.'[41]

3.40 By contrast, the NNTC felt that the original version of 87A contained in the Native Title Amendment Bill 2006 was 'adequate and appropriate'. The NNTC expressed its view that the existing definition of 'interest' in section 253 is 'so wide as to potentially frustrate parties with a real (as opposed to a merely theoretical) interest from being able to negotiate a sensible consent determination'.[42] The NNTC therefore proposed that:

> …in order to balance the considerations, the proposed section could be amended to vest in the Federal Court a discretion in terms that it could require that consent is required from a party holding an interest in the land or waters where the Court is satisfied that the party's interest is likely to be affected by the proposed agreement.[43]

3.41 Similarly, the Minerals Council opposed the proposed amendment to section 87A, recommending that the requirement for a registered proprietary interest should remain. In fact, the Minerals Council considered that the proposed amendment is 'both unnecessary and potentially destabilising'.[44] The Minerals Council argued that the amendment:

- removes the existing registration test applied to ensure that parties to a consent determination process have genuine and specific interests that will be

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39 However, persons with an interest in relation to an area of the claim outside the determination area and persons with an interest in the determination area that is not an interest *in relation to land or waters* (such as persons who only have rights of access held by all members of the public) will not be required to agree to the determination being made: EM, p. 53.

40 *Committee Hansard*, 2 May 2007, p. 7.

41 *Submission 3*, p. 2; *Committee Hansard*, 2 May 2007, p. 7.

42 *Submission 5*, p. 3; see also Mr Martin Dore, North Queensland Land Council, *Committee Hansard*, 2 May 2007, pp 3-4.

43 *Submission 5*, p. 3.

44 *Submission 8*, p. 2.

impacted on by the determination process, beyond the general rights and interests of all Australians; and

- enables parties, who are not a registered interest, to come late into the consent determination process, which has the potential to derail negotiations and delay outcomes of negotiations which may have already substantially progressed.[45]

Department response

3.42 A representative of the Attorney-General's Department explained the competing interests the proposed amendment of section 87A was seeking to balance:

> Certainly, the intention of the reforms generally is to seek to expedite the way in which the native title processes can operate. It was certainly desirable to ensure that only parties who have real and significant interests should be required to consent, with the safeguards that all other parties still have the entitlement to object to the process and the court still has to decide whether it is willing to make the determination notwithstanding the objections that might be made. [46]

3.43 The Department also submitted:

> At this stage we do not see a need to make a specific exemption for infrastructure. We think that the sort of interests that Ergon is talking about would be covered. I also note that they have some questions about tenure in any event. Providing there was sufficient government executive power at the time to carry out the relevant act, we think there that would be sufficient to bring it within legal interest.[47]

Alternative state regimes

3.44 HREOC also raised concerns in relation to items 62 and 63 of Schedule 1, which seek to clarify the scope of alternative state regimes under section 43 of the Native Title Act.[48] The Explanatory Memorandum explains that section 43:

> …enables a State or Territory to establish right to negotiate procedures which operate to the exclusion of the provisions in the Native Title Act where the Commonwealth Minister is satisfied the alternative provisions meet statutory criteria set out in subsection 43(2). The key amendments put beyond doubt the validity of the current South Australian section 43 determinations in relation to mining and opal mining (made in 1995 and 1997 respectively) which had the effect of replacing the Native Title Act

45 *Submission 8*, p. 2.

46 *Committee Hansard*, 2 May 2007, p. 19.

47 *Committee Hansard*, 2 May 2007, pp 19-20.

48 *Submission 10*, pp 5-6.

> right to negotiate provisions with a right to negotiate regime under South Australian legislation.[49]

3.45 However, HREOC argued that items 62 and 63 'cannot be called technical amendments'. HREOC was concerned 'at the proposed inclusion of provisions to retrospectively validate actions done in contravention of the provisions of the Act.'[50] In particular, HREOC noted that:

> The reasoning for the adjustment being made does not indicate that there is any confusion over the scope of a permissible alternative State regime. It is purely to address the operation of an alternative State regime that was unlawfully made.[51]

3.46 HREOC suggested that such retrospective validation of invalidly done future acts has undermined Indigenous confidence in the Native Title Act in the past. HREOC therefore urged the committee to recommend that the relevant items not be enacted, or at the very least, that any amendments should be as narrow as possible in scope, and should follow extensive consultation with affected Indigenous peoples.[52]

Other issues

Order dismissing an application relating to a future act: section 94C

3.47 The NNTT raised an issue in relation to section 94C of the Native Title Act.[53] Section 94C requires the Federal Court to dismiss certain claimant applications that are deemed to be in response to a future act notice where the relevant future act has been finalised. Under paragraphs 94C(1)(b) and (c), the application must have been made and registered within a certain timeframe measured in relation to the 'notification day' specified in the future act notice.

