The Senate

Standing Committee on Legal and Constitutional Affairs

Native Title Amendment Bill 2009 [Provisions]

May 2009

ISBN: 978-1-74229-088-1

This document was printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

MEMBERS OF THE COMMITTEE

Members

Senator Patricia Crossin, **Chair**, ALP, NT

Senator Guy Barnett, **Deputy Chair**, LP, TAS

Senator Don Farrell, ALP, SA

Senator David Feeney, ALP, VIC

Senator Mary Jo Fisher, LP, SA

Senator Sarah Hanson-Young, AG, SA

Senator Gavin Marshall, ALP, VIC

Senator Russell Trood, LP, QLD

Substitute Member

Senator Rachel Siewert, AG, WA replaced Senator Sarah Hanson-Young for the committee's Inquiry into the Native Title Amendment Bill 2009

Secretariat

Mr Peter Hallahan	Secretary
Mr Tim Watling	Principal Research Officer
Ms Cassimah Mackay	Executive Assistant

Suite S1. 61	Telephone:	(02) 6277 3560
Parliament House	Fax:	(02) 6277 5794
CANBERRA ACT 2600	Email:	legcon.sen@aph.gov.au

TABLE OF CONTENTS

RECOMMENDATIONS

Recommendation

3.19 The committee recommends that the Bill be passed.

CHAPTER 1
INTRODUCTION

1.1 On 19 March 2009, the Senate referred the Native Title Amendment Bill 2009 (the Bill) to the Standing Committee on Legal and Constitutional Affairs, for inquiry and report by 7 May 2009.

1.2 The Bill was introduced in the House of Representatives on 19 March by the Attorney-General, the Hon. Robert McClelland, and seeks to amend the *Native Title Act 1993* to give the Federal Court of Australia a more central role in adjudicating native title claims.

Summary of key amendments

1.3 In summary, the Bill:

- invests the Federal Court (the Court) with the authority to decide whether it, the National Native Title Tribunal, or another individual or body should mediate a native title claim;
- further encourages and facilitates negotiated settlement of claims;
- allows the application of amended evidence rules for evidence given by Aboriginal and Torres Strait Islander people to apply to native title claims in certain circumstances; and
- streamlines provisions relating to the role of representative bodies.

1.4 Chapter 2 examines the provisions of the Bill in more detail.

Conduct of the inquiry

1.5 The committee advertised the inquiry in *The Australian* newspaper on 25 March 2009, and invited submissions by 9 April 2009. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 50 organisations and individuals inviting submissions.

1.6 The committee received 8 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.7 The committee held a public hearing in Sydney on 16 April 2009. A list of witnesses who appeared at the hearings is at Appendix 2 and copies of the Hansard transcript are available through the Internet at http://aph.gov.au/hansard.

Acknowledgement

1.8 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.9 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the

proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

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:
>
> *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.

---

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

---

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]

---

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.

CHAPTER 3
ISSUES

3.1 With one exception, the provisions of the Bill met with general approval among submitters.[1] Significantly, the primary body representing users of the native title system, the National Native Title Council, regarded the changes as uncontroversial.[2] Some submitters offered general support for the Bill's objectives with limited qualifications, while still others argued for changes to native title arrangements that were not foreshadowed in the Bill.[3] The main critic of the Bill was the National Native Title Tribunal (NNTT), which objected to the provisions of Schedule 1, which would allow the Federal Court of Australia (the Court) to refer cases to mediation to parties other than the Tribunal.[4]

Mediation

3.2 Perhaps the most controversial of the changes the Bill would introduce are those that remove the compulsory reference of matters for mediation to the NNTT. The Government's proposals aim to address a very significant backlog of claims for settlement. The committee heard that 145 determinations were made from 1994, when the Native Title Act was passed, to the end of 2008. The average time taken to finalise these was about 6 years where the application was by consent, or 7 years where the outcome was litigated. About 475 claims are currently on foot in the system. Over a quarter of cases have been current for at least 10 years. It is estimated that the last of cases currently active will not be concluded until 2035.[5]

3.3 The Tribunal's concerns derive largely from the Bill's proposal to centralise the management of native title cases in the Court, and hinge on the assertion that the amendments would not necessarily bring about a faster or more efficient claims settling process.

3.4 The NNTT argued that the Bill's passing could give rise to accountability issues when mediators operate outside a 'governmental institution', and would see

---

1 See, for example, Northern Territory Government, *submission 7*, p. 1; Federal Court of Australia, *Submission 1*, p. 1.

2 Mr Tony McAvoy, *Committee Hansard*, 16 April 2009, p. 19. The Council's substantive argument related to the burden of proof for proving an ongoing connection to land and the role this allegedly plays in denying 'right and proper' ascertainment of native title rights.

