National Native Title Tribunal

National Native Title Tribunal Submission

Date 9 April 2009 To: Senate Legal and Constitutional Affairs Committee

INQUIRY INTO THE NATIVE TITLE AMENDMENT BILL 2009

Summary

The National Native Title Tribunal ('the Tribunal') has provided the Attorney-General and the Attorney-General's Department with detailed written comments on the proposed amendments to *Native Title Act 1993* (Cth) ('the Act'). The President and Members of the Tribunal and the Native Title Registrar have met with the Attorney-General and his advisers to discuss the Tribunal's concerns about some of the proposed amendments that relate directly to the mediation of native title claims and compensation applications.

Broadly speaking, the Tribunal is concerned that:

- because individual judges will have broad discretionary power about who will conduct mediation, the system or processes may become:
  - ad hoc, fragmented
  - less efficient
  - more expensive to the Commonwealth
- 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
- there are issues about how mediators other than the Court or Tribunal are to be identified, paid, and supported (administratively and with specialist geospatial, research, legal and other resources)
- the amendments suggest a likely fragmentation of the current regional approach to planning and case management
- the amendments fail to acknowledge that the Tribunal offers a range of mediation services (including specialised, flexible multi-disciplinary agreement-making teams that are created according to the particular requirements of individual claims, and can call on a range of geospatial, research and legal resources).

The reasons for those concerns are discussed in this submission.

The Tribunal submits that the amendments proposed by Schedule 1 to the Native Title Amendment Bill 2009 are too far-reaching and might operate to impede meeting the Australian

Government's policy objective (as described in the second reading speech on the Bill) of 'achieving more negotiated native title outcomes in a more timely, effective and efficient fashion' and contributing to 'broader, more flexible and quicker negotiated settlements of native title claims'.

The current scheme 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.

There is evidence that the current scheme produces positive outcomes. For example, there is only one native title claim in trial before the Federal Court at present (the Torres Strait regional sea claim). Two other applications are on appeal to a Full Court. All the determinations in 2008 and 2009 that native title exists were made by consent of the parties. Those determinations were in Queensland, Western Australia, and some of were over extensive areas.

The proposed amendments in Schedule 1 have the potential to marginalise or remove from the process the body which the Commonwealth established and has resourced to mediate native title claims, and which has developed extensive expertise and experience over the past 15 years.

Furthermore, the success or otherwise of the amended scheme will depend on how it is administered by individual judges of the Court. In the absence of a consistent, coordinated national approach by the Court to the management of native title applications, the concerns summarised above and outlined in more detail in this submission may well be realised.

The Tribunal accepts, of course, that the Australian Government decides its policy in relation to native title and develops legislation to give effect to its policy.

Accordingly, if the amendments proceed as proposed in Schedule 1 to the Bill, some changes might improve their operation. In suggesting the following changes, the Tribunal is endeavouring to improve the operation of amendments which it considers to be unnecessary and potentially counterproductive.

The Tribunal ***recommends*** that the Native Title Amendment Bill 2009 be amended:

- so that s 86B include specific reference to the Tribunal, either by inserting '(including the NNTT)' after 'appropriate person or body' in s 86B(1) or by inserting a reference to the Tribunal in proposed s 86B(2A)
- to allow the Tribunal to provide a regional mediation progress report or a regional work plan to the Federal Court where all or a majority of the applications in the region have been referred to the Tribunal for mediation and the President of the Tribunal considers that it would assist the Court in progressing proceedings (i.e. retain the essence of s 136G(3A) of the Act)
- to give mediators an entitlement to appear before the Federal Court rather than having to seek leave to appear (i.e. retain the effect of s 86BA(2) of the Act)

- to provide (in terms similar to those in s 82(2) and s 109(2) of the Act) that any person or body who is engaged to mediate in relation to native title matters may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any party to any proceedings that may be involved.

The Tribunal further ***recommends*** that, if the Act is amended as proposed, the Attorney-General re-issue *Mediation Guidelines: Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal* as adapted to reflect the revised legislative scheme, so that the *Mediation Guidelines* apply to mediation whether conducted by the Tribunal or by any other person or body.