3.48 However, the NNTT explained, that prior to 30 September 1998, future act notices did not contain a notification day. The NNTT was therefore concerned no application made before that date would be covered by section 94C. The NNTT also pointed out that future act notices under alternate provisions applying in South Australia do not contain a notification day. Again, the NNTT was concerned that applications lodged in response to those notices would not be covered by section 94C. The NNTT argued that the policy intention behind section 94C was that applications made in response to these future act notices should be covered by section 94C.[54]

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49 EM, p. 36.

50 *Submission 10*, p. 5.

51 *Submission 10*, p. 5.

52 *Submission 10*, p. 6.

53 Note that section 94C was inserted by the Native Title Amendment Act 2007 and is not being amended by this Bill.

54 *Submission 4*, p. 2.

3.49 The NNTT proposed that this 'defect' could be remedied by amending section 94C to cover applications lodged in response to:

- future act notices given before 30 September 1998 and registered within two months of when the notice was given; or
- a South Australian future act notice and registered within two months of when that notice was given,

where the relevant future act is now finalised.[55]

Department response

3.50 The Attorney-General's Department noted that the number of applications excluded by the drafting of section 94C was greater than initially thought and that, as a result, the government is considering whether amendments to the Bill may be required.[56]

Low impact future acts: section 24LA

3.51 Both the NSW Government and the Local Government Association of Queensland (LGAQ) pointed out that a proposal to amend section 24LA of the Native Title Act was included in the second discussion paper released by the Attorney-General's Department, but has not been included in the Bill.[57]

3.52 Section 24LA currently permits certain future acts which have a minimal effect on native title to be done without the need to comply with any procedural requirements. For example, subsection 24LA(2) allows excavation or clearing undertaken for the protection of public health or safety, or for environmental protection, to be carried out as a low impact future act. However, such acts may not be carried under this provision after a determination native title exists over the land.[58]

3.53 The second discussion paper released by the Attorney-General's Department contained a proposal to amend section 24LA to cover acts carried out after a native title determination has been made and, in particular:

> …to allow such acts to be carried out by or on behalf of Government authorities for reasons of public health or safety or environmental

55 *Submission 4*, p. 2; see also President, National Native Title Tribunal, *Committee Hansard*, 2 May 2007, pp 11 and 12.

56 *Committee Hansard*, 2 May 2007, p. 18.

57 LGAQ, *Submission 1*, p. 1; NSW Government, *Submission* 9, p. 3; see also paragraphs 30 and 31 of the second discussion paper: Attorney-General's Department and FaCSIA, *Submission 6*, Attachment C.

58 Attorney-General's Department and FaCSIA, *Submission 6*, Attachment C, paragraph 30.

> protection, but only in circumstances where the determined native title holders do not have exclusive rights over the relevant land.[59]

3.54 Both the New South Wales Government and LGAQ suggested that this amendment should be re-considered for inclusion in the Bill.[60] In particular, the LGAQ submitted that, if the proposed amendment is not made, local councils will have to either:

- enter into negotiations with each claimant group in its local government area with a view to reaching an Indigenous Land Use Agreement; or
- issue notices to native title holders at least 28 days prior to undertaking any 'low impact' work regardless of public health and safety issues.[61]

3.55 LGAQ argued that 'either option represents a significant outlay of resources, significant loss of productive time, and an onerous administrative burden'.[62]

Department response

3.56 The committee received evidence regarding consultation the Attorney-General's Department had conducted in relation to the proposal to amend section 24LA:

> We thought that it seemed like a sensible proposal, and that is why we initially floated it for consultation. We had some very strong responses to that from a range of parties—both stakeholders on the native title representative side as well as the Law Council...When we inquired further about that proposal with the Local Government Association of Queensland, they indicated that there had in fact been no practical problems with the way in which these provisions currently operate. It was simply a theoretical problem that they were concerned about. Given the very strong concerns that had been raised, it did not seem appropriate to seek to move this amendment forward to address what was only a theoretical problem where no practical issues had arisen to date.[63]

Replacement and removal of applicants: section 66B

3.57 Item 82 of Schedule 1 proposes to amend section 66B of the Native Title Act to 'streamline the process for replacing the native title applicant in claims'.[64]

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59 *Submission 6*, Attachment C, paragraph 31.

60 LGAQ, *Submission 1*, p. 1; NSW Government, *Submission 9*, p. 3.

61 *Submission 1*, p. 2.

62 *Submission 1*, p. 2 cf Mr Martin Dore, North Queensland Land Council, *Committee Hansard*, 2 May 2007, p. 4.

63 *Committee Hansard*, 2 May 2007, p. 19.

64 EM, p. 6.

3.58 However, the Carpentaria Land Council expressed the view that the proposed amendments to section 66B would not improve the process for any of the parties involved:

> ….to replace applicants under s 66B an authorisation meeting is generally required. The costs in terms of money, staff and other resources to NTRBs for authorisation meetings are usually high and therefore unlikely to occur in such circumstances…Therefore, the practical consequences of the amended s 66B will be the same as they are now, that those who no longer wish to be applicants will be applicants in name only and deceased and incapacitated applicant's names will also still remain on the register.[65]

3.59 Carpentaria Land Council suggested that the removal of applicants who consent to their removal, or who are deceased or incapacitated, should be dealt with separately to section 66B:

> The process in these two cases (where an applicant consents to their removal and where an applicant is deceased or incapacitated) should and could be as simple as filing an application (Notice of Motion) in the Court along with a supporting affidavit from an applicant who no longer wishes to retain that role and a supporting affidavit from a legal representative or applicant attaching a death certificate or medical certificate to remove a deceased or incapacitated applicant.[66]

3.60 The NNTC was concerned that the proposed amendments to section 66B only referred to the *replacement* of applicants on claimant applications, and did not clearly cover the *removal* of the name of a deceased applicant. The NNTC therefore suggested clarifications to the proposed amendments to subsection 66B(1) to ensure that it covers the removal of the name of a deceased applicant, not just the replacement of such applicants.[67]

Multiple future act notices

3.61 Item 56 of Schedule 1 would amend subsection 29(8) of the Native Title Act, which relates to notification of multiple future acts in the same notice. The Explanatory Memorandum states:

> Existing subsection 29(8) enables the Government party to give notice to the public of two or more acts to which Subdivision P applies in the same notice. There is no equivalent provision to enable notice to be given of two or more acts to specific persons. The requirement to give individual notices in relation to each future act is inefficient. Item 56 would insert proposed subsection 29(8) which would provide that the Commonwealth Minister may determine the circumstances and manner in which persons under

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65 *Submission 7*, p. 2.

66 *Submission 7*, p. 3; see also Mr Martin Dore, North Queensland Land Council, *Committee Hansard*, 2 May 2007, p. 4.

67 *Submission 5*, p. 2: see item 82, Schedule 1.

subsection 29(2) may be given notice of two or more acts in the same notice. This determination would be a legislative instrument.[68]

3.62 HREOC expressed concern that such notices could be issued in a manner that:

(a) required native title holders and their representative bodies to wade through many notifications that were irrelevant to them; and

(b) would make it more likely that important notifications will slip through the cracks.[69]

3.63 For example, HREOC told the committee that 'at least one State has to date commonly given blanket notification to representative bodies of hundreds of licences at the one time'. HREOC suggested that this amendment:

> …could be easily improved by placing conditions or restrictions on the use of s.29 notices that notify more than one proposed future act. The provision as drafted could be modified so that a s.29 notice may only contain notice of more than one Subdivision P future act if each of the future acts notified affects land claimed by the one native title claim group, or, at the least, land within the one representative body area.[70]

Department response

3.64 A representative of the Attorney-General's Department advised the committee that the government intended to set out the requirements for future act notifications in the determination made under proposed subsection 29(8):

> The bill envisages that there will be a notices determination made by the Attorney and that determination will cover the conditions that should be imposed on future act notices, in particular, ensuring that there is a reasonable provision in the way in which such notifications are given to enable a PBC or NTRB to reasonably readily determine what the pieces of land are that are going to be affected.[71]

Other issues

3.65 The NNTC also raised a number of other issues. For example, it:

- opposed the proposal to validate automatic weather stations as a facility for service to the public on the basis that this would be a 'further incursion into native title rights and interests';[72]

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68 EM, p. 33.