3 See, for example, the National Native Title Council, as per previous footnote. See also Torres Strait Regional Authority, S*ubmission 5*, pp 4–5 regarding funding for PBCs.

4 National Native Title Tribunal, S*ubmission 3*, p. 1.

5 Mr Graham Neate, *Committee Hansard*, 16 April 2009, pp 10–11.

fewer resources being available to fund 'flexible and innovative solutions…in a timely manner'.[6]

3.5 The NNTT submitted to the committee that the amendments would encourage a system that was 'ad hoc, fragmented, less efficient [and] more expensive to the Commonwealth' and that 'there could be confusion, and lack of clarity, about the respective powers and functions of the Court and the Tribunal – especially the extent of the Court's capacity to direct the Tribunal to do things (and possibly to allocate Tribunal members to mediate particular matters, and to direct how mediation is to be conducted), which raise legal and resource issues'.[7] The NNTT argued that:

> One [concern] is that the court will be able to refer part or the whole of a matter to a person or body for mediation. It may be that the matter itself is then broken up into segments—somebody deals with a particular issue and somebody else deals with another issue...One of our concerns is that when matters are referred to us generally, we can develop a regional strategy obviously in conjunction with the court directed by court orders and so on which have regard to the respective resources of the parties and can put some sort of system in place…Our concern is that if these matters are hived off to individuals or bodies particularly for particular segments some of that overall coordination of a particular claim and then the coordination of that claim with a broader region may be disrupted and indeed there may be duplication or fragmentation of services, which in the end could become more expensive to the Commonwealth rather than less so.[8]

3.6 Mr Neate argued that, on the other hand, the current system:

> clearly …identifies the respective roles of the Court and the Tribunal. When both institutions work in a coordinated and cooperative manner, timely and effective native title and related outcomes (i.e., broader settlements) are achieved. The Tribunal considers that the current scheme for the mediation of native title claims should be retained.[9]

3.7 While the NNTT made much of its particular expertise and experience in addressing native title issues[10], the committee is mindful of the conclusions of Australian Labor Party and Australian Greens' Senators in the committee's 2007 inquiry into the provisions of the Native Title Amendment Bill 2006, when they found that:

> During the inquiry, significant concerns were expressed about the expansion of the NNTT's powers, particularly as most stakeholders do not have confidence in the NNTT's capacity or expertise to conduct effective

---

6 National Native Title Tribunal, S*ubmission 3*, p. 5.

7 National Native Title Tribunal, *Submission 3*, p. 1.

8 Mr Graham Neate, *Committee Hansard,* 16 April 2009, p. 9. The committee was subsequently informed by the Registrar of the federal Court, Mr Warwick Soden, that the Court intended to conduct the new scheme within its present budget, *Committee Hansard*, 16 April 2009, p. 47.

9 National Native Title Tribunal, S*ubmission 3*, p. 2.

10 See, for example, National Native Title Tribunal, S*ubmission 3*, p. 6.

> mediation…Evidence received by the committee from NTRBs unanimously rejected the expansion of the NNTT's mediation function, citing past statistics and experience…like a majority of stakeholders, Labor and Greens Senators are not convinced that the NNTT is capable of exercising these expanded powers effectively, or properly.[11]

3.8 The NNTT's contention that the changes will not bring about improvements in the claims process was disputed by the Court. In his evidence to the inquiry, Registrar Warwick Soden told the committee that the change was:

> …welcomed by the Court as it supports its long held view that results are obtained through a flexible and responsive approach to mediation. This view is based on the Court's experience of the beneficial results of active case management by the Court in some native title proceedings… Under the proposed amendments the Court will be able to apply innovative approaches to the emerging issues, including referral of a matter to the Tribunal for mediation, court annexed mediation, the management of expert evidence, early neutral evaluation, case conferences and other practical [alternative dispute resolution] procedures.[12]

3.9 In his evidence at the hearing, Mr Soden set out at length the Court's experience with case management, and told the committee that:

> The court has a wealth of experience in managing a whole lot of different cases, including native title cases. It applies the principles of active case management. It has an international reputation for the way in which it is innovative and brings to bear the best approach to the issues that need to be resolved in different cases. In terms of coordination across the country, the court has specialist lawyers in each of the states and territories or former territories across Australia. They are experts in native title. They work closely with the judges in each of those states, particularly the native title judges who have responsibility for coordination in each state. They are in a very good position to give advice and assistance to the judges about what needs to be done in a particular matter to ensure coordination and this constant discussion between the judges across the states about coordinating issues, including priorities and the like.[13]

3.10 Mr Soden took the view that the Court was in the best position to decide on which mechanism was in the best interest of each case, including the existing option of referring the case to the NNTT, and impressed on the committee the flexibility that the changed arrangements would bring to the management and resolution of cases. He went on to say that:

> It may be that a special referral to a case management conference under the direction of a judge might be most appropriate. It might be that a special

---

11 Senate Legal and Constitutional Affairs Committee, *Inquiry into the Native Title Amendment Bill 2006 [Provisions]*, Minority Report of the Australian Labor Party and the Australian Greens, pp 63, 65.

