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Inquiry into the Native Title Amendment Bill 2009

Australian Human Right Commission

Submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Senate Standing Committee on Legal and Constitutional Affairs

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Senate Standing Committee on Legal and Constitutional Affairs in its inquiry into the Native Title Amendment Bill 2009.

2. The Commission welcomes the Government's commitment to ensuring native title contributes to closing the gaps between Indigenous and non-Indigenous Australians through achieving agreements with broad benefits to Indigenous peoples. In particular, the Commission supports the Government's commitment to ensuring that the behaviour and attitudes of all parties facilitate effective negotiation and agreement making through the systems established under the *Native Title Act 1993* (Cth) (the Native Title Act).

3. The Commission supports the passage of the Native Title Amendment Bill 2009. However, drawing on the Aboriginal and Torres Strait Islander Social Justice Commissioner's native title reports and his knowledge and experience of the system gained through his statutory monitoring role[1], the Commission makes a number of recommendations for improvements to the Bill. These are included at recommendations 1-33.

4. The Commission takes this opportunity to make a number of recommendations for further amendments to improve the native title system. These issues are not addressed in the current Bill. The Commission has included these recommendations in this submission as it considers that further reform to the Native Title Act is necessary if it is to operate in a way that realises the human rights of Aboriginal peoples and Torres Strait Islanders, and lives up to the intent of the Act as stated in its preamble. The recommendations for further reform are included at recommendations 34-57.

5. The Commission made a submission to the Attorney-General's discussion paper on proposed minor native title amendments (the discussion paper) in February this year.[2] The Commission also made a submission to this Committee in its inquiry into the Native Title [Amendment] Bill 2006.[3] In making this submission, the Commission has drawn from these previous submissions to provide recommendations on the Bill before the Committee.

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[1] The Aboriginal and Torres Strait Islander Social Justice Commissioner has a statutory responsibility under s 209 of the Native Title Act to provide an annual report to the Attorney-General on the operation of the native title system and the impact of the Native Title Act on the exercise and enjoyment of the human rights of Aboriginal people and Torres Strait Islanders. In total, 15 native title reports[1] have now been submitted to Attorneys-General. Each of these reports identify concerns about the operation of the native title system and how it should be changed to improve the realisation of Aboriginal peoples' and Torres Strait Islanders' human rights. See http://www.humanrights.gov.au/social_justice/nt_report/index.html for previous native title reports.

[2] The Commission's submission to the Attorney-General on the discussion paper is available on the Commission's website (www.humanrights.gov.au).

[3] The Commission's submission to the Senate Standing Committee on Legal and Constitutional Affairs in its inquiry into the Native Title [Amendment] Bill 2006 is available on the Commission's website (www.humanrights.gov.au).

1.1 International human rights – recent developments

6. Since the Commission made its submission to the Attorney-General's discussion paper on proposed minor amendments, the Government has indicated its support for the Declaration on the Rights of Indigenous Peoples. The Commission notes that the Declaration includes a number of articles on land and resources, including Articles 25-32 which provide for rights to maintain traditional connections to land and territories, for ownership of such lands and protection of lands by the state, establishment of systems to recognise indigenous lands and rights to redress and compensation for lands that have been taken. Improving the effectiveness and operation of the Native Title Act is essential in ensuring that Australia realises these rights. See Attachment 1 for a copy of the Declaration.

7. The Commission would also like to draw the Committee's attention to the United Nations Human Rights Committee's concluding observations on Australia's member report under the International Covenant on Civil and Political Rights made in April 2009. The Committee made one recommendation specific to native title in paragraph 16:

> The Committee, while welcoming recent reforms, 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. (Art.2 and 27)
>
> > The State party should continue its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples.

The Committee's recommendation reiterates the need for further reform and improvement of the native title system.

1.2 Structure of this submission

8. This submission is divided into two parts. Part I directly responds to the Native Title Amendment Bill.

9. Part II restates a number of other recommendations for amendment to the Native Title Act that the Commission made in its submission to the discussion paper earlier this year. The recommendations made in Part II of this submission cover a wide range of issues that have been raised in native title reports or have been raised with the Commission by stakeholders and members of the community.

10. Whilst many of the issues and recommendations raised in Part II do not bear directly on the proposed amendments under the Bill, the Commission considers that it may be of assistance to the Committee to have those matters consolidated within the body of this submission for ease of reference. The Commission remains of its previously stated views that these additional issues and recommendations require the Government's attention if the overall operation and effectiveness of the Native Title Act is to be improved.

11. The Commission would like to note that some of the recommendations made in Part II of this submission are to amend the Native Title Act to provide for powers or procedures that are potentially already possible under the law, such as under the *Federal Court of Australia Ct 1976* (Cth) or Federal Court Rules. However, the Commission has received anecdotal feedback that a number of these practices and procedures are not applied by the Court or the parties in native title proceedings for varying reasons. Because of this, the Commission has recommended that some of these mechanisms be included in the Native Title Act, to more clearly draw those mechanisms to the attention of the Courts and parties.

2 Overview of recommendations

2.1 Recommendations on the Native Title Amendment Bill 2009

12. With regard to the Native Title Amendment Bill, the Australian Human Rights Commission recommends:

Recommendations relating to Schedule 1 – Amendments relating to mediation

1. That items 6 and 12 of Schedule 1 to the Bill be amended to provide that, if the Court is considering appointing a person or body for mediation, who is not the Registrar, a Deputy Registrar, a District Registrar, a Deputy District Registrar of the Court, or the NNTT, that the Court must give the claimants an opportunity to make submissions to the Court on the appropriateness of the mediator.

2. That proposed s 94D in item 35 of Schedule 1 to the Bill be amended to state that where the mediator intends on nominating an assistant/s under proposed s 94D(3)(b), the mediator must inform the Court and the parties of the identity/ies of the assistant, and an outline of the scope of the assistance intended to be provided, and that the Court must give the claimants an opportunity to make submissions to the Court on the appropriateness of the assistant.

3. That proposed s 94N in item 35 of Schedule 1 to the Bill be amended to ensure that:

    a. in the preparation of such a report, the mediator must consult with relevant representative body/ies, and have regard to its views in relation to the development of the work plan and to its strategic and/or operational plans for the relevant period, and

    b. that the relevant representative body/ies will receive a copy of the regional report and/or work plan sufficiently in advance of the directions hearing to allow it to make any submission to the Court about the report or plan that it considers necessary.

4. That proposed ss 94E(1), 94G and 94N in item 35 of Schedule 1 to the Bill should not be enacted.

5. If recommendation 4 is not accepted, the Commission recommends that proposed ss 94E(1), 94G and 94N in item 35 of Schedule 1 to the Bill should be amended to include rights to apply to the court objecting to demands by the mediator on such grounds as legal professional privilege, prejudice to the party's claim or breach of confidence. To ensure the powers are used appropriately, the Government or the Court should also draft guidelines on how mediators should use the powers.

6. That the test for party status in s 84(3)(a)(iii) of the Native Title Act and proposed s 94J(6) in item 35 of Schedule 1 to the Bill be amended to provide that only the

parties whose interests are substantially affected by the outcome need to be party to an agreement made under the Act.

7. If recommendation 6 is not accepted, the Commission recommends that proposed s 94J(6) be amended to define a 'relevant interest' as an interest 'in relation to land or waters, which may be affected by a determination in the proceedings'.

8. That item 40 of Schedule 1 to the Bill be amended. The item should repeal s 136, and not provide a substitute.

9. If recommendation 8 is not accepted, the Commission recommends that item 40 of Schedule 1 to the Bill should be amended so that reviews by the NNTT require:

    a. the consent of the claimant

    b. that statements made at a review are confidential as well as without prejudice and require the consent of the parties before disclosure can be made

    c. review reports should only be provided to the Federal Court and non-participating parties with the consent of the participating parties.

Recommendations relating to Schedule 2 – Powers of the Court

10. That items 5 and 7 of Schedule 2 to the Bill be enacted with a minor amendment which clarifies that, if the Court considers that a statement of facts is not consistent with the claimed native title determination, that the parties are given an opportunity to re-submit the statement to address any concerns raised by the Court.

11. That the Government consider how to give more guidance to the Court on what it expects court orders covering matters beyond native title would look like. This guidance should contemplate how Court orders can recognise traditional ownership and how concerns about confidentiality of culturally sensitive information can be assured.

12. That Schedule 2 to the Bill amend s 87A(4)(b), and items 4 and 7 of Schedule 2 to the Bill be amended to remove the requirement that the Court must be satisfied that an order consistent with the agreement is 'appropriate'.

13. If recommendation 12 is not accepted, the Commission recommends that the requirement for the Court's assessment of 'appropriateness' be limited to circumstances where:

    a. a government is not a party to the agreement, or otherwise

b. affected parties have not received (or had an adequate opportunity to receive) legal advice in relation to the agreement.[4]

14. That Schedule 2 to the Bill amend s 87 to provide that only the parties whose interests are substantially affected by the outcome need to be party to an agreement made under the relevant Part of the Act.

Recommendations relating to Schedule 3 – Rules of evidence

15. That s 82 be amended to revert to its original wording.

16. If recommendation 15 is not accepted, the Commission recommends that Schedule 3 to the Bill should be enacted.

17. That s 82 be amended to provide guidance as to how the court should accept evidence in a culturally appropriate form, such as by incorporating aspects of Division 6, Order 78 of the Federal Court Rules.

Recommendations relating to Schedule 4 – Assistance in relation to inquiries etc.

18. That the Government review the operation of the respondent funding scheme established under s 183 to:

    a. provide for greater transparency and accountability of decision-making

    b. introduce mechanisms to facilitate the withdrawal of funding in the case of inappropriate conduct by the party upon application by another party or the NNTT

    c. provide greater clarity as to when a party has failed to act reasonably, such as by requiring parties to abide by the Commonwealth model litigant guidelines.

19. That Schedule 4 to the Bill (proposed s 213A) be amended to incorporate the eligibility criteria under the relevant Guidelines for the scheme, particularly to clarify that a respondent is not eligible for funding:

    i. where the party's legal rights in respect of the land uncontroversially extinguishes native title, such as where the party holds an estate in fee simple

    ii. unless the Minister is reasonably satisfied that the party's interests will not be adequately represented in the proceedings by a government or other respondent party

    iii. where the party's involvement in the proceeding is not substantial or likely to be substantial.

[4] See also T McAvoy, 'Native Title litigation reform' (2008), Native Title News, LexisNexis Butterworths, Volume 8 Issue 12 December 2008.

20. If recommendations 18 and 19 are not accepted, the Commission recommends that Schedule 4 to the Bill should be enacted.

Recommendations relating to Schedule 5 – Amendments relating to representative bodies

21. That Part 2 of Schedule 5 to this Bill should be amended to increase the level of transparency, accountability and independence in decision making in respect of decisions which will affect NTRBs.

22. That the Government establish an independent panel to advise the Minister for Families, Housing, Community Service and Indigenous Affairs on recognition, re-recognition, and withdrawal of recognition of NTRBs, with amendments to the Native Title Act to provide that the Minister must follow the advice of this panel on relevant matters.

23. If recommendation 22 is not accepted, the Commission recommends that Schedule 5 be amended to provide detailed criteria for the exercise of ministerial discretion in respect of the recognition, re-recognition, and withdrawal of recognition of NTRBs.

24. That Schedule 5 be amended to clearly state that the rules of natural justice apply to decisions made under Part 11 of the Native Title Act.

25. That item 24 of Schedule 5 to the Bill be amended to increase the minimum recognition period for representative bodies to three years.

26. That Schedule 5 to the Bill be amended to:

- provide a link between recognition and funding, such that the Department will be required to provide funds to recognised representative bodies
- require funding to be provided for the whole recognition period
- require funding and recognition periods to be the same length.

27. That item 26 of Schedule 5 to the Bill be amended to provide that a decision to vary a representative body's area is not a legislative instrument.

28. That item 26 of Schedule 5 to the Bill be amended to apply the notification and consultation requirements to all circumstances in which the Minister is considering varying the area of a representative body.

29. That proposed s 203AG in item 26 of Schedule 5 to the Bill be enacted.

30. That item 37 of Schedule 5 to the Bill be amended to ensure that in considering whether the representative body is operating 'fairly', consideration can be made to whether the organisational structure and administrative processes allow for culturally appropriate decision making or have taken into account other relevant cultural issues.

31. That Part 11 of the Native Title Act be amended to provide that, in relation to re-recognition of NTRBs:

    a. Unless the Minister considers that the existing NTRB is operating unsatisfactorily according to s 203AI (or amended s 203BA), no application for re-recognition is required.

    b. Where the Minister considers that the NTRB is not operating satisfactorily according to s 203AI (or amended s 203BA), the Minister must undertake an open and formal invitation process for other bodies/ new applicants. That process should not be limited to bodies/applicants invited by the Minister to apply.

32. That the Government take immediate steps to address the under-resourcing of NTRBs and Native Title Service Providers.

Recommendations relating to Schedule 6 – Other amendments

33. That the items in Schedule 6 to the Bill be enacted.

2.2 Additional recommendations to improve the native title system

Referral to independent referees

34. That the Native Title Act be amended to enable the referral of particular questions of fact to an independent expert referee, subject to the consent of the claimant and primary respondent, with the costs of the expert to be funded by the government under a designated funding stream.

Reducing the number of parties in native title proceedings

35. That s 84 be amended to:

    a. raise the threshold for parties seeking to be added as a party under ss 84(3)(a)(i), 84(3)(a)(iii) or 84(5), along the lines of 'a person whose interests are likely to be substantially affected to their detriment in the proceedings' or based on existing statutory or common law tests for standing or joinder as a party in civil proceedings

    b. require parties seeking to be joined to make an application to the Court establishing how their interests are affected, with other parties being given an opportunity to object.

36. That the above amendments be given immediate effect for all active native title proceedings. If this recommendation is not accepted, the Commission recommends that s 84 be amended to provide that the 2007 amendments to s 84 be given immediate effect to all active proceedings, or at the very least to all native title proceedings that have not proceeded beyond the hearing of early evidence.

37. That the Government explore other options to provide a reduced form of participation in native title proceedings, such as for respondents who only wish to ensure that their rights and interests are preserved under any final determination.

