CHAPTER 2
PROVISIONS

Schedule 1

2.1 Schedule 1 of the Bill would make a number of amendments to the native title mediation provisions in the *Native Title Act 1993* (the Act). The amendments would give the Federal Court (the Court) the role of managing all native title claims, including whether claims will be mediated by the Court or referred to the National Native Title Tribunal (NNTT) or another Court-appointed individual or body for mediation.

2.2 The Explanatory Memorandum to the Bill sets out the rationale for the amendments in the following way:

> The aim of the amendments is to emphasise the importance of mediation and draw on the Court's significant alternative dispute resolution experience to achieve more negotiated outcomes. The importance of resolving native title matters through negotiated outcomes has been a central object of the Native Title Act since it was introduced in 1994. The preamble to the Act states:
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> *A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.*
>
> Having one body actively control the direction of each case with the assistance of case management powers means opportunities for resolution can be more easily identified. Parties that are behaving with less than good faith can also be more forcefully pulled into line. Where parties are deadlocked or unwilling to see common ground, the Court can bring a discipline and focus on issues through the use of its case management powers to ensure that matters do not languish.[1]

2.3 Many proposed amendments are concerned solely with removing the current restrictions on the mediator to which cases may be referred. Whereas currently the NNTT is specified to the exclusion of all others, many amendments remove that specification, providing the Court with discretion on the mediator to be used. These amendments are not identified or discussed further in the remainder of this chapter.

2.4 Under amended subsection 86B(1), the Court must refer each application made under section 61 of the Act to the NNTT or to some other appropriate body or person, for mediation. Section 61 concerns the manner in which each native title determination application, revised native title determination application and compensation application may be made.

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1 Explanatory Memorandum, p. 4.

2.5 In deciding to which body or person the matter should be referred, the Court under proposed subsection 86B(2) may consider the training, qualifications and experience of the person who is or is likely to preside over the mediation. The Court may itself conduct the mediation under proposed subsection 86B(2A).

2.6 The exceptions to this requirement are set out at subsection 86B(3) and include where mediation is not necessary, where the applicant has not provided sufficient detail, or where there is no likelihood of the parties being able to agree. The substance of the exceptions is unamended.

2.7 The Bill repeals and replaces subsection 86B(5) which empowers the Court to refer a matter for mediation at any stage in the proceedings if it believes that agreement on key facts may be reached. The new subsections would operate together with proposed new section 87C to better enable the Court to direct cases to mediation, as well as to recall them and redirect them again, possibly to a different mediator, if such a course is deemed helpful to resolution. In deciding on the mediator, the Court may take similar matters as those contained at 86B(2) into account.

2.8 Section 86BA is concerned with the mediator's right to appear before the Court when it is deciding whether to send a matter for mediation. Its repeal and replacement would see the right removed, consistent with the Court's overall powers to manage the referral to mediation at its discretion. Replacement subsection 86BA(1) would empower the Court to request the mediator's appearance where it would assist the Court in its deliberations on a matter before the mediator. Subsection 86BA(3) makes clear that the mediator, in appearing under the section, is required to take account of new subsection 94D(4) which prohibits the disclosure of words spoken or acts done during the mediation without the agreement of the parties.[2]

2.9 According to the Explanatory Memorandum, the assistance that a mediator could bring to the Court may include, for example, a specialised knowledge of contested issues in the native title matter resulting from their involvement in the proceeding through the mediation process. The EM goes on to explain that:

> The amendment aims to facilitate open communication between mediators and the Court, and to assist the Court in its role of overseeing the management of all native title claims. It may be appropriate for a mediator conducting the mediation to appear before the Court in a number of situations because the mediator will be aware of the progress of the mediation and any specific issues pertaining to the mediated matter that the Court would benefit from hearing.[3]

2.10 Section 86 deals with the cessation of mediation. Currently there are two grounds upon which the Court may order cessation: there being no likelihood of agreement being reached; and where further mediation is deemed unnecessary. New paragraph 86C(1)(c) would add a new ground, under which the Court could order cessation if it felt it appropriate to do so. The same subsection is also amended to add

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2 New section 94D replaces existing section 136A, and covers the same subject.

3 Explanatory Memorandum, p. 10.

a power to make general orders in relation to the cessation of mediation as the Court thinks fit, at 86C(6).

2.11 Proposed new Division 4, comprising sections 94D to 94S concerns mediation conferences, and replaces existing Division 4A. The new section largely replicates and centralises provisions in sections 136, 176, and 181, with appropriate changes regarding renumbered provisions.

2.12 New subsections 136GC (1), (2) and (3) would transfer to the Court the ability to refer to the NNTT a review of the question of whether a native title claim group that is a party to proceedings has rights and interests in relation to land or water within the area that is the subject of the proceedings. The existing section provides that power to the President of the NNTT. This is consistent with the Bill's intention to transfer management of native title cases to the Court. The new provisions would also allow the Court to refer the question for review at the request of the mediator in certain circumstances.