12 Mr Warwick Soden, S*ubmission 1*, pp 1–2.

13 Mr Warwick Soden, *Committee Hansard*, 16 April 2009, p. 49.

> hearing on a specific issue that needs to resolved before any mediation could take place would be the most beneficial thing to be done in a particular case. It might be that the court thinks the best thing to do is refer the matter to one of the court's staff or another particular person who was not a member of the tribunal to exercise the mediation powers of the court by referral. It might even be a referral to the tribunal in the ordinary course.[14]

3.11 Impressive though these options may be for increasing the tempo of settlements, the committee is mindful of the need for care when appointing mediators. The Bill conveys considerable flexibility on the referring judge, and the skill, expertise and qualifications of the candidate require examination, not to mention the identification of any potential for conflicts of interest. While Mr Soden submitted that such matters would 'automatically' be considered prior to any referral, the method of assessment, particularly for a mediator unknown to the Court, was not clarified in evidence.[15]

3.12 However, Mr Soden sought to reassure the committee that the Court was aware that much was expected of it under the changes, and that it was confident of its ability to deliver:

> I just wanted to reiterate the court's view that we take this proposed responsibility very seriously. We know it will come with a degree of accountability. We know there are a lot of expectations to be placed upon us as a result of the extra responsibility and accountability, but we embrace that. These cases are crying out for a new and innovative approach to be taken. We believe, with the broad experience we have not only in this jurisdiction but in the way in which cases can be looked at and treated differently, we will bring those changes which will speed up the whole process and produce outcomes.[16]

3.13 The committee was further encouraged by evidence that the amendments were framed in the context of appropriate consultation by the Attorney-General's Department. The committee heard that representatives of the Attorney-General met with officers of the Court and the NNTT on three occasions to discuss the proposed amendments. This followed the release of a discussion paper in December 2008, which elicited 30 submissions.[17] The NNTT reassured the committee that they would continue to work closely with the Court to administer the new scheme.

3.14 The committee is mindful of the imperative to put in place a more efficient process for hearing and deciding native title claims. While the arguments of the NNTT and others that native title is inherently complex and drawn-out, the committee is

---

14 Mr Warwick Soden, *Committee Hansard*, 16 April 2009, p. 49.

15 Mr Warwick Soden, *Committee Hansard*, 16 April 2009, p. 56.

16 Mr Warwick Soden, *Committee Hansard*, 16 April 2009, p. 49.

17 Mr Warwick Soden, S*ubmission 1*, p. 1. These are available on the Department's website at www.ag.gov.au/www/agd/agd.nsf/Page/RWP73DB7F92B8E8CE99CA25723A00803C08#submissions.

impressed by the innovations and flexibilities offered by the Federal Court taking a more central role in case management. The capability of the Court is clear, and the committee considers there is good reason to anticipate a smoother and more expeditious flow of native title case management as a result of the changes being implemented. For these reasons, and in the absence of substantive criticism[18] of other aspects of the Bill, the committee recommends the Bill be passed.

Representative Bodies

3.15 The Torres Strait Regional Authority (TSRA) argued for an amendment to section 201B(1) of the Act which currently provides that Prescribed Bodies Corporate (PBCs), which are the rights-holding bodies for native title claimants, are not eligible bodies for consideration as Native Title Representative Bodies (NTRBs). TSRA called for the relaxation of this restriction, at least in respect of the Torres Strait, on the basis of the unique and special circumstances which largely derive from the Torres Strait Regional Sea Claim that is currently awaiting settlement.[19]

3.16 The Committee took no other evidence on this topic, and in any case further committee attention and examination might best take place when the details of the Sea Claim settlement are known. Accordingly, the committee makes no recommendation in respect of this matter.

Australian Human Rights Commission

3.17 The Australian Human Rights Commission (AHRC) made a substantive submission to the inquiry covering a number of issues. The Commission recommended amendments to the Bill going to, for example:

- consultation by the Court with parties to a mediation;
- the regulation of the number of parties to a claim;
- the requirement for court orders to be 'appropriate';
- the application of the *Evidence Act 1995* to native title claims;
- funding of participants in a native title claim; and
- the expansion of ministerial discretion in appointing NTRBs.

3.18 While these and other recommendations warrant further examination, the Commission's submission was received after the committee's public hearing, denying the opportunity to test the propositions put forward and benefit from any alternative views expressed by other interested parties. Accordingly, the committee suggests that the Government consider the points raised by the Commission with a view to incorporating them into future native title reform.