38. That s 84 be amended to require the Court to regularly review the party list for all active native title proceedings and, where appropriate, to require a party to show cause for its continued involvement.

39. That the Native Title Act be amended to confer on the NNTT the function of advising the Court in relation to its conduct of regular reviews of the party list referred to in recommendation 38.

40. That the Native Title Act be amended to direct the Court to consider appointing a representative party in circumstances where multiple respondents have substantially the same interest in the proceeding, either upon application by a party or on the Court's own motion.

Long term adjournments

41. That s 86F be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the claimant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as:

    a. the prospect of a negotiated outcome being reached

    b. the resources of the parties

    c. the interests of the other parties to the proceeding.

Shifting the burden of proof

42. That the Native Title Act be amended to shift the burden of proof to the respondent once the applicant has met the requirements of the registration test, in line with the discussion of this issue in this submission.

43. That the Government explore options to enable NTRBs to certify a particular group as the Traditional Owners of particular land and waters, which would act as a presumption of this fact in native title claims and for other relevant purposes.

44. That the Native Title Act be amended to empower Courts to disregard an interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

45. That the Native Title Act be amended to define 'traditional' more broadly than the meaning given at common law, such as to encompass laws, customs and practices that have remained identifiable through time, and to clarify that usufructuary rights, such as those recognised under s 211 of the Native Title Act, should be presumed to be traditional.

46. That s 223 be amended to clarify that claimants do not need to establish a physical connection with the relevant land or waters.

Extinguishment

47. That the Native Title Act be amended to specify that at the earliest possible stage in the proceedings that the Court considers it appropriate, the relevant government party must undertake tenure searches and provide a report on extinguishment to all parties and the Court.

48. That the Native Title Act be amended to limit extinguishment to the current tenure extinguishment and to repeal the provisions that validate past extinguishment where those extinguishing acts no longer continue to have effect. If the Government does accept this recommendation, the Commission recommends that the Government amend the Native Title Act to provide a greater number of circumstances in which historical extinguishment may be disregarded, such as by extending the non-extinguishment principle to cover:

    a. all Crown land

    b. other identified classes of land and waters

    c. any other area identified by the relevant government.

Disentangling the right to negotiate from the right to progress the claim

49. That the Government further examines how the procedural rights afforded under the right to negotiate provisions can be separated from the progress of the native title claim, in line with the discussion of this issue in this submission.

Recognition of commercial native title rights

50. That s 223 be amended to:

    a. clarify that native title can include rights and interests of a commercial nature

    b. provide guidance as to the evidential requirements and potential scope of any such commercial rights.

51. That the Government explore options, in consultation with state and territory governments, Indigenous groups and other interested persons, to enable native title holders to exercise native title rights for a commercial purpose.

Amendments to applications

52. That s 66B be amended to clarify that fresh authorisation is only required when a group is proposing that a new person be added to the applicant. If this recommendation is not accepted, the Commission recommends that s 66B should at least be amended to clarify that fresh authorisation is not required where the composition of the claimant group changes solely due to death or incapacitation of an claimant member.

Corporate claimants

53. That the Native Title Act be amended to allow corporations, whose membership consists *only* of the native title claim group, to be an applicant in native title proceedings.

Compulsory acquisition and the right to negotiate

54. That the Government, through the Council of Australian Governments, pursue consistent legislative protection of the rights of Indigenous peoples to give consent and permission to use and to access their lands across all jurisdictions. If this recommendation is not accepted, or otherwise in the meantime, the Commission recommends that s 26 be amended to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city.

Costs

55. That the Native Title Act be amended to include a mechanism by which the Court can have regard to settlement offers when making an order for costs.

Education function for the NNTT

56. That s 108 be amended to confer on the NNTT a formal educative function and to specify that this function should be directed primarily towards educating Aboriginal peoples and Torres Strait Islanders. The Commission recommends further that the Government ensure that the NNTT is provided with sufficient additional resources to undertake this education function.

Tabling of Native Title Reports

57. That s 209 be amended to:

    a. require tabling of Native Title Reports by the Minister, along the line of the requirements under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) for the tabling of Social Justice Reports

    b. require the Minister to formally respond to Native Title Reports, along the lines of s 107 of the *Parliament of Queensland Act 2001* (Qld).

Part I – the Native Title Amendment Bill 2009

3 Schedule 1 – Amendments relating to mediation

58. Whether Indigenous peoples are able to gain full recognition and protection of their native title rights and interests depends significantly on the process by which native title applications are resolved. The mediation of native title claims has been identified as one of the main problem areas in resolving native title claims. [5]

59. The Commission supports reform that will make the process of determining native title easier and shorter, and will assist the parties to achieve better outcomes from the process. At the same time, it is important that such goals are not pursued at the expense of justice and equality for native title claimants.

60. The process through which native title applications are resolved – referred to as the claims resolution process – was changed in 2007. The *Native Title Amendment Act 2007* (Cth) and the *Native Title (Technical Amendments) Act 2007* (Cth) (the 2007 amendments) amended the law to provide the National Native Title Tribunal (NNTT) with an exclusive mediation role, with the Federal Court able to intervene at any time.

61. To support its role in mediating claims, the 2007 amendments changed many of the NNTT's powers and responsibilities. The current Bill proposes to change the claims resolution process once again by giving the Federal Court the role of managing all native title claims. The Bill will extend many of those claims resolution powers and responsibilities to whoever is mediating the claim, be it the NNTT or any other individual or body.

62. In early 2007, before the amendments were passed, the Commission made a submission to this Committee in its inquiry into the Native Title [Amendment] Bill 2006.[6] In its submission, the Commission made a number of recommendations to improve the amendments. To the extent that those recommendations were not adopted, the Commission considers that they remain relevant to the consideration of the proposed amendments under Schedule 1 and have therefore been re-stated below for the Committee's assistance.

63. However, the Commission would like to note its support for the policy change to give the Court the role of managing all native title claims. In the *Native Title Report 2007*, the Aboriginal and Torres Strait Islander Social Justice

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[5] Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007) ch 2.

[6] Aboriginal and Torres Strait Islander Social Justice Commissioner's *submission into the Senate Committee on Legal and Constitutional Affairs inquiry into the Native Title [Amendment] Bill 2006* (25 January 2007). See www.humanrights.gov.au for a copy of the submission.

Commissioner raised concerns about the capacity of the NNTT to adequately perform its expanded mediation role.[7]

3.1 Appropriateness of mediator chosen by the Court

64. Items 6 and 12 of Schedule 1 to the Bill will allow the Federal Court to refer a native title application to any 'appropriate person or body' for mediation. The Commission is concerned that under the proposed amendments, the Court could appoint a mediator who is inappropriate for the claimants.

65. Items 6 and 12 of Schedule 1 to the Bill state that in deciding whether a person or body is appropriate to undertake the mediation, the Court may take into account the training, qualifications and experience of the person who will conduct the mediation. The Explanatory Memorandum confirms that although the Court can appoint any person or body it considers appropriate[8], in considering the training, qualification and experience of that person, the Court could:

> refer an application for mediation to a person who has particular experience or expertise that would assist to resolve the issue at hand. This could include experience in native title law … knowledge of the areas, Indigenous groups or issues involved in a particular case.[9]

66. Given the Court's discretion under the proposed provisions, and the examples of relevant experience, training and qualification that have been outlined in the Explanatory Memorandum, 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.

67. The Court may not be aware of the exact nature of any pre-existing relationship between the mediator and the claimants. For this reason, the claimants should be given an opportunity to respond to the Court about the appropriateness of its choice of mediator.

68. The Commission recommends that items 6 and 12 of Schedule 1 to the Bill be amended to clarify that, if the Court is considering appointing a person or body for mediation, who is not the Registrar, a Deputy Registrar, a District Registrar, a Deputy District Registrar of the Court, or the NNTT, that the Court must give the claimants an opportunity to make submissions to the Court on the appropriateness of the proposed mediator.

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[7] See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007) ch 2.
[8] Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), par 1.14, p 7.
[9] Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), par 1.15, p 7.

3.2 Appropriateness of assistant chosen by mediator

69. Proposed s 94D(3) in item 35 of Schedule 1 to the Bill raises a similar issue to that discussed in section 3.1 of this submission. This item will allow the mediator to appoint any assistant for the mediation that the mediator considers appropriate. The Commission is concerned that under the proposed amendment, the mediator could appoint an assistant who is inappropriate for the claimants.

70. The Explanatory Memorandum to the Bill states that '…the person conducting the mediation may be assisted by someone who, in the mediator's opinion, is an appropriate person to assist the mediation.'[10] Although the assistant may be appropriate to the mediator, they may not be appropriate to the claimants for a variety of reasons. They may have a pre-existing relationship with the claimants or be inappropriate for cultural or other reasons.

71. The Commission recommends that proposed s 94D(3) in item 35 of Schedule 1 to the Bill be amended to state that where the mediator intends on nominating an assistant/s under proposed s 94D(3)(b), the mediator must inform the Court and the parties of the identity/ies of the assistant and provide an outline of the scope of the assistance intended to be provided. Again, the Bill should also clarify that the claimants have an adequate opportunity to make submissions to the Court on the appropriateness of the assistant.

3.3 Expanding mediation powers to all mediators

72. The Commission's submission to this Committee's inquiry into the Native Title [Amendment] Bill 2006 raised a number of concerns and made a number of recommendations on the appropriateness and desirability of the expanded powers given to the NNTT for mediation.

73. A number of items in Schedule 1 to this Bill discussed below replicate and expand on those provisions by giving those powers to any person or body undertaking the mediation.[11] Consequently, the Commission would like to raise a number of those concerns again in this context.

(a) Regional progress reports and work plans

74. The Commission is concerned that regional progress reports and works plans can be made without proper regard to the objectives and priorities of the relevant representative body or bodies.

75. Proposed s 94N in item 35 of Schedule 1 to the Bill allows the Court to request mediation and regional reports.

76. The Commission supports the preparation of such reports, and recognises that it is in the interests of the efficient management of native title proceedings that the

[10] Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), par 1.68, p 16.
[11] Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), par 1.20, p 8.

Court, which has responsibility for the management of the proceedings, has full information on mediation activities.

77. However, the Commission considers that it is essential that representative bodies are in control of how their stretched resources are allocated. To the extent that mediator's reports could affect representative bodies' priorities, they should be considered in the context of the conditions in which representative bodies operate.

78. The Commission recommends that proposed s 94N in item 35 of Schedule 1 to the Bill should be amended to ensure that:

    a. in the preparation of such a report, the mediator must consult with relevant representative body/ies, and have regard to their views in relation to the development of the work plan and to their strategic and/or operational plans for the relevant period

    b. that the relevant representative body/ies will receive a copy of the regional report and/or work plan sufficiently in advance of the directions hearing to allow them to make any submission to the Court about the report or plan that it considers necessary.

(b) Referral of questions about whether a party should be dismissed

79. As raised on a number of occasions, the Commission and the Aboriginal and Torres Strait Islander Social Justice Commissioner considers that a major hindrance to native title proceedings is often simply the number of parties to the proceeding. Addressing the problems associated with excessive party numbers is therefore critical to improving the efficiency of the native title system.

80. Proposed s 94J in item 35 of Schedule 1 to the Bill will provide that the mediator can refer to the Federal Court the question of whether a party should cease to be a party to the proceeding. The Court will then be required to consider whether the party has a 'relevant interest in the proceeding' (see proposed s 94J(1)). This is defined in proposed s 94J(6) as requiring that the person has an interest that 'may be affected by a determination in the proceedings'.

81. The Commission is concerned that the definition of relevant interest in s 94J is so broad that it will rarely be possible for the Court to dismiss a party from the mediation.

82. The Commission considers that the test for the interest required to become and remain a party to native title proceedings is too low. The Commission recommends that the threshold for status as a party should be amended to reflect more traditional tests for standing in civil proceeding, such as the 'special interest' test under general law[12] or the 'person aggrieved' test under the *Administrative*

[12] *Australian Conservation Foundation v Commonwealth* (1978)146 CLR 493. See further *Onus v Alcoa* (1981) 149 CLR 27; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Benefit Fund Pty Ltd* (1998) 194 CLR 247.

Decisions (Judicial Review) Act 1977 (Cth).[13] Another alternative would be to require the party seeking to be joined to satisfy the requirements of Order 6 Rule 8 (Addition of Parties) of the Federal Court Rules. Each of these approaches has the benefit of providing a degree of certainty and predictability by drawing upon a well developed body of law.

83. The Commission recommends that both the test for party status in s 84(3)(a)(iii) of the Native Title Act and proposed s 94J(6) should be amended to provide that only the parties whose interests are substantially affected by the outcome need to be party to an agreement made under the Act.

84. If this recommendation is not adopted, the Commission recommends that s 94J(6) be amended. The proposed test for the required 'relevant interest' to remain a party in s 94J(6) is not the same as that required for a person to become a party under s 84(3)(a)(iii) of the Native Title Act.

85. The 2007 amendments changed s 84 to require that for a person to be a party the person's interest must be an interest 'in relation to land or waters, which may be affected by a determination in the proceedings', not simply that there interest 'may be affected'.

86. The Commission considers that the required interest to remain a party to the mediation as proposed in s 94J(6) should be the same as the interest required to become a party under s 84(3)(a)(iii).

87. This proposal and a number of other recommendations for reducing the number of parties to native title claims are set out in section 10 of this submission.

(c) NNTT reviews

88. Section 136GC of the Native Title Act provides that the President of the NNTT can refer to the NNTT the question of whether a claim group holds native title rights and interests. Item 40 of Schedule 1 to the Bill will replaces this provision with one that allows the Court to refer the question to the NNTT, either on its own motion or on request of the mediator.

89. In its submission to this committee on its inquiry into the Native Title [Amendment] Bill 2006, the Commission did not support the enactment of s 136G. The Commission remains of that view, and recommends the repeal of this section and that no replacement provision be enacted. The Commission notes that, to its knowledge, s136G has never been used.