Other suggestions are made that may be reflected in practical arrangements between the Court and the Tribunal if they are not covered by amendments to the Act. For example the Tribunal ***recommends*** that the Court should be obliged to consult with the President of the Tribunal before referring native title issues to the Tribunal for review or before directing the Tribunal to conduct a native title application inquiry.

In addition, the Tribunal ***recommends*** that the Act be amended to confer on the Tribunal the function of assisting parties to resolve disputes in relation to indigenous land use agreements and other agreements negotiated under the Act.

Introduction

On 17 October 2008, the Attorney-General announced a new policy in respect of the management of cases within the native title system. In particular, that policy was to vest a central role in native title case management in the Federal Court of Australia ('the Court'). The Attorney-General stated:

> Under the new system, the Court will determine *which* claims should be referred for mediation, *when* mediation should occur and *which body*, whether the Court or the National Native Title Tribunal, should mediate. (emphasis added)

In other words, the Court would have discretion about *whether* and *when* to refer an application for mediation, and it would determine whether each application would, upon referral, be mediated by either the Court or the Tribunal.

The Tribunal notes that, since that announcement, the Government's policy appears to have changed in two respects. Under amendments proposed to be made by the Native Title Amendment Bill 2009 ('the Bill'):

- the Court will have an even broader discretion about *who* might mediate (i.e. the Court, the Tribunal or another 'appropriate person or body')
- the Court will have no greater discretion than at present about *whether* and *when* a claim will be mediated.

The proposed amendments can be considered as another step in the legislative history of procedures to give effect to the objective set out in the Preamble to the Act that:

> 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.

In summary:

- the original scheme provided that every native title claim and compensation claim was made to the Tribunal which could make a determination in, or consistent with, the terms agreed by the parties. Once registered, determinations of the Tribunal were given effect as if they were orders of the Court. Only if a claim could not be resolved by agreement would the Registrar of the Tribunal lodge the application to the Federal Court for decision.
- The High Court held that a similar scheme was constitutionally invalid,[1] and a Full Federal Court held subsequently that aspects of the scheme in the Act were invalid because they purported to vest judicial power in a non-judicial body.[2]
- in 1998, the Act was amended to provide that every current claimant application became a proceeding in the Federal Court and every new application was made in the Court. As a

[1] See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 127 ALR 1.
[2] *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151, 152 ALR 294.

consequence, the Court has had general control of native title proceedings since 30 September 1998.

- the 1998 amendments provided that, as a general rule, the Court would refer each application to the Tribunal for mediation, and set out in detail the powers and functions of the Tribunal in conducting mediation.
- In 2007, following a comprehensive independent review of the claims revolution process, the Act was amended to expand the Tribunal's powers and functions in relation to mediation and to make it clear that the Court could not mediate while an application was with the Tribunal for mediation.
- The proposed amendments in 2009 will provide that both the Court and the Tribunal may mediate and, for the first time in the history of the Act, that another 'appropriate person or body' may mediate (effectively deregulating the provision of mediation services).

The Tribunal accepts that the Australian Government decides its policy in relation to native title and develops legislation to give effect to its policy. In the Tribunal's submission, however, some of the amendments discussed below go beyond what is necessary to give effect to that new policy, and might operate to impede the meeting of the Government's policy objective (as described in the second reading speech on the Bill) of 'achieving more negotiated native title outcomes in a more timely, effective and efficient fashion' and contributing to 'broader, more flexible and quicker negotiated settlements of native title claims'.

This submission refers only to the proposed amendments contained in Schedule 1 to the Bill, as those are the amendments that affect mediation of native title claims by the Tribunal.

This submission does not refer to every proposed amendment.

Policy and practical issues raised by the Bill

The Tribunal is concerned that the scheme, if enacted in the form set out in Schedule 1 to the Bill, will permit individual judges of the Court to exercise their broad discretionary powers in relation to individual applications or clusters of applications in ways which will:

- permit mediation to be carried out by a diverse range of persons and institutions with a wide range of talents, experience and expertise
- create issues of accountability on the part of mediators who operate outside the framework of a governmental institution (other than by contractual arrangements)
- permit mediation of matters to become fragmented and ad hoc, in circumstances where regional systems of case management, which have been well-established by the Court and the Tribunal, are working well
- create a more costly and less efficient system of mediation, with the risk of gaps or duplication in service provision, compared with the current range of mediation services and other forms of assistance provided by the Tribunal
- result in fewer resources being available to enable flexible and innovative solutions to be reached in a timely manner and may permit the marginalisation or removal of the Tribunal from the mediation of native title claimant and compensation applications.