Recommendation

3.19 The committee recommends that the Bill be passed.

---

18 Comments from the Australian Human Rights Commission are dealt with later in this chapter.

19 Torres Strait Regional Authority, *Submission* 5.

Senator Trish Crossin

Chair

Additional Comments by Liberal Senators

1.1 Liberal Party Senators are aware of the historically low rate of finalisation for native title claims, as illustrated by the average age of claims and the alarming projection that the last claim will not be settled until 2035.[1] They therefore support the aims and objectives of the Native Title Amendment Bill 2009, particularly the encouragement of settlement by negotiation and building flexibility into the system, thereby maximising the chances of resolution.

1.2 Liberal Senators make the point however, that the Committee was not provided with any solid evidence as to how the 2007 amendments have operated. One clear piece of evidence that was presented is the welcome news that over the past two years the number of proceedings going to trial has decreased and most proceedings are being settled by consent. No doubt there are many reasons for this, but it cannot be said that the 2007 amendments have operated in a counter-productive fashion.

1.3 The reforms in Schedule 1 have been developed without the benefit of broad consultation, and, as stated in evidence, appear to simply reflect Labor Party policy.[2] While the basis for the amendments has been made clear, the objective rationale for them has not. In the absence of a compelling case for the reforms being proposed, Liberal Senators have a range of concerns about the possible consequences of amendments to the Act.

The role of the Federal Court in managing native title claims

1.4 The stated policy objective of the Bill is to implement institutional reforms to give the Federal Court a central role in managing native title claims. The Registrar and Chief Executive Officer of the Federal Court, Mr Soden, submitted that empowering the Court to take a central role in managing all native title claims and to control the direction of each case would enhance the prospects of resolving matters without the end for protracted litigation processes. [3] He submitted that it was desirable to have resort to a range of alternative dispute resolutions (ADR) options, not just mediation. Liberal Senators note however that the Court already has that role through the 1998 amendments to the *Native Title Act 1993*. Mr Soden acknowledged that the ADR options he outlined were already available to the Federal Court, however his evidence was that '*we have not focused on those kinds of options since 1 July 2007, where the main responsibility has been with the* [National Native Title Tribunal (NNTT)].' [4]

---

[1] Committee report, p. 11.

[2] Mr Jeffrey Murphy, *Committee Hansard*, 16 April 2009, p. 43.

[3] Federal Court of Australia, *Submission 1*, p. 2.

[4] *Committee Hansard*, 16 April 2009, p. 51.

1.5 It is not clear why the Court has not been focusing on these options, as the effect of the 2007 amendments was merely to require compulsory referral of applications to the Tribunal for mediation without simultaneous mediation by the Federal Court. In addition, section 86C(1) provides that the Court may, of its own motion, at any time in a proceeding, order that mediation by the Tribunal cease. Parties to proceedings can, pursuant to section 86C(2), at any time from 3 months after the start of mediation by the Tribunal, seek an order ceasing mediation.

1.6 The 2007 amendments did not diminish the central role of the Federal Court in managing native title applications. The Court, post the 2007 amendments, has only been required to send matters to the Tribunal when, and if, it thinks the parties can reach agreement. The Court has discretion when to send a matter for mediation, and when to cease mediation. It is not clear, then, how the 2007 amendments have impacted on the Court's capacity to speed up the resolution of claims, or conversely, how this Bill, actually facilitates that task. Mr Tony McAvoy, the legal representative of the National Native Title Council, shares this concern.[5]

1.7 While the Committee has been presented with submissions suggesting that the reforms will enable the Court to take a central role in managing native title claims, the stark reality is that the Court already has that role and the amendments simply increase the range of available mediators.

Possible implications of expanding the range of mediators

1.8 In its submission to the Committee[6] the NNTT expressed concern that the amendments in Schedule 1 could result in the resolution of native title claims in a less systematic way and that the process could become ad hoc, fragmented, less efficient and more expensive to the Commonwealth. While Liberal Senators note the well established reputation of the Federal Court for efficiently disposing of the cases before it, they are concerned that the extent of the Court's capacity to direct the Tribunal to do certain things, including allocation of particular members to mediate, may result in confusion and lack of clarity about the respective powers and functions of the Court and the Tribunal.

1.9 Mr Soden gave evidence that the Court will be issuing a Practice Note to provide some guidance as to how the Court will be exercising its discretion.[7] This would be a welcome development, as one of the well documented problems facing the native title system is the inconsistency of approach by Judges of the Federal Court in the native title jurisdiction. Given this experience, Liberal Senators consider there is a likelihood of inconsistency since the Bill, in effect, de-regulates mediation by

---

[5] *Committee Hansard*, 16 April 2009, p. 26.