2.13 The amendments to section 138, which appear at items 45 to 57 in the Bill, would see the Court take from the NNTT the power to direct that a native title application inquiry be held, either at its own motion or at the request of the mediator. In the latter case the mediator could request that the Court direct a matter to the NNTT for inquiry.

2.14 A new definition of 'mediator' would be inserted at section 253. A mediator would be defined as the person to which the proceeding has been referred under section 86B, discussed earlier in this chapter.

2.15 The Application provisions of the Bill, at items 69 to 73, provide for the retrospective application of the new arrangements provided for in section 86B and in Division 4 of Part 4, to the extent that proceedings which are on foot and not completed at the commencement of the amendments will have the new arrangements applied to them.

Schedule 2

2.16 Item 5 would insert a series of new subsections to give the Court the power to make orders on matters that go beyond native title, where parties reach an agreement to do so. While the Court is currently empowered to make such orders, it must be satisfied that making such orders is 'within the power of the Court' and is 'appropriate'.[4] The Explanatory Memorandum argues that:

> These amendments would recognise the broader nature of agreements currently being made and encourage this approach. Parties would be able to resolve a range of native title and related issues through native title agreements. These amendments would clearly provide that it is within the Court’s jurisdiction to make separate orders dealing with the determination of native title and the matters covered by the agreement, including matters other than native title. The Court would also therefore have scope to use

4 This discretion would be retained under proposed section 87(5).

existing powers to control the time parties spend on these wider agreements.[5]

2.17 New subsection 87(4) would allow the Court to give effect to the terms of the agreement between parties about matters other than native title, even where the Court makes no determination about the existence of native title if it is within the Court's power and appropriate to do so. New subsection 87(6) would set out that the Court's jurisdiction allows the Court to make separate orders to give effect to the terms of an agreement under existing subsections 87(2), (3) and proposed subsection 87(5).

2.18 New subsection 87(7) would allow for regulations to specify the kinds of matters other than native title that a Court order under subsections 87(2), (3) or (5) may give effect to. While the parties may decide to include any matters other than native title that assist to resolve the claim in an agreement, and the Court may make orders on these, this subsection allows regulations to give guidance about what types of matters this could include.

2.19 The Explanatory Memorandum lists some examples of matters other than native title that may be covered by agreements. These include matters such as economic development opportunities, training, employment, heritage, sustainability, the benefits for parties, and existing industry principles or agreements between parties or parties and others that might be relevant to making orders about matters other than native title.[6]

2.20 Item 5 also provides for an agreed statement of facts to be lodged with the Court, and gives the Court discretion to accept the statement or not. In order to accept the statement, it must be agreed by at least the applicant and the principal government respondent in the proceedings. The aim of these provisions, proposed subsections 87(8) to 87(11), is to facilitate negotiation between parties, reduce court time, and speed up the resolution process.

2.21 Item 7 substantially mirrors Item 5, and applies where agreements are reached in respect of a part of an area which is the subject of the claim.

Schedule 3

2.22 Schedule 3, which adds new section 214 to the Act, would allow the Commonwealth *Evidence Act 1995* as amended by the *Evidence Amendment Act 2008* to apply to native title proceedings which had commenced prior to 1 January 2009. The Evidence Amendment Act made changes to the Commonwealth Evidence Act which were intended to assist Aboriginal and Torres Strait Islander people to give evidence in native title matters. The amendments recognise the manner in which Indigenous communities record traditional laws and customs, and concern hearsay, opinion and narrative rules for evidence given by Aboriginal and Torres Strait Islander people which are of particular relevance in the native title context.

2.23 Only native title proceedings that commence after 1 January 2009 can rely on the recent amendments. The amendments made by this schedule would allow the

5 Explanatory Memorandum, p. 32.

6 Explanatory Memorandum, p. 32.

Court to admit evidence in a native title proceeding under the new evidence rules where part of the evidence in the proceeding had been taken prior to 1 January 2009 and either the parties consent to the application of these new provisions, or the Court, after considering the views of the parties, considers it is in the interests of justice for these new provisions to apply.

Schedule 4

2.24 This Schedule replicates the provisions in existing section 183, which provide for the Attorney-General to offer assistance to parties to mediation, inquiries and other proceedings, in certain circumstances. However, it does expand the class of mediation for which assistance may be sought beyond mediation through the NNTT, in accordance with amended section 86B.

2.25 It further provides for the saviour of applications that are on foot prior to the commencement of the amended section.

Schedule 5

2.26 Part 1 of this Schedule is concerned with repealing transitional provisions introduced in respect of Aboriginal and Torres Strait Islander representative bodies in 2007. In most cases, provisions are spent, and the Bill proposes to repeal them. In others, they are being replicated in the form of new or renumbered subsections. Bodies recognised immediately before the commencement of the provisions will retain their status notwithstanding the provisions, until their pre-existing instrument of recognition expires.