90. The Commission's concerns with the review power are as follows.

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[13].Section 5. See, generally, *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 54 FLR 421; *United States Tobacco Co v Minister for Consumer Affairs* (1988) 83 ALR 79; *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509; *Right To Life Association (NSW) Inc v Secretary, Department of Human Services and Health & Anor* (1995) 56 FCR 50; *Ogle v Strickland* (1987) 13 FCR 306.

(i) NNTT reviews have the disadvantages of trial without the advantages

91. The NNTT cannot make a determination of native title. As a result, any review by the NNTT as to whether a claim group holds native title is of no legal force. There can be no legally binding determination of any matters at the end of the review.

92. Yet all parties will still have to prepare for, and act in a review with a similar degree of care to that required for trial. If they are to be conducted fairly, a review will have to be conducted with many of the trappings of Court proceedings, including an adequate opportunity for all parties concerned to provide material and make submissions.

93. If the NNTT's opinion is contrary to the claimant's view, none of the respondent parties is likely to continue to engage seriously in mediation for the consensual resolution of the proceedings. The evidentiary material and argument presented for the purposes of the review will have to be presented again by the claimant at trial.

94. All of this will use up a considerable amount of time as well as scarce representative body funds and Commonwealth funding of non-claimants. Where a review is held, this can be expected to significantly increase the amount of time and money spent in the mediation stage of native title proceedings.

(ii) Burden of reviews will fall unfairly on the claimant

95. The Commission considers that the burden of reviews will fall unfairly on the claimant because:

a. The claimant bears the burden of proof in relation to most of the matters in issue in native title proceedings and so it is the claimant's case that will be the subject of the review.

b. It is only the claimant whose prospects of a favourable determination will be potentially prejudiced by a review, and so it will be only the claimant who will need to take time and care in the conduct of a review.

c. The already cash strapped representative bodies will have to finance the conduct of any review, further stretching the resources available to claimants.

d. In the event that the NNTT's opinion is against the claimant, he or she will not have any administrative right of appeal or second opinion - he or she will be faced with the prospect of taking his or her case to trial, since all prospects of a mediated outcome will have disappeared.

e. At the trial, the claimant will then be disadvantaged by the fact that the respondents will have had a dress rehearsal for their opposition to the claimant's case (regardless of what the Act may say about the privacy or without prejudice nature of such reviews and inquiries).

(iii) Review and inquiry provisions confuse and complicate the native title resolution framework

96. The Commission is concerned that the reviews discussed above further complicate the institutional framework for the resolution of native title proceedings.

97. Reviews by the NNTT threaten to create even greater confusion by enlarging the role of the NNTT to include quasi-judicial investigations into the factual and legal issues at the heart of a native title claim, the determination of which is, appropriately, the sole domain of the Federal Court.

98. There is no benefit to any party, and least of all to the claimant, in there being a multiplicity of forums involved in the resolution of native title claims, particularly without any one forum maintaining control over the proceedings. Since the Act already provides that every native title application is to be a proceeding in the Federal Court, it is appropriate for the presiding judge of the Federal Court to have complete control over the management of those proceedings. This is how all other legal proceedings are managed. The role of the NNTT in relation to the resolution of native title application proceedings should be kept simply to mediation, with the presiding judge having control over whether mediation is to continue or whether the proceedings are unlikely to be resolved other than by judgment on the hearing of the evidence and legal argument.

99. The Commission recommends that item 40 of Schedule 1 to the Bill is amended. The item should repeal s 136, and not provide for a substitute.

100. If item 40 is enacted, it should be amended so that reviews require:

a. the consent of the claimant

b. that statements made at a review are confidential as well as without prejudice and require the consent of the parties before disclosure can be made

c. review reports should only be provided to the Federal Court and non-participating parties with the consent of the participating parties.

4 Schedule 2 – Powers of the Court

101. Schedule 2 to the Bill proposes to make two major changes to allow the Court to:

    a. make orders that cover matters beyond native title

    b. rely on a statement of facts agreed between the parties.

(a) Items 5 and 7 - orders that cover matters beyond native title

102. Items 5 and 7 of Schedule 2 to the Bill will provide the Court with the powers to make orders that give effect to the terms of an agreement reached between the parties, whether or not the parties have reached agreement on a determination of native title.

103. As stated in its submission to the Attorney-General's discussion paper, the Commission supports the Government's efforts to encourage parties to native title claims to work together to reach agreements with broad and beneficial outcomes.

104. Items 5 and 7 of Schedule 2 to the Bill will clarify that the Court can make orders which reflect the agreement that parties have made. Various stakeholders have indicated to the Commission that elevating the legal status of the agreement to that of a Court order would be welcomed, as it would ensure that the agreement was formally recognised and more readily enforceable. It could also encourage parties to negotiate native title claims more laterally, creatively and flexibly, rather than simply on an 'all or nothing' basis in relation to just the determination of native title.

105. For these reasons, the Commission recommends that items 5 and 7 of Schedule 2 to the Bill be enacted.

106. However, the Commission is concerned that the level of detail in the Bill and the Explanatory Memorandum will not be sufficient for the Court to use the powers effectively.

107. As recognised in the Explanatory Memorandum to the Bill, there are a number of matters that could be included in such agreements. These may include economic development opportunities, training, employment, heritage, sustainability, and existing industry principles.[14]

108. The Commission considers that the Government should explore how Court orders could provide a mechanism through which the Court and governments could

[14] Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), par 1.10, p 32. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2006), chs 4-6, and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007), ch 11.

formally recognise traditional ownership, even in cases where native title was not determined to exist for one reason or another.

109. Given the range of topics that orders could encompass, the Court may face difficult questions in forming those orders, such as what level of specificity the order would require. Would the terms of such an agreement be capable of being expressed with the level of specificity required to constitute a Court order, particularly given the breadth and complexity of the matters of agreement that could be covered? And what would be the consequences of a breach, particularly for claimants? For example, if the agreement imposes obligations on the native title claimants through the agreement (such as taking certain actions to maintain the environment in the region), and they cannot maintain that responsibility due to lack of resources, what would be the consequence of a breach? If the order is attached to their native title determination, would a breach jeopardise the recognition of their native title rights?

110. Another relevant consideration is that if the agreement forms part of a Court order or is annexed to orders then it will be publicly available. There may be parts of the agreement which, according to traditional law, the claimants may not wish to be made available to the broader public.

111. The Commission recommends that the Government consider how to give more guidance to the Court on the appropriate form and detail for such orders would look like, including how orders can recognise traditional ownership short of a determination of native title, and how concerns about confidentiality of culturally sensitive information can be addressed.

(b) Items 5 and 7 - rely on a statement of facts agreed between the parties

112. Items 5 and 7 of Schedule 2 will provide the Court with the power to rely on a statement of facts agreed between the two primary parties.

113. The Commission supports the proposed amendment and recommends that it should be enacted with minor amendment.

114. When making an order or determination under s 87 and 87A, the Court must be satisfied that it is within its power to make the order or determination. Items 5 and 7 of Schedule 2 would not change this, and therefore the Court cannot accept an agreed statement of facts where the statement does not, or cannot, support a determination that is within the power of the Court to make.[15]

115. The Commission recommends that items 5 and 7 of Schedule 2 to the Bill should be amended to clarify that if the Court considers that a statement of facts is not consistent with the claimed native title determination, the parties shall be given an opportunity to re-submit the statement to address any concerns raised by the Court.

[15] See also later in this section of this submission for comments on the issues of the 'appropriateness' of the determination, and the requirement for all parties to agree to the determination, s 87 of the Native Title Act.

(c) Further amendment to section 87

116. The Commission considers that two further amendments could be made to ss 87 and 87A of the Native Title Act to better facilitate the Government's wish to see parties reach agreements with better and broader outcomes. In particular, the Commission recommends that the Bill:

a. remove the requirement that courts be satisfied that the determination of native title is 'appropriate'

b. remove the requirement that all parties agree.

(i) Section 87A(4)(b), items 4 and 7 of Schedule 2 – remove 'appropriate'

117. Sections 87 and 87A of the Native Title Act require the Court, in deciding whether to make orders or a determination consistent with an agreement between the parties, to consider whether the orders are 'appropriate' and whether it is within its power to make those orders.

118. In the past, when parties have come to an agreement and presented it to the Court under ss 87 or 87A for a consent determination of native title, difficulties have occasionally arisen when the Court has turned to consider whether making that determination is 'appropriate' (as required by s87(1) and s87A(4)(b)).

119. Items 4 and 7 of Schedule 2 of this Bill, and existing s 87A(4)(b), retain the necessity for the Court to consider whether the order is 'appropriate'.

120. The Explanatory Memorandum to the Bill appears to presume that by giving the Court the power to rely on a statement of facts agreed between the parties, the Court will feel less compelled to look at further evidence in order to satisfy itself of the 'appropriateness' of the order or whether it is in its power to make that order.[16] For example, it states that:

> In some circumstances, a State or Territory has agreed to accept oral accounts from key members of native title claimant groups, and on this basis, to agree to a determination. In such a situation, it should be open to the Court to accept the statements of facts as agreed by the parties, without requiring such evidence to be brought before the Court and without the Court needing to make independent inquiries to be satisfied as to the basis of the agreed statement of facts.[17]

121. The Commission is concerned that this may not always be the case. When it comes time to make an order or determination, the Court is still required to consider whether that order or determination is appropriate and whether it is within the Court's power to make. To do this, the Court may feel the need to examine all of the evidence.

[16] See Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), par 1.11, pp 32-36.
[17] Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), par 1.11, p 33.

122. In the Commission's view the Court's consideration of whether the order or determination is appropriate is an additional hurdle which is neither necessary nor appropriate.

123. The Native Title Act is intended to recognise and protect existing native title rights and interests in the land. The parties are intended to be primarily undertaking a fact finding exercise to determine whether the claimant's native title rights and interests exist and how those rights and interests should be legally recognised. The agreement put before the Court is the outcome of that lengthy and comprehensive exercise. Unlike the majority of civil proceedings, native title applications are subject to various additional procedural requirements such as registration and notification. It includes a long and detailed agreement making process in which a government is usually a party to represent and protect the broader public interest. The process often requires large amounts of evidence to be prepared and considered. If, after these processes, the parties have reached an agreement, and it is within the Court's power to make an order reflecting the agreement, the Commission considers that it is unnecessary for the Court to undertake a further qualitative assessment as to the appropriateness of the determination.

124. In addition, given that the Court may be called upon to approve a consent determination at any stage in the proceeding, the Court may be poorly placed to assess the appropriateness of the determination without reviewing the relevant evidence. This undermines many of the advantages that the consent determination procedure seeks to achieve in facilitating the early resolution of native title claims.

125. The Commission recommends that Schedule 2 to the Bill amend section 87A(4)(b), and items 4 and 7 of Schedule 2 to the Bill be amended to remove the requirement that the Court must be satisfied that an order consistent with the agreement is 'appropriate'.

126. Alternatively, if the Committee does not accept this recommendation, the Commission recommends that the requirement for the Court's assessment of 'appropriateness' be limited to circumstances where:

    a. A government is not a party to the agreement, or otherwise

    b. Affected parties have not received (or had an adequate opportunity to receive) legal advice in relation to the agreement.[18]

(ii) Section 87 – remove the requirement that all parties agree

127. Section 87 of the Native Title Act requires the agreement of **all** parties to the proceeding for a consent determination to be made, irrespective of whether each

[18] See also T McAvoy, 'Native Title litigation reform' (2008), Native Title News, LexisNexis Butterworths, Volume 8 Issue 12 December 2008.

party's interests may be affected by the terms of the agreement.[19] Given the large number of respondents that are often involved in native title claims, this can require a significant investment of time and resources in order to ensure the involvement and agreement of all parties. Some of the parties may only have minor interests in the proceedings, yet through their involvement (or lack thereof) they may be able to hinder or even prevent the approval of a consent determination agreed to by all other respondents, including the primary respondent.

128. In the decision of *Rubibi Community v State of Western Australia (No 7)*[20], Justice Merkel recommended that s 87 of the Native Title Act be amended to state that the agreement of parties to a mediated outcome only applies to the parties whose interests are affected by the outcome.[21]

129. The Commission agrees with his Honour's views and recommends that Schedule 2 to the Bill amend s87 to provide that only the parties whose interests are substantially affected by the outcome need to be party to an agreement made under the relevant Part of the Act.

130. One model for formulating such an amendment would be to mirror the requirements for parties who need to be party to an agreement made under s 87A. This would limit the requirement for consent to parties who hold specific interests *at the time the agreement is made*. Similar to s 87A, s 87 could also allow for other parties to be notified and given the opportunity to make submissions to the Court objecting to the proposed determination.

131. The Commission notes that taking steps to reduce and more effectively manage the number of parties to native title proceedings is of great importance in improving the overall effectiveness and efficiency of the native title system, not only in respect of consent determinations. Accordingly, section 10 of this report discusses a number of further recommendations for the Committee's consideration in relation to the management of party numbers.

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[19] Although recognising that native title will be granted *in rem*, a party's future rights may still be affected by native title, but the Court should be able to presume that the government party will represent the broader public's interest.
[20] (2006) FCA 459.
[21] See also section 10 of this submission which address the issue of the removal of parties throughout proceedings, s 84 of the Native Title Act.

5 Schedule 3 – Rules of evidence

132. Schedule 3 to the Bill will apply recent amendments to the *Evidence Act 1995* (Cth) (the Evidence Act) broadly to native title claims by allowing the amended rules of evidence to apply to native title proceedings which have commenced. Even where partial or early evidence has been taken by the Court, the Bill will allow the Court to admit evidence under the new evidence rules where either both the parties agree or the Court considers it in the interests of justice that the new rules apply.

133. In July 2008, the Commission made a submission to this Committee in its Inquiry into the Evidence Amendment Bill 2008.[22] In the submission, the Commission supported the proposed amendments to the Evidence Act which now provide exceptions to the hearsay and opinion rule for evidence of Aboriginal and Torres Strait Islander traditional law and custom. The amendments will remove an injustice that Aboriginal peoples and Torres Strait Islanders have long faced in the Australian legal system because of their oral tradition of knowledge.

134. While the Commission supports the recent amendments to the Evidence Act, the Commission does not consider that these amendments will provide a complete solution to the problems of Indigenous evidence. This is particularly so for elements of native title which do not go to proving the content of traditional law and custom, such as evidence of genealogy, which under the recent amendments to the Evidence Act, will still be subject to the hearsay and opinion evidence rules.