69 *Submission 10*, p. 4.

70 *Submission 10*, p. 4.

71 *Committee Hansard*, 2 May 2007, p. 26.

72 *Submission 5*, p. 1: see proposed paragraph 24KA(2)(la) – Item 34 of Schedule 1.

- supported the proposal to allow respondent parties to withdraw without leave at any time prior to the commencement of a substantive hearing. However, it suggested that any party (including other respondents) should be able to seek costs upon the withdrawal, and that a like right to withdraw should be accorded to applicants;[73] and
- noted that proposals referred to in the second discussion paper (paras 16-20) to provide for amendments of ILUAs were not included in the Bill.[74]

3.66 The Carpentaria Land Council welcomed the amendment to encourage the Native Title Registrar to apply the registration test in a timely manner. At the same time, it suggested that the wording requiring the Registrar to use his or her 'best endeavours' to finish considering a claim was too weak. However, it is noted that this wording reflects the wording of the existing section 190A.[75]

3.67 Finally, a number of drafting errors in the Bill were identified during the committee's inquiry.[76] A representative of the Attorney-General's Department advised that the government was addressing these errors.[77]

Committee view

3.68 The committee is pleased to note that the proposed amendments in the Bill have been the subject of extensive consultation and, in particular, that FaCSIA and the Attorney-General's Department have made adjustments to the proposals now embodied in the Bill in response to feedback from stakeholders.[78]

3.69 The committee also acknowledges that the proposed amendment of section 87A, which provides for consent determinations over part of a claim area, seeks to address recommendation 9 of its report regarding the Native Title Amendment Bill 2006.[79] The committee received conflicting evidence in relation to this amendment. Some parties suggested that the amendment to broaden the range of parties who must consent to a determination, to include those who hold unregistered or non-proprietary interests in relation to land and waters, would not capture all significant interest holders. Other parties considered that the amendments went too far. The NNTC suggested that section 87A should require consent from parties with an interest in relation to land and waters where the Court is satisfied that the party's interest is likely

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73 *Submission 5*, p. 2: see proposed subsection 84(6A) – Item 87 of Schedule 1.

74 *Submission 5*, p. 4; see also NSW Government, *Submission 9*, pp 2-3.

75 *Submission 7*, p. 4.

76 See for example, HREOC, *Submission 10*, p. 7; and also paragraph 4(b) of Item 138 of Schedule 1.

77 *Committee Hansard*, 2 May 2007, pp 18 and 20.

78 See *Committee Hansard*, 2 May 2007, pp 18 and 22.

79 See Senate Legal and Constitutional Affairs Committee, *Report on the Native Title Amendment Bill 2006 [Provisions]*, February 2007, pp 51-52, 56.

to be affected by the proposed agreement.[80] In the view of the committee, this proposal strikes an appropriate balance between the need to efficiently resolve native title matters and the need to protect those with substantive interests in the claim area.

3.70 The committee heard a variety of views on the issue of whether reviews of the decision of the Native Title Registrar not to register a claim should be carried out by the Registrar and his delegates or by a Member of the NNTT. The committee considers that it would be more appropriate for reconsideration of registration decisions under proposed section 190E to be conducted by a Member of the NNTT. In particular, the committee accepts that applicants would have greater confidence in the independence of the review if it were conducted by a Member.

3.71 The committee considers that there is some ambiguity in the interaction between proposed sections 190E and 190F. It does appear that the provisions would currently permit an applicant to apply to the Court for review of the Registrar's decision not to accept a claim while the NNTT was conducting an internal review of that decision under proposed section 190E. The committee recommends that the provisions be amended to ensure that review by the NNTT does not occur in parallel with an application to the Court.