The Tribunal supports a flexible native title system that encourages more negotiated settlements of native claims.

The Tribunal currently offers:

- a range of mediation services
- multi-disciplinary mediation/agreement-making teams that are created according to the particular requirements of individual claims
- related assistance, including research, geospatial and legal resources.

The Tribunal also carries out significant educational and public information functions by the provision of targeted information particularly in relation to claimant applications and clusters of claims.

Agreement-making teams are allocated (and supplemented from time to time) according to the requirements for individual claims or clusters of claims. One good example was the Spear Creek mediation in South Australia where various disputes about overlapping claimant applications were resolved with the assistance of a team of members together with staff with geospatial and research skills.

The Tribunal is able, from its member and staff resources, to provide additional assistance as required. In recent weeks, the President has:

- appointed a member at short notice to take over a mediation from another member who was unable to mediate due to a family crisis
- appointed a member with particular legal skills to assist another member in specific tasks at a critical stage in mediation when there were issues between parties about the content of a consent determination.

These are illustrative of the flexibility and broad capacity of the Tribunal to assist parties. Some of that may be lost by a combination of the specific drafting referred to below and the administration of the new scheme.

It is not at all clear from the legislation or the Attorney-General's public speeches:

- how that level of service can be or will be provided by other persons or bodies in the marketplace, and
- who will pay for the provision of those services (although presumably it will be the Federal Court).

Experience to date has shown that where the Court and the Tribunal work closely together on a state, territory or regional basis, a range of results can be achieved under the existing scheme. Positive outcomes have been achieved where:

- the Court has administered the scheme in a consistent manner
- the respective powers and functions of the Court, Tribunal, native title representative bodies and parties have been recognised, and
- the human and financial resources available to the participants have been taken into account.

Even when there has been close coordination by the Court and the Tribunal, claims have not necessarily been resolved quickly. That is the reality of native title. For example, a recent analysis of the steps leading to the consent determination in the Thalanyji peoples claim in Western Australia shows[3] that there were 28 Federal Court directions hearings, 37 mediation conferences (and numerous other meetings) and 19 mediation reports, most of them in the period after the Court heard preservation evidence in September 2004 and before a consent determination was delivered on 18 September 2008.[4]

Two other broad observations can be made about the potential effect of the proposed amendments. First, it should be understood that there are numerous factors that delay the resolution of claims, most of which will not be met by the proposed amendments to the Act and which require changes (including behavioural changes) elsewhere. Hence, claims can take years to resolve, particularly if there is a broader settlement of claims (possibly including, for example, land grants under state or territory legislation, joint management of conservation reserves).

Second, much will depend on how the scheme, if enacted in the form set out in the Bill, is administered by judges of the Court. There may be issues about the extent to which the judges will adopt a consistent, coordinated national approach to the management of native title applications under the revised scheme.

The Tribunal is in discussions with representatives of the Court about the implementation of the proposed scheme.

The Tribunal will continue to work closely with the Court to administer the scheme.

Comments and submissions about specific proposed amendments to the Native Title Act

(1) Mediation Provisions

The Bill proposes changes to s 86B(1) of the Act, which subsection is central to the Government's new policy direction.

Proposed s 86B(1): *Discretion about who will mediate:* The draft of s 86B(1) states that (subject to an order under subsection (3)) the Court 'must refer' each application 'to an appropriate person or body' for mediation. This goes well beyond the announcement on 17 October 2008.