135. For these reasons, the Commission recommends that the Evidence Act should not apply to native title proceedings. This is outlined below in section 5.1 of this submission. If this recommendation is not accepted, the Commission makes alternative recommendations in sections 5.2 and 5.3 of this submission.

5.1 Evidence Act should not apply to native title claims

136. The wide range of factors that inhibit effective cross-cultural communication while taking evidence of native title have been widely reported. In a recent speech, the CEO of a Native Title Service Provider provided a useful summary of some of these factors:

> You are all aware of the cultural, linguistic and historical factors that impact upon Indigenous people's interaction with the legal system. Such factors that include:
>
> - Fragmentation of knowledge as to who can speak on certain matters.
> - The complex kinship systems that may influence who can speak to whom.
> - The protocols around sorry business and the periods for grieving.
> - Different decision-making processes.

[22] A copy of the Commission's submission is available at: http://www.humanrights.gov.au/legal/submissions/2008/20080730_evidence.html

- English is a second, third or fourth language for many Indigenous peoples and that Aboriginal English has its own syntax which can cause its own cross-cultural communication difficulties.
- For historical reasons, the deep-rooted and perfectly understandable mistrust that Indigenous people have of the legal system and all those within it – sometimes, even their own legal representatives.
- Many Indigenous people are disadvantaged across the full range of social indicators; health, housing, employment, education, etc – this disadvantage impacts upon their ability to understand and engage in the process

> There are countless other factors at play that you have all doubtless had some experience with. In my view those same factors are at play in native title matters but are considerably magnified; after all native title applications are brought on behalf of 'societies'.[23]

137. Similarly, in *Ward v Western Australia* Justice Lee stated that:

> Of particular importance in that regard is the disadvantage faced by Aboriginal people as participants in a trial system structured for, and by, a literate society when they have no written records and depend upon oral histories and accounts, often localised in nature. In such circumstances application of a rule of evidence to exclude such material unless it is evidence of general reputation may work substantial injustice …[24]

138. When the Native Title Act was enacted in 1993, the original s 82 provided that the rules of evidence did not apply to native title proceedings, as follows:

> 82(1) The Federal Court must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt.
>
> (2) The Court, in conducting proceedings, must take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.
>
> (3) The Court, in conducting proceedings, is not bound by technicalities, legal forms or rules of evidence.

139. Section 82 of the Native Title Act was then amended as part of the substantial amendments to the Act made in 1998. Section 82 now reads [the amendments are in *italics*]:

> 82(1) *The Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.*
>
> (2) In conducting its proceedings, the Court *may* take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, *but not so as to prejudice unduly any other party to the proceedings.*
>
> (3) *The Court or a Judge must exercise the discretion under section 47B of the Federal Court of Australia Act 1976 to allow a person to appear before the*

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[23] K Smith, *Proving native title; discharging a crushing burden of proof,* (Speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008).
[24] *Ward v Western Australia* (1998) 159 ALR 483.

> *Court or Judge, or make a submission to the Court or Judge, by way of video link, audio link or other appropriate means if the Court or the Judge is satisfied that:*
>
> *(a) the conditions set out in section 47C in relation to the video link, audio link or other appropriate means are met; and*
>
> *(b) it is not contrary to the interests of justice to do so.*

140. Consequently, the Native Title Act now starts from the premise that in native title proceedings, the rules of evidence will apply.

141. Previous native title reports[25] have outlined the significant evidentiary difficulties faced by Indigenous peoples seeking to establish the elements of the definition of native title in s 223 of the Act. The standard and burden of proof, and the operation of s 82 in its current form place particular burdens on Indigenous people seeking to gain recognition and protection of their native title, particularly in light of the common barriers to the receipt of Aboriginal and Torres Strait Islander testimony and evidence discussed above.

142. Although s 82 gives the Court the power to order that the parties are not bound by the rules of evidence, it is rarely used by the Courts. When it is used, the Commission is informed that the rules are not being applied consistently. Neither the 1998 amending legislation nor the accompanying secondary materials such as the Explanatory Memorandum and second reading speech provide guidance on what factors may justify an order setting aside the rules of evidence. As a result, the scope and application of the s 82 discretion is far from clear. The section was described by the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation as 'an enigma with no judicial determination of what this entails'.[i]

143. In light of widely acknowledged difficulties in relation to the receipt of Aboriginal and Torres Strait Islander evidence in Court, and the acute impact of these difficulties in native title proceedings, the Commission recommends that s 82 should revert to its original wording, to provide the Court with greater flexibility in admitting and assessing native title evidence.

5.2 Schedule 3 – Rules of evidence

144. If the Commission's recommendation that the Evidence Act should not apply to native title proceedings is not adopted, the Commission recommends that Schedule 3 to the Bill should be enacted.

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[25] see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, Human Rights and Equal Opportunity Commission (2002),
Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission (2005) and
Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007).

5.3 Further amendment to existing s 82

145. In addition, if the Commission's recommendation that the Evidence Act should not apply to native title proceedings is not adopted, the Commission recommends further improvement to existing s 82. The Commission considers that s 82 should be amended to provide guidance as to how the Court should accept evidence in a culturally appropriate form. The Commission has received feedback from stakeholders that it may assist the Court to have s 82 amended to incorporate aspects of Division 6, Order 78 of the Federal Court Rules.

6 Schedule 4 – Assistance in relation to inquiries etc.

146. Schedule 4 to the Bill replicates existing s 183 which provides for the scheme through which the Attorney-General can grant financial or legal assistance to non-claimants who are involved in native title proceedings.

147. Schedule 4 to the Bill will move the location of the existing s 183 to a different Part of the Act to make it clear that the Attorney-General can provide assistance to non-claimants who are involved in all native title mediations, whether or not they are being conducted by the National Native Title Tribunal or another person or body.

148. Schedule 4 will not change the operation of the existing funding scheme operating under s 183 of the Native Title Act. The Commission's comments in this submission are therefore directed at recommending to the Committee how the current scheme could be improved.

6.1 Further amendment to proposed section 213A

149. Under s 183 of the Native Title Act, respondents may be funded by the Commonwealth under the 'respondent funding scheme' to participate in native title proceedings.[26]

150. The Commission considers that it is important to ensure that decisions made under this scheme are appropriate and that respondent parties funded under the scheme are not having a negative impact on the overall functioning of the native title scheme. At present, however, there is currently very little transparency as to the implementation and operation of this funding scheme. In particular, there is little information available on which parties are being funded to participate in the proceedings, how the relevant Attorney-General Guidelines[27] are being applied and whether the ongoing funding of particular parties is appropriate. For example, in 2006, the Australian National Audit Office observed that:

> [The Attorney-General's Department] is unable to evaluate either the effectiveness of the Respondents Scheme at either the individual grant level or the contribution the programme is making to the larger Native Title System outcome.[28]

151. As stated above, schedule 4 to the Bill simply moves the existing s 183, but does not change its operation. The Commission recommends that further changes should be made by introducing mechanisms for improving the transparency and accountability of decision-making under the scheme.

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[26] For more information see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007), ch 4.
[27] *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* (2006).
[28] Australian National Audit Office, *Administration of the Native Title Respondents Scheme,* Audit Report No.1 (2006-2007), p133. At http://www.anao.gov.au/, (viewed January 2009).

152. The Commission also queries whether there is currently an adequate mechanism by which funding can be withdrawn in respect of respondents that inappropriately undermine the conduct or resolution of a claim. The Commission notes that the Guidelines allow for the withdrawal of funding in certain circumstances, including where the respondent acts unreasonably.[29] However, the Guidelines do not articulate a mechanism by which other parties or the NNTT can apply to the Attorney-General to have a party's funding withdrawn, such as where the NNTT is of the view that the party has refused to make a bona fide and reasonable endeavour to resolve the dispute.[30]

153. In addition, the reference in the guidelines to a failure to act reasonably is not defined or clarified. The Commission considers that it might be appropriate for the propose s 213A or the Guidelines to be amended to stipulate that recipients of funding under the scheme must agree to abide by the Commonwealth model litigant guidelines scheduled to the Legal Service Directions and that failure to so comply may result in withdrawal of funding.

154. In relation to eligibility for receiving funding, the Commission notes that the current s 183(3) of the Native Title Act states that the Attorney-General can grant funding if he or she considers that it is 'reasonable'. The Attorney-General's Guidelines give a list of considerations for the Attorney-General in determining reasonableness.[31] However this list is merely a guide and is not legally binding on the Minister. The Commission considers that it may be appropriate to incorporate the criteria relating to eligibility for funding within the terms of the new s 213A. In particular, the Commission considers that the proposed s 213A should clarify that a respondent party is not eligible for funding:

    a. where the party's legal rights in respect of the land uncontroversially extinguishes native title, such as where the party holds an estate in fee simple, on the basis that that party's rights are already adequately protected under the terms of the Native Title Act itself

    b. unless the Minister is reasonably satisfied that the party's interests will not be adequately represented in the proceedings by a government or other respondent party

    c. where the party's involvement in the proceeding is not substantial or likely to be substantial, such as where a party intends to assume a limited role in the proceeding.

155. Subject to the Commission's recommendations for improving the transparency, accountability and operation of the respondent funding scheme generally, the Commission supports the enactment of Schedule 4 to the Bill.

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[29] *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* (2006), Division 7.9.
[30] See generally *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459.
[31] *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* (2006), Part 5.

7 Schedule 5 – Amendments relating to representative bodies

156. In the preamble to the Native Title Act, Parliament recognises that it is important that 'appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation'.

157. It is widely accepted that native title claimants are unlikely to be successful in having their native title rights recognised and protected without the assistance of effective, and adequately resourced, Native Title Representative Bodies (NTRBs).

158. Schedule 5 to the Bill makes a number of changes relating to NTRBs. The Commission has some concerns with the amendments proposed in the Bill, particularly the many provisions which provide the Minister with broad discretions in decision making across the process of recognising a body as a representative body.

159. NTRBs are essential to the operation of the native title system. Any changes that would increase their effectiveness in representing their Indigenous constituents would undoubtedly assist the proper working of the Native Title Act. Therefore, the Commission also recommends a number of further amendments to Part 11 of the Native Title Act which it considers would be beneficial to the operation of NTRBs and the native title system.

7.1 Schedule 5, Part 1 – removal of transitional arrangements

160. The Commission has no comments on the items in Part 1 of Schedule 5 to the Bill.

7.2 Schedule 5, Part 2 – recognition of representative bodies

161. The Commission is concerned that Part 2 of Schedule 5 expands the already broad level of discretion enjoyed by the Minister in making decisions relevant to the recognition of representative bodies.

162. In its submission to this Committee on the Native Title [Amendment] Bill 2006, the Commission raised concerns about the impact of the 2007 amendments which could erode the security of status and administrative independence of NTRBs.[32] The Commission's submission included comments on the amendments which:

- Introduced limited term recognition, meaning that the continued recognition of each representative body was reconsidered at the end of each period.

[32] See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007) ch 3 and Aboriginal and Torres Strait Islander Social Justice Commissioner's *submission into the Senate Committee on Legal and Constitutional Affairs inquiry into the Native Title [Amendment] Bill 2006* (25 January 2007).

- Preferred broad Ministerial and Departmental discretions over prescribed standards in relation to decisions concerning recognition.

- Relaxed the procedural fairness requirements in relation to the withdrawal of recognition and reduction of representative body areas.

- Removed significant aspects of the accountability regime from the Native Title Act to funding conditions imposed by the Department and an expansion of the Department's discretion in relation to the provision of funds and the imposing of conditions in relation to the provision of funds.

163. Some of these concerns are relevant to the amendments proposed in Part 2 of Schedule 5 to the Bill.

164. Although the provisions in Part 2 of Schedule 5 to this Bill could streamline some processes and provide greater flexibility, the Commission is concerned that the law must strike a balance between flexibility and ensuring transparent, objective and predictable decision-making by the Minister.

165. The pursuit by a representative body of a native title group's legal rights and interests will often place the representative body, and the group that it is assisting, in opposition to the Commonwealth and State or Territory governments. An NTRB must ensure that it represents Aboriginal peoples' and Torres Strait Islanders' views and interests in negotiation with government and when undertaking their functions under the Act. Yet at the same time NTRBs are funded by government

166. The Commission highlights the need for representative bodies to maintain an appropriate level of independence from government to ensure the integrity of the native title system. NTRBs must have, and understand themselves as having, a secure existence that is not dependent on maintaining the positive regard of the Commonwealth.

(a) Level of Ministerial discretion in decisions affecting NTRBs

167. A number of the 2007 amendments to the Native Title Act provided the Minister with broad discretions in deciding whether to recognise an NTRB. For example, following the 2007 amendments, when giving recognition to an NTRB, the Minister only needs to be satisfied that the body is, or will be able to, perform the functions of a representative body satisfactorily. Similarly, the Minister only needs to be satisfied that the body is not performing satisfactorily or that there are irregularities in its finances, in order to withdraw recognition of the body.[33]

168. The proposed amendments in Part 2 of Schedule 5 to the Bill will provide further broad Ministerial discretion in decision making which affects representative bodies. For example:

- Item 24 – proposed subsection 203AD(3B) which will require the Minister to determine whether in his or her opinion the recognition period will have an

[33] See *Native Title Act 1993* (Cth), s 203AH(2).

impact on the efficient performance of the functions of the representative body.

- Item 24 – proposed subsection 203AD(3A) which will allow the Minister to recognise representative bodies for any period of between one to six years. Proposed subsection 203AD(3D) will allow the Minister to take into account any other matters he or she considers necessary or relevant in deciding on the period of recognition.
- Item 26 – proposed subsection 203AE(5)(b) which will allow the Minister to vary the area for which a body is the representative body on his or her own initiative. Whilst proposed subsection 203AE(7) provides a list of relevant considerations, the Minister will not be compelled to take these considerations into account.[34]
- Item 26 – proposed subsection 203AE(7), and Item 24 – proposed subsections 203AD(3B) and (3C) which will allow the Minister to consider any information in his or her possession (personally, or in the possession of the Department) when deciding on the recognition period or whether to vary a representative body's area.