3.72 The committee accepts evidence from FaCSIA that the amendments in relation to the charging of fees by PBCs for the performance of their statutory functions are necessary in order to regularise the existing practice of parties negotiating with PBCs. In its report on the Native Title Amendment Bill 2006, the committee recommended that the Australian Government finalise and implement proposed funding arrangements for PBCs as a high priority.[81] The committee welcomes advice that the Australian Government is currently preparing guidelines for funding of the operational costs of PBCs in certain circumstances.

3.73 The NNTC suggested that the regulation-making power in proposed subsection 59(1) should be limited to ensure that non-Indigenous people cannot be members of PBCs. The committee considers that the issue of the appropriate membership of a PBC is best left to the native title holders. In particular, it is possible that native title holders may wish to accord non-voting membership to non-Indigenous spouses or advisors.

3.74 It was clear from evidence to the committee that there is a need to establish a mechanism providing for a default PBC where the native title holders fail to nominate a PBC or a PBC is wound up. FaCSIA advised the committee that the intention of the government is that regulations providing for the determination of a default PBC would designate the Federal Court as the body responsible for determining the PBC. The committee is strongly of the view that the Court is the appropriate body to determine

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80 *Submission 5*, p.3.

81 See Senate Legal and Constitutional Affairs Committee, *Report on the Native Title Amendment Bill 2006 [Provisions]*, February 2007, pp 35-36, 51.

PBCs and accepts this assurance that the government intends to provide for the Court to determine PBCs under the regulations. While the committee is mindful of concerns that the native title holders should not be dictated to in relation to the legal entity which represents their native title interests, it seems appropriate to make provision for the determination of a replacement body in the narrow circumstances envisaged. Furthermore, the initiatives to address the funding needs of PBCs should ensure the sustainability of PBCs and reduce the need for recourse to these provisions.

3.75 Evidence to the committee suggested that the proposed process for the removal of applicants who consent to removal, or who are deceased or incapacitated, could be further simplified. In the committee's view, there is some merit in the suggestion that the Native Title Act should separately provide for the removal of an applicant where there is no need for replacement of that applicant.

3.76 The committee notes the concerns of HREOC in relation to the amendments relating to alternative state regimes and, in particular, the provisions to put beyond doubt the validity of the current systems for approving mining and opal mining in South Australia.[82] However, the committee supports their enactment given that the amendments simply seek to place on a firm footing the understanding parties have been operating upon to date.

3.77 The NNTC submitted that where a party seeks a Court order, under proposed section 84D, requiring an applicant to produce evidence of authorisation, the party seeking the order should be required to show cause why the Court should make the order. In the committee's view, the drafting of this provision already ensures that the Court has a discretion as to whether to make the order. As a result, the Court will be able to require the party seeking the order to provide information as to why the order is required.

3.78 Finally, the committee recommends that the various drafting errors in the Bill, identified during the committee's inquiry, be rectified.

Recommendation 1

3.79 The committee recommends that proposed subparagraph 87A(1)(c)(v) require consent from a party, with an interest in relation to land and waters in the determination area, where the Federal Court is satisfied that the interest is likely to be affected by the proposed determination.

82 Items 62, 63, 127, 138 and 139 of Schedule 1.

Recommendation 2

3.80 The committee recommends that proposed section 190F be amended to clarify that an applicant may not apply to the Federal Court for review of the Native Title Registrar's decision not to accept a claim while the National Native Title Tribunal is reconsidering the claim under proposed section 190E.

Recommendation 3

3.81 The committee recommends that proposed section 190E be amended to provide that reconsideration of the Native Title Registrar's decision not to accept a claim should be carried out by a Member of the National Native Title Tribunal.

Recommendation 4

3.82 The committee recommends that the Australian Government consider amending the Bill to provide a separate, simplified process for the removal of an applicant who consents to removal, or who is deceased or incapacitated, where there is no requirement to replace that applicant.

Recommendation 5

3.83 The committee recommends that drafting errors in items 88, 123 and 138 of Schedule 1 of the Bill and section 94C of the Native Title Act be rectified.

Recommendation 6

3.84 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

Senator Guy Barnett

Chair