[6] NNTT, *Submission 3*, p. 1.

[7] *Committee Hansard*, 16 April 2009, p. 54. Mr Soden said that the proposed Practice Note will be '*very comprehensive'* and '*will give an explanation of what is expected and will list a whole lot of options that the court will focus upon'.*

allowing individual Judges considerable discretion by referring matters to mediation by private mediation service providers. In the context of a totally deregulated private mediation service market, vesting the Court with an unlimited discretion and then allowing it to be exercised by individual judges has the potential to result in a number of serious unintended consequences.

The identification, payment and support of private mediators

1.10 The Bill removes references to the NNTT mediating from the Act, and instead simply refers to a person or body mediating. The only statutory guidance is contained in proposed subsection 86B(5B) which provides that the Court may refer matters to a Registrar, Deputy Registrar, District Registrar or Deputy District Registrar of the Federal Court for mediation. The Bill therefore takes a minimalist approach in terms of specifying qualifications of private mediators. In contrast, Tribunal members are appointed by the Governor General,[8] a Presidential member must be a Judge, or former Judge or have been enrolled as a legal practitioner for more than five years. Ordinary members must have special knowledge in relation to Aboriginal or Torres Strait Islander societies, or land management, or dispute resolution or any other class of matters considered by the Governor-General to have substantial relevance to the duties of a member.[9]

1.11 Without appropriate clarification, Liberal Senators are concerned that private mediators may not possess qualifications and experience of practices which might actually be important in ensuring their honesty, their integrity and their capacity to do the work required of them. Tribunal members are statutorily required to have a range of skills, with dispute resolution being only one. In an unregulated mediation market, it is not clear what particular skills a mediator will bring to the process. Having regard to the range of interests involved, including indigenous, mining, pastoral and infrastructure, the risk of conflicts of interest are ever present. Deregulating mediation service delivery in such proceedings without any regulatory standards to protect the parties is unsatisfactory.[10]

1.12 The Bill is also unclear as to whether a Judge could appoint an organisation to mediate, resulting possibly in a person other than a Judge determining who would carry out the mediation. Proposed subsection 86B(1) allows the Court to refer an application to '*an appropriate person or body*' for mediation. The Bill provides no significant guidance on the appointment of private mediators. This is inconsistent and inappropriate in a Bill which it is claimed will facilitate greater Court case management.

---

[8] s. 111 *Native Title Act 1993.*

[9] s. 110 *Native Title Act 1993.*

[10] In his submission for example, the Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC) notes that '*it is possible that the Court could chose a mediator who is entirely inappropriate for the Indigenous claimants. For example, if a mediator has intimate knowledge of the area and the claimant group, or other Indigenous groups residing in the area, then he or she may run the mediation with a predetermined outcome in mind*'.

1.13 Liberal Senators note that all existing coercive powers vested in the Tribunal will be vested in private mediators.[11] The powers given to these private mediators include: to require parties to attend conferences, or to exclude parties or their representatives from conferences (s. 94E), directing parties to produce documents (s.94G), referring questions of fact or law to the Court (s.94G), referring a question to the Court whether a party should be dismissed (s.94J), prohibiting the disclosure of information given or disclosed at a conference (s.94L), reporting breaches of the requirement to act in good faith (s.94P) and granting to such private mediators the same protections and immunities as a High Court Judge (s.94S).

1.14 To seek to give to an individual Federal Court judge the untrammelled right to appoint a person to mediate, when such a person is thereby vested with such broad powers and given the protections of a High Court Judge, is both surprising and concerning. Such extensive powers should only be exercised by persons acting under strict statutory guidelines and appointed according to well defined rules, and with such appointment having elements of both transparency and accountability.

1.15 In summary, the appointment of private persons (and organisations) inevitably raises questions of accountability insofar as those persons and organisations operate outside the framework of a government institution with all of the relevant regulatory checks and balances.

Limiting the capacity of the NNTT to provide information to the Court

1.16 The proposed amendments remove the capacity of the NNTT to provide the Court with voluntary regional mediation progress reports and regional work plans if the President considers that such a report or work plan would assist the Court in progressing proceedings. In its submission to the Committee, the NNTT noted that '*if the Act is amended by proposed s 94N and the repeal of s 136G(3A), the Tribunal will lose the capacity to volunteer such reports, and the Court may be deprived of a valuable source of information for case management in regions where most or all claims have been referred to the Tribunal for mediation.*'[12]

1.17 The Explanatory Memorandum states[13] that it is unnecessary for the Tribunal to provide such reports or work plans given the purpose of the amendments is to give the Court the overall control of native title claims. Liberal Senators were not persuaded by this argument, which appears to be part of a pattern to try to justify all manner of changes on the basis that the Court should be given basically unrestricted discretion to run its proceedings. The NNTT pointed out[14] that the provision of such reports in no way diminishes the Court's control of its proceedings. The Court can

---

[11] ATSISJC, *Submission 8*, p. 16.