The Tribunal is concerned that the proposed amendment to s 86B(1) of the Act goes too far. If enacted, it would permit each judge of the Court to exercise his or her broad discretionary power to permit mediation to be carried out by a diverse range of persons and institutions with wide and varying talents, experience and expertise. In its terms, the proposed amended s 86B(1) does

[3] Daniel O'Dea, 'Negotiating consent determination: co-operative mediation – the Thalanyji experience, paper delivered to the Negotiating Native Title Forum, Melbourne, 19 February 2009.
[4] *Hayes on behalf of the Thalanyji People v Western Australia* [2008] FCA 1487.

not acknowledge, or give any preference to, the Tribunal which has built up considerable experience and expertise in mediating complex native title matters.

If the expression 'an appropriate person or body' as used in proposed amended s 86B(1), is meant to extend only to people (other than Tribunal members) engaged by the Court as officers of the Court, the provision need not be cast so broadly. The Tribunal understands that the Registrar of the Court from time to time appoints people to act as Deputy Registrars to perform certain tasks on behalf of the Court in matters other than native title. If so, the Registrar's powers are similar to the power of the President of the Tribunal to appoint a consultant for specific purposes (s 131A) and who is treated as if they were a member of the Tribunal (s 136A(7)) for specified purposes. If that approach is what is contemplated, then s 86B(2A) and a recast s 86B(1) could provide that result and s 86B(2) could be deleted.

Accordingly, the Tribunal ***recommends*** that s 86B include specific reference to the Tribunal, either by inserting '(including the NNTT)' after 'appropriate person or body' in s 86B(1) or inserting a reference to the Tribunal in proposed s 86B(2A).

The Tribunal also notes that, the proposed revisions to s 86B(1):

- would create issues of accountability on the part of any mediators operating outside the framework of a governmental institution (particularly as they are to be given the same powers and immunities as Tribunal members, but are not subject to the same disciplinary constraints)
- might permit mediation of matters to become fragmented and ad hoc (especially as most native title matters, however well resourced and organised can take some years to resolve and involve a range of meetings and services)
- are likely to create a more costly and less efficient system of mediation, with the risk of gaps or duplication in service provision
- leave uncertain the ways in which an appropriate level of service can be or will be provided by other persons or bodies in the marketplace
- do not specify who would pay for the provision of those services (see (3) below)
- potentially result in fewer resources being available to enable flexible and innovative solutions to be reached in a timely manner
- permit or even facilitate the marginalisation of the Tribunal from the mediation of native title claims, one of its core statutory functions
- in so doing, could precipitate a range of potentially adverse and expensive effects on an inherently challenging native title system.

Proposed s 86B(2): The Tribunal has concerns about this subsection insofar as it relates to the Tribunal (which is presumably included as 'a particular... body') because:

- the Act already specifies the qualifications that Tribunal members must have for appointment to the Tribunal (s 110)
- the Act already specifies the qualifications that a Presidential consultant must have (s 131A(2))
- if the subsection gives the Court power to refer an application to a particular member of the Tribunal, it is contrary to s 123(1)(b)(i) of the Act and could significantly impede the

proper functioning of the Tribunal in the performance of its mediation and other functions, including the important mediation and arbitration of future act proceedings.

Proposed s 86B(5C): The Tribunal is concerned about the potential operation of this subsection (particularly where the whole or part of a proceeding is referred to the Tribunal) if it could -

- allow the Court to order how a member of the Tribunal conducts a mediation
- limit the capacity of a member of the Tribunal to be assisted by another member or staff member other than by a Court order.

The apparent capacity for the Court to decide whether a Tribunal member may be assisted in conducting mediation is confirmed in proposed s 94D(3)(a) which provides that a Tribunal member may be assisted by another Tribunal member or staff member 'subject to an order made under subsection 86B(5C)'. These provisions:

- are contrary to the role of the President under s 123(1) of the Act
- take effect *after* the referral of a matter, which suggests that if an order was made which limited the assistance to a mediator then every time additional assistance is required an application would have to be made to the Court for variation of an order under s 86B(5C). This would impose unnecessary practical constraints on Tribunal mediation and an unnecessary burden on the Court. In the Tribunal's experience, the President is able to arrange assistance to a member as appropriate (sometimes at short notice or as circumstances change) from the range of Tribunal members. It should be noted that usually a Tribunal member is assisted by one or more members of staff in every mediation conference.