169. In the Commission's view, the breadth of the discretions proposed in the Bill render many of the Minister's decisions virtually unreviewable. The provisions proposed in the Bill, in combination with the existing broad discretions in Part 11 of the Act, mean that there is extremely limited opportunity for decisions of the Minister to be reviewed.

170. The Commission recommends that Part 2 of Schedule 5 to this Bill should be amended to increase the level of transparency, accountability and independence in decision making in respect of decisions which will affect NTRBs.

171. In particular, the Commission recommends that the Government establish an independent panel to advise the Minister on recognition, re-recognition, and withdrawal of recognition of NTRBs, with amendments to the Native Title Act to provide that the Minister must follow the advice of this panel on relevant matters.

172. If this recommendation is not accepted, the Commission recommends that the Bill be amended to specify detailed criteria for the exercise of ministerial discretion in recognition, re-recognition, and withdrawal of recognition of NTRBs. Such statutory criteria should allow representative bodies to predict what standards or indicators they will have to meet in order to be reasonably assured of recognition

[34] The Bill includes a number of other Ministerial discretions at all stages of the process of recognising, varying or withdrawing a representative body's status. These include: item 8 – proposed subsection 203A(7) which would allow, but not compel, the Minister to arrange for general invitations for any eligible bodies to apply for recognition as the representative body; items 14 and 15 – proposed subsection 203A(1) which would allow the Minister to tailor the way bodies are invited to apply for recognition; item 32 – proposed subsection 203AH(3A) which would allow the Minister to extend the period during which a representative body can make submissions responding to why its recognition should not be withdrawn.

for longer periods and promote confidence in the objectivity of the decision making process.

(b) Breadth of information the Minister may consider when making decisions

173. A related issue is how the rules of natural justice apply to decisions made by the Minister.

174. The Commission is concerned that the singular reference in the Explanatory Memorandum to the application of the rules of natural justice to one item in the Bill could be confusing and construed as implying that the rules of natural justice do not apply to the other items in the Bill.

175. In relation to proposed paragraph 203AH(4)(d) in item 33 of Schedule 5, which allows the Minister to consider any information in his or her possession (personally, or in the possession of the Department) in considering whether to withdraw recognition of the body as the representative body for that area, the Explanatory Memorandum to the Bill states that:

> This provision would give notice to the representative body that any information previously provided to the department may be taken into account … Information provided by affected persons for whom the representative body performs its functions would be considered.[35]

176. It also states that the rules of natural justice would apply.[36]

177. However there is no other mention in the Explanatory Memorandum or the Bill about the rules of natural justice. Even when explaining similar provisions to that mentioned above, which also will allow the Minister to consider any information available to him or her, the Explanatory Memorandum fails to mention the rules of natural justice.[37]

178. The one reference to natural justice in the Explanatory Memorandum, and the failure to mention it in reference to very similar provisions, raises the question of whether decisions made by the Minister must comply with the rules of natural justice.

179. The Commission considers that the Bill should state clearly that the rules of natural justice apply to decisions made under Part 11 of the Native Title Act.

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[35] Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), par 1.83, p 53.
[36] Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), par 1.83, p 54.
[37] See for example, item 24, proposed subsections 203AD(3B) and (3C) of Schedule 5 and Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), par 1.46, p 48.

(c) Item 24 – proposed subsection203AD(3A) - recognition periods

180. Item 24 of Schedule 5 to the Bill provides that NTRBs are recognised as the representative body for limited, fixed terms of between one and six years.[38]

181. The Commission has previously raised concerns about the negative impact that short recognition periods can have on NTRBs including:

- it increases the workload of representative bodies in applying for re-recognition
- it undermines the ability of representative bodies to make medium to long term plans that are essential if representative bodies are to be effective
- it creates a perception that representative bodies are insecure, temporary organisations whose existence is dependent upon ministerial discretion and political expediency
- it makes it more difficult to attract and retain staff, by rendering NTRBs unable to offer long term job security.

182. The combined effect of the above factors mean that it can be very difficult for NTRBs to build a profile and operate as respected, long-term organisations. Item 24 of Schedule 5 to the Bill will require the Minister to consider whether the period of recognition will promote the efficient performance of the functions of the body. However, the Commission is of the view that this is not sufficient to ensure stability for representative bodies.

183. The Commission recommends that a longer minimum period for recognition, of at least three years, would increase the stability and standing of representative bodies.

184. The Commission recommends that item 24 of Schedule 5 to the Bill be amended to increase the minimum recognition period for representative bodies to three years.

185. Additionally, the Commission recommends that the Bill be amended to:

- provide a legal link between recognition and funding, such that the Government will be required to provide funds to recognised representative bodies for the whole of the recognition period
- require funding and recognition periods to be the same length.

[38] The Bill will make minor amendment to the existing law regarding recognition periods. At the moment, the law allows for one year recognition periods in specified limited circumstances (see *Native Title Act 1993* (Cth) ss 203A-203AA and s 203AD). However, item 24 of Schedule 5 to the Bill will allow the Minister to recognise for a period of a minimum of one year in any circumstance.

(d) Item 26 - proposed section 203AF – notification requirements and receiving submissions

186. On many occasions the Commission and the Aboriginal and Torres Strait Islander Social Justice Commissioner have emphasised the importance of Government ensuring informed consultations are held before policy changes are made that might affect Indigenous peoples.

187. The Declaration on the Rights of Indigenous Peoples states that Indigenous peoples have a right to give their free, prior and informed consent before any policy which affects Indigenous peoples' rights is implemented. This is particularly important in relation to land. In 2005, the United Nations Committee on the Elimination of Racial Discrimination concluding observations on Australia stated:

> The Committee recommends that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land.

188. For this reason the Commission considers that the public notification and consultation requirements that are proposed in item 26 of Schedule 5 to the Bill should apply to all situations where the Government is considering varying, the area of a representative body.

189. Giving Aboriginal and Torres Strait Islander people an opportunity to make a submission on changing a bodies' area is integral. As the Explanatory Memorandum to the Bill recognises, the members of the Aboriginal and Torres Strait Islander community for whom the representative body performs its functions will be directly affected by a change in body.[39]

190. Under the existing provisions of the Native Title Act the Minister is required to publish public notice and receive submissions from the public in any case where he or she is considering varying, extending or reducing a representative body's area (see ss 203AE(6), 203AF(6) and 203AG(6)).

191. However, as it is currently drafted, the Bill will only require the Minister to inform the public and receive submissions for a variation of a representative body's area where it was initiated by him or her. The notification and submission requirements do not have to be complied with if the representative body requests the variation (see proposed subsection 203AF(1) in item 26 of Schedule 5 to the Bill).

192. The Commission recommends that the requirements for notification and receiving submissions should apply to all variations of a representative body's area, regardless of how the variation was initiated.

193. The Commission notes that proposed s 203AG in item 26 of Schedule 5 to the Bill requires the Minister to give notice to the Aboriginal and Torres Strait Islanders who live in the area to which a decision to vary an area relates. This provision

[39] See Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), par 1.67, p 51.

applies to all variations. The Commission supports this amendment and recommends its enactment.

(e) Item 37 – proposed paragraph 203BA(2)(c) – NTRB's must operate fairly

194. Item 37 of Schedule 5 to the Bill will provide that representative bodies must ensure that its structures and processes operate fairly. The new paragraph will provide a list which the representative body must have particular regard for when considering the fairness of its operation. This list is a replication of s 203AI(2) in the Act.

195. The Commission recommends that item 37 of Schedule 5 to the Bill should be amended to ensure that in considering whether the representative body is operating 'fairly', consideration can be made to whether the organisational structure and administrative processes allow for culturally appropriate decision making or have taken into account other relevant cultural issues.

7.3 Further amendments to Part 11of the Native Title Act – improving the security and independence of NTRBs

196. The *Native Title Report 2007*[40] and the Commission's submission to the Attorney-General on his discussion paper on minor amendments to the Native Title Act, made recommendations for further amendment to Part 11 of the Native Title Act to improve the security and independence of NTRBs. An overview of those recommendations is provided here.

(a) Extending recognition of NTRBs

197. In response to the Attorney-General's discussion paper on minor amendments to the Native Title Act, the Commission recommended that it should only be necessary for NTRBs to submit applications for re-recognition if they are not performing satisfactorily.

198. However, where the NTRB has not been performing satisfactorily, the Commission considers that the process for applying for re-recognition as an NTRB should be an open tender process and should not be limited to those bodies the Minister invites to apply. Such an approach would ensure that the best possible body for that area can operate as the NTRB.

199. Item 18 of Schedule 5 to the Bill will make some allowance for this by allowing the Minister to arrange for general invitations from eligible bodies to apply to become the representative body. However, a general application process is optional.

200. The Commission recommends that Part 11 of the Native Title Act should be amended to provide that, in relation to re-recognition of NTRBs:

[40] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007) ch 3.

a. Unless the Minister considers that the existing NTRB is operating unsatisfactorily according to s 203AI (or amended s 203BA), no application for re-recognition is required.

b. Where the Minister considers that the NTRB is not operating satisfactorily according to s 203AI (or amended s 203BA), the Minister must undertake an open and formal invitation process for other bodies/ new applicants. That process should not be limited to bodies/applicants invited by the Minister to apply.

201. There are a number of benefits to this approach, particularly if minimum recognition periods of only one year are maintained.[41] These primarily include the cost and resource savings from not requiring an NTRB to submit a detailed application.

(b) Resourcing of NTRBs

202. A factor which has significantly impacted on the ability of native title claimants and other parties to negotiate and reach outcomes though the native title system has been the under-resourcing of NTRBs and Native Title Service Providers (NTSPs). Various native title reports make recommendations about resourcing of these bodies.[42] The Commission also directs the Committee to the Commission's submission to the Government's discussion paper on native title payments which discusses this issue further. Suffice to note here that the Commission recommends that the Government take immediate steps to address the under-resourcing of NTRBs and NTSPs.

[41] See recommendations above in section 7.2 in which the Commission recommends a minimum three year recognition period.
[42] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007) ch 3.

8 Schedule 6 – Other amendments

203. The Commission has no comments on the items in Schedule 6 to the Bill. The Commission recommends that the items in Schedule 6 to the Bill be enacted.

Part II – The need for further reform

204. Part I of this submission responds to the Schedules of the Native Title Amendment Bill 2009.

205. As noted earlier in this submission, this Part of the submission goes beyond the matters raised in the Bill. However, the Commission considers that it may be of assistance to the Committee to be referred to the following additional issues and recommendations. In the Commission's view, these are matters that require the Government's attention in improving the overall operation and effectiveness of the Native Title Act in addition to the reforms introduced under the Bill.

206. Due to time restraints, the discussions of relevant issues below are not intended to be exhaustive and the Commission would welcome the opportunity to discuss or develop these proposals further.

9 Inquisitorial processes, such as use of referees

207. In various native title reports, the Aboriginal and Torres Strait Islander Social Justice Commissioner has commented on the inappropriate nature of, and the negative consequences that flow from, the adversarial system in which native title is determined. The Commission supports changes that will shift the focus of proceedings to an inquisitorial approach. It has been reported that former Deputy President of the NNTT and NSW Supreme Court judge Hal Wootten has written of the native title process in Australia:

> To leave the consequences of these policies to litigation in private actions based on existing rights, in courts designed to settle legal rights by an adversary system within a relatively homogeneous community, is at once an insult to the Indigenous people and a prostitution of the courts.[43]

208. The new referral powers contained in the Federal Justice System Amendment (Efficiency Measures) Bill (No. 1), which allow the court to refer questions arising from proceedings to a referee for inquiry and report, may go some way to reducing the negative impacts that the adversarial setting has on native title claimants and the outcomes reached.

209. The collection of expert evidence is a time-consuming and expensive aspect of native title litigation. Accordingly, the Commission considers that it is sensible to provide a mechanism by which the court can decide particular questions of fact, such as in respect of genealogy, by referring the question to one independent expert referee, rather than via multiple and conflicting expert reports and testimony put forward by the parties.

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[43] Chief Judge Joe Williams, 'Confessions of a Native Judge: reflections on the role of transitional justice in the transformation of Indigeneity', (2008) 3(14) *Land, Rights, Laws: Issues of Native Title* p 8.

210. However, the Commission cautions that such a power should only be used with the agreement of the applicant and the primary respondent. Involvement in such an inquiry process will presumably require considerable time and resource commitments from the parties. In addition, the available pool of appropriate expert referees is small and parties may legitimately hold strong views about the appropriateness of a particular referee, particularly where the relevant question referred is pivotal to the claim.

211. The Commission notes that requiring the consent of parties is consistent with the inquiries function provided for under Division 5 of Part 6 of the Native Title Act. This Division provides for an inquiry to be undertaken by the NNTT at the request of the court (and in other circumstances). However, s 138B(2)(b) provides that the applicant that is affected by the proposed inquiry must agree to participate. This consent is necessary for the efficient progression of the claim and to ensure that resources are not diverted away from the process that is already underway.

212. The Commission therefore recommends that any new power of the Federal Court to refer questions arising in proceedings to a referee for inquiry and report should be limited in native title proceedings to circumstances in which the applicant and the primary respondent agree to the inquiry.

213. Finally, the Commission is concerned that the Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) and the accompanying material do not state who will pay the costs of the independent expert. If the costs are shared between the parties, it could have significant implications for NTRBs and the running of that claim and their other claims. If the court bears the cost, this could create a disincentive for the court to use the power. The Commission considers that the most appropriate party to pay the expert's costs is the Australian Government. Ideally, a separate funding stream would be established by the Government under the Attorney-General's portfolio for this purpose.

10 Reducing the number of parties to native title proceedings

214. As discussed in section 3.3 of this submission, a major hindrance to native title proceedings can simply be the number of parties to the proceeding. Addressing the problems associated with excessive party numbers is therefore critical to improving the efficiency of the native title system. This could be achieved through a number of complementary mechanisms.

(a) Application for party status

215. Section 84 of the Native Title Act identifies who can become a party to a native title claim. In essence, the Act divides potential parties into two groups; those who have a specified interest in the proceeding, and those who fall within broad catch-all provisions.