[12] NNTT *Submission 3*, p. 12.

[13] Native Title Amendment Bill 2009, *Explanatory Memorandum* para 1.78.

[14] NNTT, *Submission 3*, p. 13.

give such weight as it considers appropriate to the contents of such a report or work plan.

1.18 Liberal Senators see the force of the Tribunal's view. The legislation currently confers on the Tribunal the *right* to appear before the Federal Court at a hearing in relation to any matter that has been referred for mediation. The Bill inserts a provision (s.86BA) that only *permits* the Tribunal to appear before the Court if '*the Court considers that the mediator might be able to assist the Court in relation to a proceeding.'* The Explanatory Memorandum concludes by justifying the removal of the right of appearance on the basis that this '*would be consistent with granting the Court control over native title proceedings.'*[15] Liberal Senators do not understand the logic of removing the Tribunal's right of appearance. It was inserted in the 2007 amendments with the aim of facilitating better communications between the Court and the Tribunal, and there is no evidence before the Committee that this has not proved to be the case.

Schedule 2 – Powers of the Court

1.19 Schedule 2 contains some provisions designed to facilitate consent determinations of native title. One proposed reform would allow the Court to make orders that cover matters beyond native title, while another would enable the Court to rely on a statement of facts agreed between the parties. Liberal Senators see some merit in this reform, recognising that a determination of native title is part of a bundle of issues that parties want resolved as part of a broader settlement. We consider however, that the application of this proposal will need to be carefully monitored, and that any constitutional or serious procedural issues are dealt with proactively and in consultation with the relevant States and Territories.

Lack of prior consultation and evidence to support the proposals

1.20 Finally, Liberal Senators are concerned by evidence to the Committee suggesting an absence of consultation in developing these reforms. The Government states it used an evidence-based approach to policy development. While this is welcomed, we are concerned that little attention has been paid to the view of the NNTT. In his evidence to the Committee, Mr Neate, the President of the Tribunal, stated that he '*was advised of the announcement of the proposed changes immediately prior to them – the day before.'*[16]*…'But this was really advising me of what was about to be announced.'*[17] It is of concern to Liberal Senators that the Attorney-General would develop and then announce substantive changes to the *Native Title Act 1993,* impacting on the core mediation function of the National Native Title Tribunal, without even consulting with the President of that Tribunal.

---

[15] Native Title Amendment Bill 2009, *Explanatory Memorandum*, para 1.36.

[16] *Committee Hansard,* 16 April 2009, p. 3.

[17] *Committee Hansard,* 16 April 2009 p. 4.

Senator Guy Barnett
Deputy Chair

Senator Russell Trood

Senator Mary Jo Fisher

Additional Comments from the Australian Greens

1.1 The Australian Greens support the findings of the majority report of the Senate Standing Committee on Legal and Constitutional Affairs but do not believe that either the legislation or the committee report go far enough in addressing the need for more fundamental reform to the Native Title Act. In particular, we share the concerns of a number of witnesses (including the National Native Title Council (NNTC) and the Australian Human Rights Commission (AHRC)) that these relatively minor amendments represent a missed opportunity to address the current limitation of the Native Title Act and to deliver on the intent of the Act to deliver justice and tangible benefits to Australia's first peoples[1].

1.2 Native title should offer an opportunity for Aboriginal Australians and Torres Strait Islanders to participate in the management of their land, maintain and enhance their cultural responsibilities and spiritual connection to it, and benefit from the sustainable use of its resources. The fact that the system of native title law to date has not enabled them to do so is an indictment on the legal framework for native title, and the way it has facilitated misuse of its processes by state and territory governments to frustrate the rights of the traditional owners of the land.

Proposed Amendments

1.3 The amendments proposed in the Native Title Amendment Bill 2009 were considered to be minor and non-controversial by most of the witnesses to the inquiry, with the National Native Title Tribunal (NNTT) raising some concerns over how the changes would potentially impact on their ongoing operations.

1.4 As Tony McAvoy on the NNTC put it:

> …the amendments that are proposed in this amendment bill are not controversial. They may make some small difference but they are not going to make any vast change in the way in which native title matters are dealt with. There is not going to be any rush of settlement of native title applications as a result of any of these amendments.[2]

1.5 These comments reflect the recent analysis of (now) Chief Justice Robert French, who argues that the heavy burden on the principal parties to native title litigation is a result of these claims being proceedings conducted in the Federal Court and so '… their resolution is, to a degree, constrained by the judicial framework…' particularly its requirement that '…applicants prove all elements necessary to make

---

[1] Preamble to the *Native Title Act 1993*.