2.27 Part 2 deals with applications for recognition by representative bodies. An amendment to paragraph 201B(1)(b) would see all representative bodies eligible to be recognised as such. The current paragraph restricts recognition to representative bodies who are registered bodies corporate.

2.28 Items 14 and 15 would amend subsection 203A(1) and paragraph 203A(1)(a) to remove the requirement that the Commonwealth Minister must 'determine' a way in which applicants may be invited to apply for recognition as a representative body. This change would allow the Commonwealth Minister to make a written invitation tailored to the specific circumstances of the eligible body to which the invitation is addressed. The effect of these items would be that if an eligible body is already a recognised representative body the invitation may simply ask whether the representative body would like to be considered for recognition for a further period. Item 17 would allow more than one representative body to be invited to be recognised for an area, and would reduce the administrative burden for representative bodies and streamline the recognition process for the Minister.

2.29 Item 18 would provide more flexibility for the Minister in finally determining the period of recognition of the eligible body. The amendments would remove the obligation currently falling on the Minister to offer recognition for the same period as foreshadowed in the original letter of invitation to the body. It would also provide for the revocation of invitations before final determination. The overall effect is to allow the minister to form a comprehensive view of the performance of the body prior to making enforceable undertakings about recognised representative status.

2.30 Item 20 removes the current prescription on the form of the application made by the eligible body to the Minister for recognition. The Explanatory Memorandum contends that this flexibility would allow for the body to readily provide information in a particular format without any additional work on its part.[7]

2.31 Item 24 provides for the Minister to reduce the area for which a body is a representative body, and in the event that the area is reduced to zero, that the body ceases to be a representative body. The item also replaces paragraph 203AD(2D)(b) with new subsection 204AD(3A) which gives the Minister the power to make a body a representative body for between 1 and 6 years.

2.32 Subsection 3B would provide for the Minister to take account of a number of factors in making their decision as to the length of recognition. These include financial management, efficient performance of duties, whether the body is under external administration, and any other information provided by the Minister's department.

2.33 Item 26 would repeal existing sections 203AE, AF and AG, which deal with the process for varying the boundary line of an area represented by a recognised body. The sections provide for a different process according to the way in which the boundaries are to be varied, and effect on adjoining recognised bodies. The new provision would allow the Minister to vary the boundaries irrespective of how the boundary is to be varied, and for any reason. The Minister may also act on the request of a representative body to vary the area over which they operate. However, new subsection 203AE(9) will require the minister to consider submissions on the proposed variation prior to a final decision being made.

2.34 New section 203AF would set out the notification requirements where the minister, on their own initiative, is considering varying the boundaries of an area. The Minister, under the amendments, would be required to notify any relevant representative bodies, the Aboriginal and Torres Strait Islander people in the area(s), and to advertise the potential variation in the local newspaper. In each case, the content of the notice is prescribed, and an offer to make submissions on the subject must be made. Proposed section 203AG requires that notification of the Minister's decision be made to the same parties on similar terms to that required under section 203AF.[8]

2.35 New section 203AH deals with withdrawal of recognition of a representative body. Where the body ceases to exist, or requests it no longer be recognised, the Minister must withdraw recognition. These arrangements remain largely unchanged. Where the Minister exercises discretion to withdraw recognition, the amendments would see the notice period reduce from 60 to 30 days, although the Minister may extend the period on request.[9]

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7 Explanatory Memorandum, p. 47.

8 Item 39 would have the effect of saving the application of existing sections 203AE, AF and AG, for the purposes of any relevant matters that remain outstanding at the time of the commencement of the amendments.

9 Items 31 and 32.

2.36 In making a decision under Division 2 of Part 11 (Recognition of representative Aboriginal and Torres Strait Islander bodies), amended subsection 203AI(1) would require the Minister to have regard to the body's compliance with section 203BA, which deals with how functions of representative bodies should be performed, before making a decision.

2.37 Section 203BA, in turn, would be amended to set out the matters previously contained at paragraph 203AI(2). The reorganisation of sections 203AI and 203BA largely reflect a desire to correct an overlap between the two provisions.

Schedule 6

2.38 This Schedule deals with bank guarantees and trust arrangements for the secure holding of compensation payments in respect of native title determinations. It clarifies that the Court can use either a bank guarantee or a trust scheme, following the mistaken removal of the trust option in the Native Title (Technical Amendments) Act. The amendments in respect of the trust option are important so as to make the Court's options consistent across state and territory and federal legislation, and remove any question about the validity of the state trust regimes.

2.39 The Schedule also simplifies the provisions for cancelling bank guarantees during a 'Right to Negotiate' process. Finally, the Schedule makes some minor, technical amendments to the penalty provisions, in line with a drafting directive from the Office of Parliamentary Drafting.