216. Members of the first group identified above have automatic standing as a party under one of the following provisions :

- Section 84(3)(a)(ii): the person claims to hold native title in the area covered by the application.

- Section 84(3)(a)(i): the person has an interest specified in s 66(3)(a)(i) – (vi) by virtue of:

    a. s 66(3)(a)(i): a registered native title claimant in relation to any of the area in the application.

    b. s 66(3)(a)(ii): a registered native title body corporate in relation to any of the area covered by the application.

    c. s 66(3)(a)(iii): a representative Aboriginal or Torres Strait Islander body for the area covered by the application.

    d. s 66(3)(a)(v): the Commonwealth Minister.

    e. s 66(3)(a)(vi): the local government body for the area covered by the application.

217. Members of the second group identified in [215] above have standing as a party under one of the following provisions :

- Section 84(3)(a)(iii): the person's interest, in relation to land or waters, may be affected by a determination in the proceedings.[44]

- Section 84(3)(a)(i), by virtue of s 66(3)(a)(iv): any person who, when the notice of the claim is given, holds a proprietary interest, in relation to any of the area covered by the application, that is registered on a public register maintained by government.

- Section 84(5): the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.[45]

218. The provisions identified in [217] above provide extremely broad tests for party status. The net result is that in native title proceedings, party numbers can reach the hundreds. In addition, the breadth of these tests means that, exceptional cases aside, there is virtually no prospect of the claimant successfully challenging the addition of a particular respondent. In the *Native Title Report 2007*, the Aboriginal and Torres Strait Islander Social Justice Commissioner outlined the negative impact on the realisation of Indigenous peoples' native title rights by having excessive numbers of parties involved in the proceedings.[46] One of these is that party numbers can hamper the ability of the parties to reach agreements, as well as exponentially increasing the costs and delays of pursuing a claim.

219. The Commission considers that the thresholds for party status identified in [217] are too low and require adjustment.

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[44] People applying for party status under this provision must state in writing to the Court that they wish to be a party within a time frame specified under s 66.
[45] People use this provision to become a party where they haven't applied within the time frame required to apply under s 84(3)(a)(iii).
[46] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007), chapter 4.

220. The Commission acknowledges that native title claims have the potential to impact on a wide range of persons, who might understandably seek involvement in the proceeding to ensure that their interests are represented and taken into account. However, the Commission considers that the current balance is poorly struck and has resulted in overwhelming numbers of respondents being added, sometimes with only marginal relevance to the claim. This has unquestionably resulted in excessive delays, costs and frustration of settlement efforts throughout the native title system.

221. The Commission also notes that a government party usually takes the primary role in defending native title claims. In doing so, the government's role is primarily to ensure that a wide diversity of community views and interests are represented, as well as to test the validity of a native title claim by essentially acting as contradictor to the claim.

222. In order to strike a more appropriate balance, the Commission recommends that the sections mentioned in [217] above, that is, ss 84(3)(a)(iii), 84(5), and 66(3)(a)(iv), be amended along the lines of 'a person whose interests are likely to be substantially affected to their detriment by a determination in the proceedings.'

223. Alternatively, the threshold for addition as a party under these provisions could be amended to reflect more traditional tests for standing in civil proceeding, such as the 'special interest' test under general law[47] or the 'person aggrieved' test under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[48] Another alternative would be to require the party seeking to be joined to satisfy the requirements of Order 6 Rule 8 (Addition of Parties) of the Federal Court Rules. Each of these approaches has the benefit of providing a degree of certainty and predictability by drawing upon a well developed body of law.

224. In addition to adjusting the threshold for inclusion as a party, the Commission considers that the procedure for becoming and remaining a party also requires adjustment.

225. The Commission recommends that the Government amend s 84 so that persons applying for party status under the provisions identified in [217] above must make an application to the Court setting out how their interests are likely to be substantially affected if the Court were to make the determination sought in the application.[49] The claimant and the primary respondent should then have an opportunity to make submissions to the Court opposing the addition of the party.

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[47] *Australian Conservation Foundation v Commonwealth* (1978)146 CLR 493. See further *Onus v Alcoa* (1981) 149 CLR 27; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Benefit Fund Pty Ltd* (1998) 194 CLR 247.

[48] .Section 5. See, generally, *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 54 FLR 421; *United States Tobacco Co v Minister for Consumer Affairs* (1988) 83 ALR 79; *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509; *Right To Life Association (NSW) Inc v Secretary, Department of Human Services and Health & Anor* (1995) 56 FCR 50; *Ogle v Strickland* (1987) 13 FCR 306.

[49] The Commission acknowledges that persons who become parties under [216] have interests of a nature that they would be substantially affected by a determination if it is made, and consequently they should not be required to make a formal application to the Court to be joined as a party.

226. The Court would of course retain the discretion as to whether to join the person as a party. However, by raising the threshold for addition as a party, as well as requiring the proposed respondent to carry the burden of proof in establishing why they should be added, this would contribute to the more effective management of the number of parties to claims. In particular, claimants and primary respondents would have a firmer basis on which to challenge the addition of parties whose interests appear peripheral or adequately represented by other parties, together with a formal opportunity to make that challenge before the Court.

227. Finally, the Commission acknowledges that the 2007 amendments to s 84[50] included some positive elements.[51] For example, the amendments provide that a party's interests must be 'in relation to land or waters' and that a Court must consider whether it is in the interests of justice to add the party to the proceeding. However, the Commission is concerned that these amendments only apply to applications lodged on or after the date the amendments came into effect in that year. The result is that the amendments do not apply to the 500 or so native title claims that have already been commenced.

228. The Commission has recommended above that the threshold for the addition of parties under s 84 should be amended. The Commission considers that these changes should have immediate effect and apply to all proceedings that have already been commenced. If this recommendation is not accepted, the Commission recommends that the Native Title Act be amended to provide that the 2007 amendments to s 84 apply to all native title proceedings, or at the very least to all native title proceedings that have not proceeded beyond the hearing of early evidence.

229. The Commission further recommends that the Government also explore options to enable a reduced form of participation in native title proceedings for certain respondents. For example, whilst some respondents may wish to participate fully in the proceedings, including through adducing evidence and participating in settlement negotiations, others may seek only to be added as a party to ensure that their rights and interests are preserved under any final determination. For such parties, affording full procedural and other rights in the claim may not be necessary. A tiered system of participation may allow for certain procedural matters, including many of those discussed in this submission, to be dealt with more expeditiously by only requiring the consent of the 'key players' to the proceeding, usually the claimant and the government party.

(b) Removal of parties throughout proceedings

230. When notice of a native title claim is given, any person who, at the time the notice is given, holds a proprietary interest that is registered on a public register in relation to any of the area covered by the application has an automatic

[50] The 2007 amendments slightly amended the test for party status by requiring that the interest is in 'relation to land or waters' and other minor changes.
[51] See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007* (2008), p 35.

entitlement to become a party to the proceeding.[52] However, many people who become parties when the claim is first made may lose their relevant interest as the claim progresses. This might be due to changed circumstances over the intervening years or due to the fact that extinguishment is often not considered until late in the proceeding.

231. Section 84 details a number of ways a party may be removed from the proceeding, such as through leave of the Court after the proceeding has begun.[53] Section 84(9) also states that the Court is to consider making an order that a person cease to be a party if the Court is satisfied that the person no longer has interests that may be affected by a determination in the proceeding. However, the Commission has been told by users of the system, that the Court's power to remove parties is under-utilised. The Commission considers that if the above recommendation to raise the threshold for a party's addition as a party were to be adopted then this would provide one mechanism through which the Court's power to remove parties may be more effectively utilised. This is because it would enable claimants and respondents to more effectively challenge the ongoing involvement of parties whose interests have faded or disappeared during the life of the claim.

232. An additional way to ensure a regular 'clean up' of the party list would be to amend s 84(9) of the Act to require the Court to regularly review the party list for all active native title proceedings and, where appropriate, to require a party to show cause for its continued involvement. To assist the Court to do so, the National Native Title Tribunal (NNTT) could undertake an advisory role to the Court. The NNTT has the expertise and access to the information necessary to undertake such a review and could be required to advise the Court on parties that no longer hold the necessary interest to maintain party status.[54]

(c) Representative parties

233. Another mechanism for more effectively managing the number of parties to native title claims is through the use of representative parties.

234. Representative parties are used in Federal Court proceedings in a number of circumstances. Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the Federal Court Act) enables representative complaints to be commenced in the Federal Court by one or more of the persons to the claim as representing some or all of the other persons, if:

a. seven or more persons have claims against the same person;

b. the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

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[52] See *Native Title Act 1993* (Cth), s 84(3)(a)(i) and *Native Title Act 1993* (Cth), s 66(3)(iv).
[53] *Native Title Act 1993* (Cth), s 84(7).
[54] Section 136DA already allows a member of the NNTT to refer to the Federal Court the question of whether the party should cease to be a party. However, the Commission is recommending that the Court be required to actively clean up the party list for active native title proceedings at set intervals, with the NNTT providing specific advice on who it considers retains an interest.

c. the claims of all those persons give rise to a substantial common issue of law or fact.

235. Order 6, Rule 13 of the Federal Court Rules deals with representative respondents. It enables the Court, at any stage in proceedings, to appoint any one or more of the respondents to represent others with the same interests.

236. While there is nothing preventing the Court using the representative party mechanism provided by Order 6, Rule 13 in native title proceedings, the Commission understands that it is rarely used. The Commission recommends that the Government consider amending the Native Title Act to specifically direct the Court to give consideration to appointing a representative party in native title proceedings in respect of multiple respondents with substantially the same interest, either upon application by a party or on the Court's own motion.

11 Further amendment to s 86F – long term adjournment

237. In the course of collecting information for the *Native Title Report 2008*, a number of stakeholders suggested that the Native Title Act should allow the parties (where the claimant and the primary respondent consent) to request a long term adjournment. This would give the parties the room and time to negotiate ancillary outcomes, without being under pressure from the Court to resolve the determination of native title. For example, Victorian Attorney-General Robert Hulls MP commented:

> The problem sometimes arises where these broader outcomes are not being realised because of pressure from the Court to resolve the native title question more quickly. This can lead to missed opportunities for Traditional Owners, or ancillary agreements that are difficult to implement because the policy development behind them was rushed. Preparing for regular Court appearances can divert resources from making progress on negotiating broader agreements.[55]

238. Under s 86F of the Native Title Act, the Court can order an adjournment to help negotiations. It may do this on its own motion or on application by a party. The Court can then end the adjournment on its own motion, on application by a party, or if the NNTT reports that the negotiations are unlikely to succeed.[56] However, the NNTT has stated in respect of s 86F that the parties 'should not assume that alternative or even related agreement-making will be accepted by the Court as legitimate reason for delaying resolution of the claim'[57]

239. The Commission recommends that s 86F be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the claimant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as:

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[55] R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.
[56] *Native Title Act 1993* (Cth), s 86F(3) and 86F(4).
[57] NNTT *Native title claims: overcoming obstacles to achieve real outcomes*.

a. the prospect of a negotiated outcome being reached

b. the resources of the parties

c. the interests of the other parties to the proceeding.

12 Shifting the burden of proof

240. The Commission has significant concerns that the evidential burden of proving native title is simply too great.

241. In 2005, the United Nations Committee on the Elimination of Racial Discrimination concluding observations on Australia, stated:

> The Committee is concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands.
>
> The Committee wishes to receive more information on this issue, including on the number of claims that have been rejected because of the requirement of this high standard of proof. It recommends that the State party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of indigenous peoples to their land.[58]

242. 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.

243. 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.

244. The Commission considers that at least some of the burden of proving native title should be shifted. A shift in the burden would also improve the operation of the system. As the Chief Justice of the High Court of Australia stated:

> Despite the significant decisions which have been made in the High Court and in the Federal Court since the NT Act was enacted, the essential nature of the process created by the first rules set out in *Mabo (No 2)* and the burdens and the costs which they impose have not been greatly mitigated over the years. There has been an increasing number of mediated determinations, but they

[58] Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia,* UN Doc CERD/C/AUS/CO/14 (2005). At http://www.austlii.edu.au/au/journals/AILR/2005/37.html (viewed January 2009).

> still seem to involve long and costly investigations and negotiations. In the absence of a national land rights statute, the rules for the determination and definition of native title rights set out in the NT Act *cannot seem to shake off the logistical difficulties imposed by the requirement for proof of connection*.[59]

245. Others have argued that the burden should be shifted to those who were responsible for the dispossession. As one academic put it:

> …the question should not be how we can deal with indigenous 'claims' against the state, but rather how can the colonisers legitimately settle and establish *their* own sovereignty.[60]

246. Such an approach is not inconsistent with the Native Title Act. The preamble states that the High Court has held that the common law 'recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands.' A presumption in favour of the existence of native title rights and interests would simply recognise and give respect to this fact.

247. The Commission notes that there are currently a number of laws in which the burden of proof shifts to the respondent in respect of certain elements. This is typically in situations where the respondent is the more appropriate party to prove the relevant issue, such as because the relevant information is in the control or mind of the respondent.