Consistently with those concerns, the Tribunal is concerned at the wide scope of proposed s 86B(5C)(c). The Tribunal acknowledges, however, that the Federal Court already has wide powers in relation to Court-annexed mediation as set out in Order 72 of the Federal Court Rules.

The Court already has considerable power to manage claims, particularly in relation to those matters where it has ordered that mediation cease. Some of the proposed changes would be unhelpful and potentially burdensome on the Court and the Tribunal.

(2) <u>Respective powers and functions of the Court and the Tribunal</u>

As noted above, the proposed amendments will significantly affect the respective powers and functions of the Court and the Tribunal, although it is not clear how all these changes will operate as between the two institutions.

The Tribunal is not a party to proceedings and is not within the Court, so it is unclear to what extent the Court will be able to direct it to act.

For example:

- the amendments seem to give the Court power to refer an application to a particular member of the Tribunal (proposed s 86B(1),(2),(5) and (5A)) – if so, that is contrary to s 123(1)(b)(i) of the Act and could significantly impede the proper functioning of the

Tribunal in the performance of its mediation and other functions, including the important mediation and arbitration of future act proceedings

- the Tribunal is concerned about the potential operation of proposed s 86B(5C) (particularly where the whole or part of a proceeding is referred to the Tribunal) if it could:
    - allow the Court to order how a person conducts a mediation
    - limit the capacity of a member of the Tribunal to be assisted by another member or staff member other than a Court order.

It is clear that the Court will be able to direct the Tribunal to conduct native title application inquiries (proposed s 130B(1)) and refer to the Tribunal native title issues for review (proposed s 136GC(1)), and the Bill seems to deprive the Tribunal of its current role in initiating them as tools to mediation.

(3) Resourcing of participants

If the expression 'an appropriate person or body' is as broad as it suggests, numerous practical difficulties are likely to arise. For example:

- How will the Court identify which persons or bodies are both appropriate and available to do the work as it arises (e.g. at a directions hearing when the Court is deciding to whom it must refer each application for mediation)? Will the Court keep a register of suitably qualified people who are ready, willing and able to operate over some years in relation to complex multi-party proceedings?
- Who will pay these persons or bodies? Will funding come from the Court (as seems to be implied) or will arrangements be made for assistance to be provided by the Attorney-General's Department (e.g. the unit currently dealing with respondent funding)?
- Who will determine how much they are to be paid (as compared with the daily rate for Tribunal members set by the Remuneration Tribunal which is used as a benchmark for Presidential consultants)?
- Who will provide logistical and specialist support (e.g. research and geospatial services) to them?
- If the Tribunal is to provide these services, who will request their provision and how will the Tribunal prioritise competing demands on its resources from others without compromising the performance of its own statutory functions (including important future act and other functions unrelated to the mediation of claims)?

As noted above, the Court will be able to direct the Tribunal to conduct native title application inquiries and refer to the Tribunal native title issues for review. Such direction need not have regard to whether the Tribunal has the relevant resources (see (4) and (5) below).

In the medium to longer term there will be issues about how the relative resources (human and financial) of the Federal Court and the Tribunal are to be allocated or reallocated if circumstances and demands on each change. It is not clear how these issues will be addressed in light of the current four year cycles of funding of the native title system.

(4) Reviews about native title issues

Proposed s 136GC: The Tribunal has two concerns with the amended section.

First, by empowering only the Court to direct the Tribunal to conduct a review, the Act will remove from the Tribunal one of its discretionary tools in aid of its mediation. That will reduce, rather than enhance, the flexibility of the system. The Tribunal is not averse to the Court referring a matter to the Tribunal for review (particularly if a range of other bodies and persons are conducting mediation), but suggests that the President retain the existing power. In other words, either the Court or the President could refer an issue for review by the Tribunal.

Second, this section will empower the Court to direct the Tribunal to conduct a review and (implicitly) requires the Tribunal to hold such a review. It should be noted that:

- a review must be conducted by a Tribunal member (s 136GC(4))
- another member may assist in the review (s 136GC(5))
- as a general rule, a review may not be conducted by a Tribunal member who is disqualified under the Act (because they are mediating the application (proposed s 94D(5)), or have reconsidered the claim after the Registrar did not register the claim (s 190E(6)), or conducted an inquiry in relation to the proceeding (s 138C(2)))
- the Tribunal currently has nine members
- the President could engage a consultant to conduct a review (s 131A).