[2] *Committee Hansard*, 16 April 2009, p. 20.

out the continuing existence of native title rights and interests *within the meaning of the NTA and their recognition by the common law*.'[3]

1.6 The AHRC also argued that further reforms were necessary to realise the human rights of Aboriginal and Torres Strait Islander peoples and to enact our international commitments. The Australian Greens consider that the amendments suggested by the AHRC have merit, and recommend that the Government consider their adoption.

1.7 The AHRC also drew to the attention of the committee the latest statement from the United Nation's Human Rights Committee, which '…notes with concern the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act. It regrets the lack of sufficient steps taken by the State party to implement the Committee's recommendations adopted in 2000.'[4]

1.8 The small number of submissions to this inquiry by Aboriginal organisations possibly reflects both the minor nature of these changes and the short timeframe the inquiry allowed for submissions. Given the current problems, costs and delays faced by parties to the native title process and the significant concerns with other aspects of the native title process that have been highlighted over the last decade it is disappointing that more significant reforms have not been brought forward by the Rudd Government at this point.

Burden of Proof

1.9 The most significant relatively simple amendment that could be made at this time to help with actually '…achieving more negotiated native title outcomes in a more timely, effective and efficient fashion'[5] (as the Attorney General claims is the intent of this Bill) was, in the view of the vast majority of the witnesses who addressed this issue the burden of proof placed onto native title claimants to prove connection and continuity.

1.10 The AHRC argues that:

> It cannot be disputed that Indigenous peoples lived in Australia prior to colonisation and that the Crown was responsible for the dispossession of Indigenous peoples throughout Australia. It has also been acknowledged by governments over time through various policies, laws and statements of recognition, including the creation of land rights regimes and other mechanisms, that Indigenous peoples are the Traditional Owners of the land.

---

[3] Justice Robert French, *Lifting the burden of native title – some modest proposals for improvement*, Federal Court, Native Title User Group, Adelaide, 9 July 2008, p. 1. *(emphasis added).*

[4] Australian Human Rights Commission, submission 8, p. 4.

[5] Hon. Robert McClelland MP, Second Reading speech, *House Hansard* 19 March 2009.

> It is in this context that the Commission argues that it is unjust and inequitable to continue to place the demanding burden of proving all the elements required under the Native Title Act on the claimants.[6]

1.11 The NNTC argued that the burden of proof placed onto native title claimants unfairly ties them up in long-winded and costly research and litigation, arguing that in the Federal Court:

> The state is a party and is entitled in the way that the law is presently structured to demand that the party seeking the remedy prove its case; it is entitled to do that. It can sit in mediation and require the applicant to prove each point to a level of satisfaction. Whilst in a spirit of settlement that might seem to be unreasonable, it is a long way short of being in bad faith or of there being an absence of good faith.[7]

1.12 On these grounds the NNTC argues that improving mediation processes and referrals or making changes to 'good faith' provisions will not result in a dramatic increase in the number of successful native title claims or the speed with which they are resolved, because:

> Unfortunately, for many traditional owners, simply reaching the point of getting into substantive negotiations with any of the respondent parties is a hurdle that many have been unable to attain as yet. In many cases, the state will not even talk to them about serious settlement because they have not presented a connection report.[8]

1.13 The NNTC further argued that:

> The longest delay is in getting into discussions and concluding discussions with the respondent parties, and invariably the primary respondents are state governments or the Commonwealth. That is where the real delays and problems are, and that is where this shifting of the onus of proof will have great effect.

1.14 Instead the NNTC argue for a rebuttable presumption of continuity, along the lines suggested by Justice French.

> …if the parliament is interested in bringing forward settlement of native title applications and reducing the cost associated with the hundreds of applications that are presently before the court then a simple measure—one which is described by Chief Justice French in his paper as a modest proposal—would be to introduce a presumption of continuity. It would require a number of small provisions to be inserted into the legislation.

1.15 It is my submission that having inserted those provisions the initial premise for the establishment of the presumption could be made out in the application itself

---

[6] Australian Human Rights Commission, submission 8, p. 48.

[7] Mr Tony McAvoy, NNTC, *Committee Hansard*, 16 April 2009, p. 23.