248. For example, in a claim of indirect sex discrimination under the *Sex Discrimination Act 1984* (Cth), once an claimant has established that a particular requirement, condition or practice disadvantages women, the onus then shifts to the respondent to establish that the requirement, condition or practice is reasonable in the circumstances.[61] Similarly, s 664 of the *Workplace Relations Act 1996* (Cth)[62] provides that in claims alleging termination of employment for a proscribed reason (including sex, marital status, pregnancy, family responsibilities and absences from work during maternity leave or other parental leave[63]), the onus is on the respondent to establish that the termination was not for a proscribed reason.[64]

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[59] Chief Justice R French, *Rolling a rock uphill? – Native Title and the myth of Sisyphus,* (speech delivered at the Judicial Conference of Australia National Colloquium, 10 October 2008), p16 (our emphasis).
[60] D Short, 'The social construction of Indigenous `Native Title' land rights in Australia', (2007), 55(6) *Current Sociology* 857, p 872 (original emphasis). At http://csi.sagepub.com/cgi/reprint/55/6/857.pdf (viewed January 2009).
[61] *Sex Discrimination Act 1984* (Cth), s 7C. See further Australian Human Rights Commission, 'Chapter 4 The Sex Discrimination Act', (2009), *Federal discrimination Law Online*, p 55. At http://www.hreoc.gov.au/legal/FDL/chap4.html (viewed January 2009).
[62] See further, in relation to establishing causation under the *Racial Discrimination Act 1975* (Cth), HREOC, *An International Comparison of the* Racial Discrimination Act 1975: *Background Paper No 1* (2008), Chapter 8.
[63] *Workplace Relations Act 1996* (Cth), s 659(2)(f) and (h).
[64] See, eg, *Bognar v Merck Sharp Dohme (Australia) Pty Ltd* [2008] FMCA 571, [47]: 'By virtue of s.664 of the WR Act, the respondent bears the onus of proving that it did not terminate the claimant 's employment for a prohibited reason, or for reasons that included a prohibited reason.' See also *Liquor, Hospitality Miscellaneous Union, Liquor & Hospitality Division, NSW Branch on behalf of its member,*

249. If the burden of proof were shifted to the respondents after a claimant had satisfied the registration test, in most cases the government party would presumably take on the role of adducing evidence to rebut the relevant presumptions. In the Commission's view, this is appropriate. The government party is the most likely party to hold the relevant information. It also has the resources to commit and is the party that undertook the extinguishing act by granting the interest in land in the first place.

250. The Commission 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. The Native Title Act already includes a number of procedural mechanisms that act as a safeguard. For example, there are extensive notification provisions which ensure any opposing claim group and other interests have an opportunity to be represented.

251. In addition, the registration test administered by the NNTT acts as an important safeguard. Part 7 of the Native Title Act provides for the registration test, and what a registration application should include. Under s 190B, the conditions about merits of a claim are set out. These include that the claimants must:

    a. Identify the area

    b. Identify the claim group

    c. Identify the native title rights and interests claimed

    d. Identify the factual basis for a claim

    e. Satisfy the Registrar that there is a prima facie case that the native title rights and interests can be established.

252. The Commission does not recommend amending the registration test. Indeed, the Commission cautions that, if the onus of proof were to be adjusted as recommended, it would be necessary to ensure that the criteria or application of the registration test does not become harder for claimants to satisfy. If this were to occur, then the end result would be that the current problem is simply shifted to an earlier stage which would additionally jeopardise important procedural rights that are gained through registration testing and place the assessment of evidence outside the Court system.

253. In addition to the reasons outlined above, a number of procedural benefits would flow from shifting the burden of proving some elements of native title to the respondents. For example, it would encourage governments to progress native

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Wayne Roberts v Woonoona Bulli RSL Memorial Club Ltd [2007] FCA 1460, [21]: 'In this proceeding it is thus not necessary for the Union to prove that Mr Roberts' employment was terminated for the reason, or for reasons including the reason, that he refused to negotiate in connection with, make or sign an AWA. However, the Club will have established a defence to the Union's application if it has proved that Mr Roberts' employment was terminated for a reason or reasons that do not include a proscribed reason.' See also *Tandoegoak Anor v Marguerite Gerard Pty Ltd* [2007] FMCA 621, [38]: 'The Court is cognisant of the reverse onus of proof contained in s 664 of the Act.' See also *Abrahams v Qantas Airways Ltd* [2007] FMCA 634, [10].

title claims without insisting that claimant s first provide comprehensive connection reports. Additionally, a presumption gives governments greater incentive to provide the information they hold earlier in the proceedings to clarify the areas of dispute. For example, there would be an incentive for governments to collate tenure information at the same time as compiling their proof to rebut any of the presumptions (discussed below).

12.1 Presumptions

254. The Commission considers that once the registration test is satisfied, there are a number of questions of facts that should be presumed in favour of the claimant s. In a recent paper, current Chief Justice of the High Court proposed a draft provision for the Native Title Act in relation to the statutory form such presumptions could take, 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.
>
> (2) 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.[65]

255. The Commission supports the enactment of a provision in the terms suggested by his Honour above.

12.2 Rebutting the presumptions

256. The respondents would then have an opportunity to adduce evidence to rebut any of the above presumptions. Further statutory clarification would also be required in respect of such rebuttal, as discussed below.

(a) Traditional Owners of the land

257. The Commission considers that the presumption that the claimants are the Traditional Owners of the land should only be rebuttable by a respondent if it can show there is a justifiable basis to believe that another group were, or are, the Traditional Owners. In such a case, the onus would be on that respondent to adduce evidence to prove that the claimant group is not the same society as that at sovereignty. Evidence of a substantial dispute over traditional ownership or overlapping claims could be tendered as evidence to dispute traditional ownership. However, in these cases the government party should be required to assist the Indigenous parties to resolve the disputes between them and to establish who the Traditional Owners are for the relevant area.

258. The Commission notes that the Native Title Act would also require articulation of how a particular group meets the definition of being a traditional owner. The meaning of this expression under s 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* may not necessarily be appropriate for the Native Title Act. Further consultation with Indigenous groups on this issue would therefore be required.

259. The Commission also considers that NTRBs or NTSPs could potentially play a role in certifying a particular group as the Traditional Owners of particular land. The Commission notes that NTRBs and NTSPs are often uniquely well placed to make such assessments, due to their familiarity with local communities. Whilst such certification may not be capable of constituting conclusive proof of traditional ownership, it may provide an appropriate starting point for establishing a presumption of traditional ownership. Such a certification process might also provide an avenue for recognition of traditional ownership for other purposes, without the group necessarily being required to meet the onerous registration test under the Native Title Act.

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[65] Justice Robert French, 'Lifting the burden of native title – some modest proposals for improvement' Federal Court, Native Title User Group, Adelaide, 9 July 2008, copy available at: http://www.fedCourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf.

(b) Substantial interruption

260. The Commission recommends that the Native Title Act should specify that, where a claimant meets the registration test, continuity in the acknowledgement and observance of traditional law and custom shall be presumed, subject to any evidence of substantial interruption. This would clarify that the onus rests with the respondent, usually the government party, to prove a substantial interruption rather than for the claimant s to prove continuity.

261. Furthermore, the Commission considers that the interpretation of 'substantial interruption' developed at common law requires amendment. In the *Native Title Report 2007*[66], the Aboriginal and Torres Strait Islander Social Justice Commissioner summarised the native title claim of the Larrakia people. That case illustrates the vulnerability and fragility of native title, whereby a break in continuity of traditional laws and customs for just a few decades (post World War Two) was sufficient for the Court to find that native title did not exist. The Commission considers such a comparatively minimal interruption should not be sufficient to defeat a claim to native title, especially in cases where the claimant group, like the Larrakia, has revitalised their culture, laws and customs following such a short interruption.

262. In the *Larrakia* case, Justice Mansfield recognised in his judgment the strength of the Indigenous society before him. After giving his conclusion that native title did not exist, he stated:

> It is a conclusion which is not intended to, and should not, be seen as meaning that the Larrakia people do not presently exist as a society in the Darwin area with a structure of rules and practices directing their affairs. They clearly do.[67]

263. To avoid such an outcome occurring again, the Commission recommends that the Government amend the Native Title Act to address the Court's inability to consider the reasons for interruption in continuity. Such an amendment could empower Courts to disregard any interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

(c) Definition of traditional

264. The Commission recommends that the Native Title Act should also provide greater clarity as to what the respondent must prove to rebut the presumption that the laws and customs observed are 'traditional'. The Commission also considers that such statutory clarification should also amend the meaning of 'traditional' developed at common law, which has become unduly restrictive.

265. The Commission recommends that 'traditional' should encompass laws, customs and practices that have remained identifiable through time. This would go some

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[66] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007), chapter 7.
[67] Risk v Northern Territory [2006] FCA 404, per Mansfield J, para [938].

way to allowing for Indigenous peoples' rights to culture[68] and would also clarify the level of adaptation allowable under the law. The Commission also considers that usufructuary rights, such as those recognised under s 211 of the Native Title Act, should be presumed to be traditional.

(d) Requirement for physical connection

266. The Commission recommends that the Native Title Act should clarify that the definition of native title in s 223 does not require that the claimants have a physical connection with the land or waters.

267. Requiring evidence of physical connection sets an unnecessarily high standard which may prevent claimants who can demonstrate a continuing spiritual connection to the land from having their native title rights protected and recognised.

268. The Commission notes that such an amendment would not alter, but merely codify the common law position on this issue. Since the Full Federal Court decision in *De Rose,*[69] the Courts have repeatedly rejected the need for 'on-going or continual physical occupation of the land' by the claimants. However, the Commission considers that statutory codification would nevertheless be of further assistance in clarifying this issue for Courts and parties.

13 Extinguishment

13.1 Consideration of extinguishment earlier in proceedings

269. An issue that has been criticised by a number of stakeholders is that extinguishment issues are ordinarily considered too late in the proceedings. The Commission agrees that it would advantage all parties if areas in which native title has been extinguished were established early in the proceedings. Such an approach would reduce the number of parties to the proceedings (as some could then be removed) and it would help the remaining parties to identify areas of contention and those over which there is no issue. This would further assist parties to identify where early evidence could be taken and reduce the resources required to pursue the claim further.

270. The Commission considers that the appropriate party to provide tenure information is the government party. The government party typically holds the relevant information, is in the best position to undertake a thorough search, has the resources to commit, and was the party that undertook the extinguishing act by granting the interest in land in the first place.

271. The Commission recommends that the Native Title Act specify that at the earliest possible stage in the proceedings that the Court considers it appropriate, the

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[68] See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Human Rights and Equal Opportunity Commission (2008), chapter 3.
[69] *De Rose v South Australia No 2* (2005) 145 FCR 290.

relevant government party must undertake tenure searches and provide a report on extinguishment to all parties and the Court.

13.2 Extension of the non-extinguishment principle/ historical tenure

272. The preamble to the Native Title Act states:

> where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect[70].

This is not what occurs in practice.

273. After the 1998 amendments to the Act, the circumstances in which native title rights are extinguished permanently were expanded significantly. As the Federal Court recognised in *Northern Territory v Alyawarr*:

> The preamble declares the moral foundation upon which the NT Act rests. It makes explicit the legislative intention to recognise, support and protect native title. That moral foundation and that intention stand despite the inclusion in the NT Act of substantive provisions, which are adverse to native title rights and interests and provide for their extinguishment, permanent and temporary, for the validation of past acts and for the authorisation of future acts affecting native title. [71]

274. As discussed in *Native Title Report 2002*, the breadth and permanency of the extinguishment of native title through the Native Title Act is contrary to Australia's international human rights obligations.[72] It is also an unnecessary approach, without a satisfactory policy justification.

275. The Commission recommends that the Native Title Act be amended to limit extinguishment to the current tenure extinguishment and repeal the provisions that validate past extinguishment where those extinguishing acts no longer continue to have effect.

276. If the extinguishment provisions were amended in this way, the outcomes achieved under the Act would improve. The cost and resources required to undertake historical tenure research would be reduced significantly and native title proceedings would be simpler and faster to resolve.

277. If the Government does accept this recommendation, the Commission recommends that the Government consider amending the Native Title Act to provide a greater number of circumstances in which historical extinguishment may be disregarded. The Act already provides examples of where prior extinguishment has been disregarded in ss 47 to 47B. The circumstances in which this occurs could be expanded by amending the Act to include a new

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[70] *Native Title Act 1993* (Cth), preamble.
[71] (2005) 145 FCR 422 at [63].
[72] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002,* chapter 2. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport02/chapter2.html#1.2 (viewed 12 January 2009).

provision/s. For example the non-extinguishment principle could be extended to cover:

a. all Crown land

b. other identified classes of land and waters

c. any other area identified by the relevant government.

278. Both recommendations would require some mechanism for transitional provisions to clarify the date on which 'current' tenure is established.

279. The Commission acknowledges that the approaches recommended in this section will not do away with all historical tenure research that is required. Any extinguishment of native title that occurred after the enactment of the *Racial Discrimination Act 1975* (Cth) will still need to be examined more closely in order to determine whether compensation is payable to the claimants under that Act. But overall, a rule which disregards historical extinguishment should reduce the number of circumstances in which compensation under the Racial Discrimination Act may apply.

14 Disentangle the right to negotiate from the progress of the native title claim

280. An issue that was highlighted as part of the 2007 changes to native title was the number of claims that were lodged to secure procedural rights such as the right to negotiate. A significant number of these claims have never been progressed to determination for varying reasons, particularly lack of resources.

281. The procedural rights protected under the right to negotiate provisions in the Native Title Act are of significant value. The utilisation of these rights is the door for many Indigenous peoples' participation and engagement in the economy, and provides the key to participation in industries and enterprises on or in respect of the relevant land and waters. The economic significance of these rights was identified by the Attorney-General and the Minster for Families, Housing and Community Services and Indigenous Affairs as a reason for the recent discussion paper on how to improve the benefits that flow from agreements made through this system.

282. The right to negotiate which is triggered by having a native title claim registered, operates through the future acts regime of the Native Title Act. The granting of procedural rights after registration recognises that the claimants have a prima facie case; that is, it is likely they are the Traditional Owners of the relevant land and waters. However, pursuing a claim and negotiating an agreement using the right to negotiate are two very different activities with potentially very different outcomes. Kevin Smith, the CEO of Queensland South Native Title Services stated:

> The reality is that this current unprecedented resource sector boom presents an opportunity for a good number of clients to engage in the real economy for the first time and possibly *only* time. On the other hand, my clients are acutely aware that a native title determination application allows for the recognition of

> rights and interest to land and waters for the benefit of both current and future generations.
>
> The [Native Title Act] sets up a real conflict of duty for many of our clients; the duty of prosecuting a claim to ensure that substantive rights and interests are recognised while simultaneously discharging their moral duty to their claim group to exercise procedural rights to negotiate fair compensation for mining on their ancestral lands. The irony, somewhat perversely, is that under the current arrangements they must do the former to preserve the latter. The perversity lies in the reality that after two hundred years of valiantly and defiantly withstanding waves of colonisation the legislation that delivered *some* hope might in fact be the Tsunami that dashes *all* hope. Not because they do not want to engage in both processes but because of the bureaucratic, highly legalistic and expensive burden of being simultaneously engaged in *both* processes.
>
> One might argue, 'The claim group will just have to use the mining compensation money to prosecute their claim'. The obvious response, being 'Why should they have to when the tax-payer is footing the entire bill for respondents to resist the claims, the Tribunal to mediate and the Court to determine the application'.[73]

283. Mr Tony McAvoy, barrister, has similarly suggested that the two processes should be 'de-coupled'. He suggests that the NNTT should become a 'procedural rights oversight and management body'. The procedural rights would still be granted on the basis of passing the registration test, after which the claimants could be a 'native title procedural rights holder'. The claimants could then indicate if they wished to apply for a native determination.[74]

284. One benefit of the approach that McAvoy has identified is that if claimants could discontinue on the basis that they would retain procedural rights, a number would take that opportunity, reducing the applications before the Federal Court.