Given that some member and other resources are likely to be required to conduct reviews, and the possibility that the number of members suitable to conduct a particular review may be limited (having regard to the statutory disqualification or perceived conflict of a member or members in relation to a particular application) and the Tribunal may have to engage a consultant for this purpose (at additional cost to the Tribunal), the Tribunal ***recommends*** that the Court should be obliged to consult with the President before referring to the Tribunal native title issues for review.

(5) <u>Native title application inquiries</u>

Proposed ss 138B, 138C: These sections will empower the Court to direct the Tribunal to hold a native title application inquiry and require the Tribunal to hold such an inquiry. It should be noted that:

- an inquiry must be conducted by a Tribunal member (s 138C(2))
- another member may assist in the inquiry(s 138C(2))
- as a general rule, an inquiry may not be conducted by a Tribunal member who is disqualified under the Act (because they are mediating the application (proposed s 94D(5)), have reconsidered the claim after the Registrar did not register the claim (s 190E(6)), or have conducted a review in relation to the application (s 136GC(8)))
- the Tribunal currently has nine members
- the President cannot engage a consultant to conduct an inquiry.

Given the extent of resources that are likely to required to conduct some inquiries, and the possibility that the number of members suitable to conduct an inquiry might be limited (having regard to the statutory disqualification or perceived conflict of a member or members in relation to a particular application), the Tribunal ***recommends*** that the Court should be obliged to consult with the President before directing the Tribunal to conduct an inquiry.

(6) Fragmenting of regional approach to claims management

Under the proposed ss 86E(2) and 94M(3) the Court will have power to request 'one or more mediators' to provide a regional mediation progress report or a regional work plan in relation to mediations being conducted by 'that mediator or those mediators'. It is difficult to see how that will work if a range of mediators (other than the Court or the Tribunal) are mediating in a region. A collaborative exercise of this nature could be expensive.

Since the 2007 amendments to the Act (and in some jurisdictions before those amendments), the Tribunal has provided regional mediation reports and work plans for regions or states, informed by its regional planning processes. Dividing this work among a range of persons or bodies would:

- probably result in fragmented or uncoordinated reports for a state or territory or region
- run counter to an integrated regional planning process by the Court and Tribunal (including the Tribunal's National Case Flow Management Scheme)
- add to the cost of regional planning if either:
    - a range of bodies prepared regional mediation reports or work plans on only those matters which they were mediating, or
    - they cooperated with each other and were all involved in overarching planning.

The benefit of the current scheme is that the Tribunal works with major parties or their representatives (including governments and the local native title representative body or bodies) to develop a regional approach and prioritisation of matters having regard to such factors as Court orders, available resources, and the progress of individual applications or clusters of applications. The amendments to s 86E(2) would have the potential to undermine that approach.

(7) Voluntary regional mediation progress reports and regional work plans

The Tribunal is concerned that the proposed amendments to the Act would remove the capacity of the Tribunal to provide the Federal Court with voluntary regional mediation progress reports and regional work plans if the President considers that such a report would assist the Court in progressing proceedings (see current s 136G(3A)).

In recent years the Tribunal has worked closely with State and Territory governments, native title representative bodies and native title service providers, other key respondent parties, and officers of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and the Attorney-General's Department to develop regional planning in relation to native title applications. Such planning has enabled a more coordinated and structured approach to be taken to the resolution of native title claimant applications, and has assisted the Court to develop coherent case management strategies for regions.

Although individual judges of the Court have not always requested the Tribunal to provide regional reports or work plans, Tribunal Members may provide such documents to the Court where the President of the Tribunal considers that such a document 'would assist the Court in progressing proceedings in a State, Territory or other region of Australia' (s 136G(3A)). We understand that the Court has found such reports to be helpful.