[8] Mr Tony McAvoy, NNTC, *Committee Hansard*, 16 April 2009, p. 23.

and the section 62(1) affidavit which supports the application, and then the burden would automatically shift to the states.[9]

1.16 The form of such a provision recommended by Justice French is as follows:

- (1) This section applies to an application for a native title determination brought under section 61 of the Act where the following circumstances exist:
    - (a) the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group;
    - (b) members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional;
    - (c) the members of the native title claim group, by their laws and customs have a connection with the land or waters the subject of the application;
    - (d) the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.
- (1) Where this section applies to an application it shall be presumed in the absence of proof to the contrary:
    - (a) that the laws acknowledged and customs observed by the native title claim group are traditional laws and customs acknowledged and observed at sovereignty;
    - (b) that the native title claim group has a connection with the land or waters by those traditional laws and customs;
    - (c) if the native title rights and interests asserted are capable of recognition by the common law then the facts necessary for the recognition of those rights and interests by the common law are established.[10]

1.17 As the AHRC argues, such an approach is consistent with the stated intent of Native Title Act (as expressed in the preamble) and in line with a number of current Australian laws which shift the burden of proof to the respondent, including the *Sex Discrimination Act 1984* and the *Workplace Relations Act 1996*.[11] Furthermore, given that governments are both the party that granted interests in traditional lands to others

---

[9] Mr Tony McAvoy, NNTC, *Committee Hansard*, 16 April 2009, p. 20.

[10] Justice Robert French, *Lifting the burden of native title – some modest proposals for improvement*, Federal Court, Native Title User Group, Adelaide, 9 July 2008, pp 11–12.

[11] AHRC, submission 8, p. 49.

and are the holders of the vast majority of relevant records, it would seem both fitting and appropriate that they bear the burden of proof.[12]

1.18 The main procedural benefit of including a presumption of continuity would be the manner in which it encouraged governments to progress native title claims without first insisting claimants present comprehensive connection reports.[13] It would also provide much greater incentive for them to access their records and provide to the court at a much earlier point the information they hold that could clarify areas that are under dispute.[14] A respondent party, including a state or territory government could choose to challenge such a presumption and present evidence to make its case, but it could also choose not to challenge and disregard any substantial disruption in continuity of acknowledgement of traditional laws and customs should it desire.[15]

1.19 The AHRC says that 'it does not consider that shifting the burden of proof to the primary respondent in native title cases would result in opening the 'flood-gates' for native title claims'[16] provided that existing procedural mechanisms within the Native Title Act that act as safeguards are retained – such as the current notification provisions and registration test.

1.20 The existing registration test, which requires claimants to specify the details and merits of their claim, should act to limit ambit and spurious claims. The Commission cautions against toughening the existing registration test, arguing that this would simply shift the current problem to an earlier stage and place the assessment of evidence outside of the Court.[17] It recommends instead that that Commonwealth and the National Native Title Tribunal draft a clear and comprehensive guide to the registration test.

Recommendation 1

1.21 That the Native Title Act is amended to include a rebuttable presumption of continuity.

Senator Rachel Siewert

Australian Greens

---

[12] AHRC, submission 8, p. 50.

[13] AHRC, submission 8, p. 51.

[14] AHRC, submission 8, p. 51.

[15] Justice Robert French, *Lifting the burden of native title – some modest proposals for improvement*, Federal Court, Native Title User Group, Adelaide, 9 July 2008, p. 11.

[16] AHRC, submission 8, p. 50.

[17] AHRC, submission 8, p. 50.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Registrar and Chief Executive Officer of the Federal Court of Australia
2	Joint submission by the Attorney-General's Department and FaHCSIA
3	National Native Title Tribunal
4	Law Council of Australia
5	Native Title Office, Torres Strait Regional Authority
6	National Native Title Council
7	Northern Territory Government
8	Australian Human Rights Commission

ADDITIONAL INFORMATION RECEIVED

1	National Native Title Tribunal - covering letter re answers to questions on notice. Received 22 April 2009
2	National Native Title Tribunal - list of former and present members of the tribunal. Received 22 April 2009
3	National Native Title Tribunal - chart showing the number and categories of Tribunal members for each year from 1994 to 2009. Received 22 April 2009
4	National Native Title Tribunal Report on native title dated March 2009. Received 22 April 2009
5	Copy of judgement McLennan and others on behalf of the Jangga People v State of Queensland [2009] FCA 236. Received 22 April 2009

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Thursday 16 January 2009

ANDERSON, Ms Louise, Native Title Registrar
Federal Court of Australia

KARLSSON, Ms Tiffany, Principal Legal Officer, Legislation, Scrutiny & International Team, Native Title Unit
Attorney-General's Department

MCAVOY, Mr Tony, Representative
National Native Title Council

MURPHY, Mr Jeffrey, Acting Assistant Secretary, Claims and Legislation Branch, Native Title Unit
Attorney-General's Department

NEATE, Mr Graeme, President
National Native Title Tribunal

ROCHE, Mr Greg, Branch Manager, Portfolio Governance
Department of Families, Housing, Community Services & Indigenous Affairs

SODEN, Mr Warwick, CEO/Registrar
Federal Court of Australia