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 its case management in regions where most or all claims have been referred to the Tribunal for mediation. This may be significant in some jurisdictions (principally New South Wales) where claimant applications have been allocated to various judges who are not responsible for regions or large clusters of claims and who do not sit together in regional case management conferences or directions hearings. It is unlikely that such judges would request regional reports from the Tribunal, yet such reports can provide a framework within which decisions about the case management of individual claims can be made by individual judges.

The Explanatory Memorandum in relation to the amendments states that the Bill does not replicate the existing s 136G(3A) on the basis that it is 'unnecessary' for the Tribunal to provide that type of mediation reports that are not requested by the Court 'given the purpose of these amendments is to give the Court overall control of native title claims' (para 1.78). That explanation is not convincing. The provision of a report to the Court does not in any way diminish the Court's control of its proceedings. The Court may give such weight as it considers appropriate to the contents of the report or work plan. In the absence of a direct request under proposed s 94N(3) there will be no capacity for that overview to be before the Court.

It should be noted that, by contrast, proposed s 94N(4) will enable the person conducting the mediation to provide a voluntary written report to the Court setting out the progress of the mediation if the person considers that it 'would assist the Court in progressing the proceeding in relation to which the mediation is being undertaken'. The proposed subsection (4) would replicate the effect of existing s 136G(3). There would seem to be no reason in principle why, in appropriate circumstances, the capacity to provide a voluntary regional mediation progress report or regional work plan should not also be retained in the amended Act.

Recommendation: The Tribunal ***recommends*** that the Native Title Amendment Bill 2009 be amended to allow the Tribunal to provide a regional mediation progress report or a regional work plan where all or a majority of the applications in the region have been referred to the Tribunal for mediation and the President of the Tribunal considers that it would assist the Court in progressing the proceedings (i.e. retain the essence of s 136G(3A) of the Act).

(8) Mediator's right of appearance before the Federal Court

Subsection 86BA(2) of the Act currently confers on the Tribunal the *right* to appear before the Federal Court at a hearing that relates to any matter that is currently before the Tribunal for mediation 'for the purpose of assisting the Court in relation to a proceeding' (s 86BA(2)). This section does not give the Tribunal the right to become a party to the proceedings (s 86BA(5)).

Proposed new section 86BA will *permit* a mediator (including the Tribunal) to appear before the Court at a hearing that relates to any matter that is currently before the mediator 'if the Court considers that the mediator may be able to assist the Court in relation to a proceeding'. The right to appear is thus removed and appearance will be with the permission of the Court.

The Explanatory Memorandum (at para 1.36) sets out in some detail the forms of assistance that a mediator could bring to the Court. It states that the amendments aim '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'.

In practice it would be difficult to know in advance of a hearing whether the Court would want a mediator present. Under the present Federal Court Rules, the Tribunal is obliged to notify parties and the Court of its intention to appear (O78 r48). Presumably the Rules would be amended if there is no right of appearance for the mediator. The uncertainty created for a mediator who has no entitlement to appear and who will not necessarily know whether he or she should appear would seem to undermine the benefits for the Court and parties of having mediators or their representatives present in Court.

According to the Explanatory Memorandum, 'Including the discretion for the Court to grant leave for a mediator to appear, rather than allowing a mediator to have an automatic right of appearance, would be consistent with granting the Court control over native title mediations'. If, however, it is intended that mediators will assist the Court, then the Court loses no 'control over native title mediations' if a mediator is entitled to appear before it. The Court may give such weight as it considers appropriate to any information provided or submissions made by the mediator and will necessarily maintain complete control over the proceedings.

Recommendation: The Tribunal ***recommends*** that the Native Title Amendment Bill 2009 be amended to give mediators an entitlement to appear before the Court rather than having to seek leave to appear (i.e. retain the effect of s 86BA(2) of the Act).

(9) Taking account of cultural and customary concerns in mediation

Subsection 109(2) of the Act states that the Tribunal, 'in carrying out its functions, may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any party to any proceedings that may be involved'. Subsection 82(2) makes the same provision for the Federal Court in 'conducting its proceedings'.

Recommendation: The Tribunal ***recommends*** that the Native Title Amendment Bill 2009 be amended to provide (in terms similar to those in s 82(2) and s 109(2) of the Act) that any person or body who is engaged to mediate in relation to native title matters may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any party to any proceedings that may be involved.

(10) Revised Mediation Guidelines

Following the amendment of the Act in 2007, the previous Attorney-General, the Hon Philip Ruddock MP, issued *Mediation Guidelines: Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal.* The *Mediation Guidelines* set out principles of best practice and standards of behaviour which parties to mediation in the Tribunal and their representatives should seek to uphold.

Recommendation: If the proposed amendments to the Act are enacted, the Tribunal ***recommends*** that the Attorney-General re-issue the *Mediation Guidelines* as adapted to reflect the revised legislative scheme so that they apply to any native title mediation, whether conducted by the Tribunal or any other person or body.

(11) Proposed Tribunal role in dispute resolution

Beyond the mediation of claimant applications, the Tribunal has a range of other important functions including:

- providing assistance to people who want to negotiate Indigenous Land Use Agreements (ILUAs)
- mediating, holding inquiries and arbitrating in relation to future acts
- providing a range of other assistance to parties and other persons.

Much of the Tribunal's work relates, and increasingly will relate, to issues following determinations that native title exists.

Both the Native Title Payments Working Group Report (2008) and the Australian Government's Discussion Paper on optimising benefits from native title agreements (2008), highlight the need for effective implementation of agreements. The Discussion Paper states that the range of issues identified as contributing to successful implementation includes 'providing effective measures to deal with parties' failure to fulfil their agreement commitments'.

The Tribunal submits that it has the capacity, skills, experience and knowledge to assist parties to resolve disputes under agreements. In support of this submission, the Tribunal notes that the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account ('the PJC') recommended in 2001:

> That the Act be amended to grant to the Tribunal powers to assist with dispute resolution (following registration of an ILUA) in circumstances where relevant parties to the ILUA request it.[5]

When making that recommendation, the PJC stated that the Act:

> makes no provision for resolution of disputes arising under an ILUA following registration. Nevertheless, parties are able to include terms within the ILUA outlining the way that disputes will be resolved if they arise, as is the case with a normal commercial agreement.[6]

The Act currently makes no provision for the Tribunal to assist the parties to reach agreement when a dispute arises. By contrast, the Land and Resources Tribunal of Queensland (subsequently disbanded) was given functions under its enabling state legislation to assist parties in resolution of disputes arising under ILUAs in specified circumstances.[7]

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[5] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Nineteenth Report, Second Interim Report for the s206(d) Inquiry – Indigenous Land Use Agreements*, September 2001, recommendation 6, paragraph 7.33.
[6] Ibid, paragraph 7.32.
[7] Ibid, paragraph 7.33.

Accordingly, the Tribunal ***recommends*** that the Act be amended to confer on the Tribunal the function of assisting parties to resolve disputes in relation to ILUAs and other agreements negotiated under the *Native Title Act 1993.*

Conclusion

The Tribunal supports a flexible native title system that encourages more negotiated settlements of native title claims. The Tribunal wants the system to work better for all participants, and the broader community.

The Tribunal has considerable experience, expertise and commitment to offer the native system and it is important that these attributes be fully utilised in the future.

The Tribunal's concerns about aspects of the amendments contained in Schedule 1 to the Bill are set out in this submission, together with specific recommendations.

Whether or not the Australian Government intends the marginalisation or removal of the Tribunal from the mediation of applications, the legislation would allow that to occur, with a range of potentially adverse and expensive effects on an inherently challenging native title system which, in large part, is funded by the Commonwealth.

Much will depend on how the scheme, if enacted in the form set out in the Bill, is administered by individual judges of the Court.

The Tribunal is in discussions with representatives of the Court about the implementation of the proposed scheme.

The Tribunal will continue to work closely with the Court to administer the scheme. However, it should be clearly understood that:

- even in these circumstances, claims can take years to resolve, particularly if there is a broader settlement of claims (which may include, for example, land grants under state or territory legislation, joint management of conservation reserves), and
- there are numerous factors that delay the resolution of claims, most of which will not be met by the proposed amendments to the Act and which require a complete reappraisal of the operation and structure of the native title system (including behavioural changes).