285. The Commission recommends that the Government further examine how the procedural rights afforded under the right to negotiate provisions can be separated from the progress of the native title claim.

15 Recognition of commercial native title rights and interests – ss 211 and s223

286. The Government has stated that it considers that Indigenous communities should be using their native title rights to leverage economic development.[75] The link between native title and economic development has been further acknowledged by the Government through its decision to include native title in its Indigenous Economic Development Strategy.

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[73] K Smith, Chief Executive Officer of the Queensland South Native Title Services, Speech delivered at the JCA Colloquium, Friday 10 October 2008, Surfers Paradise.
[74] T McAvoy, *Native Title Litigation Reform*, Frederick Jordan Chambers, Sydney, 24 November 2008.
[75] J Macklin, *Beyond Mabo: Native title and closing the gap*, (delivered at the James Cook University, Townsville, 21 May 2008) p 3.

287. Various native title reports have commented on the existing scope for using native title for commercial benefit, and have identified some limitations in the system that may prevent a community from being able to use native title rights to support their economic development aspirations.

288. One of these problems was outlined in the *Native Title Report 2007*, which used the example of fishing rights to outline aspects of the common law that appear to be preventing recognition of any commercial aspect of native title rights and interests. Specifically, the Courts have often appeared to take the view that customary Indigenous laws and customs for the purpose of native title do not include commercial activity. This perception has created a false dichotomy that customary rights are mutually exclusive to commercial rights.[76]

289. There is growing evidence that this dichotomy is neither necessary nor accurate. For example, the story discussed in *Native Title Report 2007* of the Gunditjmara peoples in Victoria is an example of a community that was able to prove that their ancestors had established an ancient aquaculture venture. The Federal Court recognised their native title rights and the Gunditjmara peoples are now using these rights to re-establish commercial eel farming.

290. A significant amount of recent anthropological and archealogical research supports the existence and operation of trade between Australian Indigenous peoples and others. The trade was with other Indigenous peoples both domestically and internationally. This enterprise and economy has yet to be fully recognised by the native title system and the Courts.

291. Alternatively, the evidential bar for establishing the relevant bundle of native title rights has been set so high as to exclude or significantly limit the prospect of commercial rights being recognised. For example, in *Yarmirr* at first instance, in response to evidence of trade with neighbouring tribes in clay, bailer shells, cabbage palm baskets, spears and turtle shells, Olney J held:

> The so-called 'right to trade' was not a right or interest in relation to the waters or land. Nor were any of the traded goods 'subsistence resources' derived from either the land or the sea.[77]

292. His Honour also observed that evidence of trade with Macassan fishermen related only to the gathering of trepang, but did not assist in establishing rights or interests in relation to other resources of the sea.[78]

293. The above line of reasoning reveals a very narrow approach to the characterisation of the relevant right. In addition to an uninterrupted practice of commercial fishing, his Honour appeared to require further proof of a specific traditional right to have done so before he would accept it as a 'right or interest in

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[76] For further info see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007) chapter 10.
[77] *Yarmirr & Ors v Northern Territory & Ors* (1998) 82 FCR 533 at 587[D].
[78] Ibid 588[C]. This approach appears to have been endorsed by Beaumont and von Doussa JJ in the Full Court, where their Honours noted: '...the group was confronted with obvious difficulties in seeking to prove title to resources of the kind in question, given their diversity of specific character and location in a relatively large area of sea.' *Commonwealth v Yarmirr & Ors* (2000) 101 FCR 171 at 231 [253].

relation to waters'. Furthermore, even if a community could establish such a continuous right, his Honour's reasoning then calls for a 'drilling down' to the particular species being traded (such as Trepang), rather than allowing a more generic right to trade in the marine resources of the claim area.

294. The Commission recommends that the Government clarify that the definition of native title in s 223 can include rights and interests of a commercial nature. This would help to clarify for the Courts that native title rights and interests should not be regarded as inherently non-commercial. Such an amendment could also provide guidance as what evidential requirements must be met in establishing a commercial native title right and the scope of that right. For example, it could clarify that evidence of traditional laws and customs relating to trade in a particular resource of the claim area is sufficient to establish a right to trade in **any** resources of the claim area.

295. The *Native Title Report 2007* also raised the problem that even if commercial native title rights and interests are proven and recognised by the Court, the commercialisation of those native title rights would remain subject to relevant state and territory laws and regulations by virtue of s 211.[79]

296. Section 211 of the Native Title Act provides for the interaction of:

a. native title rights and interests that include recognising a right to undertake certain activities (such as fishing or hunting)

b. Commonwealth, state or territory government regulation of that activity (such as licensing).

297. If a government regulates an activity under the section, then that regulation does not apply to restrict native title rights and interests to the extent that the activities are undertaken for personal, domestic or **non**-commercial needs. As a result, even if Indigenous people can overcome all of the s 223 requirements, any commercial use of their native title rights remain subject (and vulnerable) to government regulation. In short, having travelled the long road to establish a commercial native title right, the claimant would nevertheless still need to join the queue for the applicable permit or licence to engage in commercial activities.

298. The Commission recognises that there are valid reasons why regulation of a commercial activity in respect of native title rights is necessary, particularly in respect of protecting public safety, competing rights and interests and the environment. However, the Commission recommends that the Government explore options that would limit the impact of government regulation in relation to holders of native title rights in appropriate cases.

299. For example, the Government could explore options with state and territory governments to afford priority treatment for native title holders in obtaining applicable permits and licences to commercialise the relevant right. Alternatively, the Government could explore options for developing limited markets for

[79] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007) chapter 10.

particular commercial activities, such as trade within and between particular native title groups in a particular industry. Such limited markets could be freed from more complex layers of regulation that might otherwise apply and could be adapted to be more culturally appropriate to the particular groups and activities.

300. For the above reasons, the Commission recommends that that s 223 be amended to:

a. clarify that native title can include rights and interests of a commercial nature

b. provide guidance as to the evidential requirements and potential scope of any such commercial rights.

301. The Commission further recommends that the Government explore options, in consultation with state and territory governments, Indigenous groups and other interested persons, to enable native title holders to exercise their native title rights for a commercial purpose.

16 Amendments to applicants – s 66B

302. Prior to the 2007 changes to the Native Title Act, where a group of persons were authorised to be the applicant for a native title claim, it was implicit that the authorisation remained in effect in respect of so many of the persons who remain willing to so act.[80] That is, new authorisation of the applicant under s 61 was not needed where one member of the applicant group died or was no longer willing to act. Re-authorisation of the applicant was only required if a new member was added to the applicant.

303. Justice Spender said of the law before the 2007 amendments:

> It is important to remember that the persons who are authorised by a native title claim group to make an application are not authorised merely to make the application, but also to '*deal with matters arising in relation to*' the application. If one person comprising an 'applicant ' were to die, it would be contrary to the purpose of the Native Title Act to require there to be a further authorisation meeting to authorise another group of persons (perhaps constituted by the remaining members of the '*originally specified persons*') to be the 'applicant'. Such a frustration of proceedings, perhaps proceedings well advanced, would be antithetical to the purpose of the Native Title Act. That is the paramount consideration, but the gross waste of time and resources also serves to indicate that an interpretation of 'applicant' which avoids all of these consequences is clearly to be preferred.[81]

304. However, s 66B was amended in 2007 to insert two additional clauses into the reasons why applicants need to be re-authorised. These were:

[80] See the decisions of *Chapman v Queensland* (2007) 159 FCR 507 (2006) 154 FCR 233; *Butchulla People v Queensland* (2006) 154 FCR 233 and *Doolan v Native Title Registrar* (2007) 158 FCR 56.
[81] *Doolan v Native Title Registrar* (2007) 158 FCR 56 para 70.

a. paragraph 66B(1)(a)(i) – where a person consents to his or her replacement or removal

b. paragraph 66B(1)(a)(ii) – the person has died or become incapacitated.

305. The Explanatory Memorandum to the Bill which made the amendments stated that s 66B would now be the only mechanism through which any changes to the applicant could be made.

306. In 2008, the Federal Court considered the amended s 66B in *Sambo v Western Australia*[82] (Sambo). In that case, the Federal Court concluded that even when a person comprising the applicant has died, Parliament's intention was that 'there is to be an authorisation by the claim group of the replacement applicant, whether or not the deceased person is replaced by another person as part of the applicant '.[83] That is, since the 2007 changes to the Native Title Act, the only means whereby 'any changes can be made to the composition of the applicant is via s 66B.[84] The Court held that changes cannot be made to the applicant under Order 6, rule 9 of the Federal Court Rules.

307. It follows from the decision in Sambo that even where a person who forms part of the applicant dies, or consents to their removal, the remaining persons who make up the applicant cannot continue without fresh authorisation. Such a requirement can have serious ramifications for the proceeding. Authorisation meetings are resource intensive and inevitably result in delays in progressing the claim.

308. It also follows from the decision in Sambo that if one member dies, then until fresh authorisation is gained, there is arguably no longer an authorised applicant to act on behalf of the claim group. This potentially could jeopardise the whole proceeding. For example, until the re-authorisation process has been complied with, the status and capacity of the applicant to progress the claim is uncertain. It is not clear who can give instructions to legal representatives to respond to Court orders and undertake negotiations.

309. The Commission agrees that fresh authorisation is appropriate where a new person is added to the applicant.

310. The Commission recommends that s 66B be amended to clarify that fresh authorisation is only required when a group is proposing that a new person be added to the applicant. At the very least, s 66B should be amended to clarify that fresh authorisation is not required where the composition of the applicant group changes solely due to death or incapacitation of an applicant member.

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[82] [2008] FCA 1575.
[83] Ibid [29].
[84] National Native Title Tribunal, 'Replacing the claimant – must use s66B', (2008), Hotspots Issue 29. At http://www.nntt.gov.au/News-and-Communications/Newsletters/Native-title-Hot-Spots-archive/Documents/Hot%20Spots%2029/Sambo%20v%20WA.pdf (viewed January 2009).

17 Corporate applicants – s 61

311. The Commission recommends that the Native Title Act be amended to allow corporations, whose membership consists *only* of the native title claim group, to be an applicant in native title proceedings.[85]

312. Section 61 of the Native Title Act provides for native title applications to be made by a person or persons claiming to hold native title either alone or with others. The Federal Court's interpretation of this provision in *Western Australia and the Northern Territory of Australia v Patricia Lane, Native Title Registrar and Others*[86] had the effect of removing the capacity to claim native title through an incorporated body. In that case Justice O'Loughlin stated that s 61 requires an application to be made by a person or persons claiming to hold native title either alone or with others. The result is that native title applications must be made by natural persons.

313. This creates difficulties, as the 'applicant', which may be comprised of many people, must be of one mind. When this is questioned or if a member of the applicant needs to be removed or becomes unable to perform that role then it creates difficulty for the whole claim group who must go through the procedures set out in the Act, including re-authorisation (in all circumstances post-*Sambo*).

314. Giving the claim group the option of authorising a corporate entity as the applicant would have a number of benefits. These include:

    a. The decision makers would be the directors of the corporation. This would make it easier for the claim group's legal representatives to obtain instructions quickly and with certainty.

    b. The internal rules of the corporation would determine the process for the removal and replacement of directors and what happens on death or incapacitation of a director.

    c. The procedures set out in the corporation's rules and the decision making framework set up under it would be determined by the members of the corporation, that is, the applicants. Those rules could be tailored by the group so as to be culturally appropriate. In the case the rules are not followed, the actions of the corporation could be challenged in separate proceedings.

    d. The claim group would have a corporate entity that is already constituted, in preparation for it then taking on the role of acting as the registered native title body corporate if a determination of native title is ultimately made.

315. The Commission recommends that s 61 be amended to allow a corporation, whose membership consists wholly of the native title claim group, to apply for native title.

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[85] For further information, see T McAvoy, 'Native Title litigation reform' (2008) 93 *Reform* 30.
[86] [1995] FCA 1484 (24 August 1995).

18 Compulsory acquisition and the right to negotiate – s 26

316. The *Native Title Report 2008*[87] provides a discussion of the decision in *Griffiths v Minister for Lands, Planning and Environment*[88] (Griffiths) in which the High Court found that the legislative provision to acquire land 'for any purpose whatsoever'[89], including native title, provides the Minister with the power to acquire native title in the land.

317. In his dissenting judgment in Griffiths, Justice Kirby outlined the *sui generis* nature of native title, and the history of Indigenous land rights in Australia as reasons why the acquisition of native title should be treated differently to other interests in land. This approach is consistent with relevant international human rights principles.

318. When the Native Title Act was enacted, it provided a measure of protection from compulsory acquisition by providing native title claimants with a right to negotiate with the government over the acquisition of native title for the benefit of third party private interests. This protection was considered by many to be an important measure of respect for traditional law and custom. It has been said by previous Aboriginal and Torres Strait Islander Social Justice Commissioners that the right to negotiate provisions (as they were originally enacted) were not a 'windfall accretion' or gift of government; but an intrinsic component of native title to the land.[90]

319. In the *Native Title Report 1997*, the compulsory acquisition of native title for the benefit of third parties was discussed in light of the Wik 10 point plan amendments. These amendments removed the right to negotiate for the acquisition of native title for the benefit of third party private interests when the land involved is inside a town or city.[91] The amended Act reduced the right to negotiate to a much lesser procedural right to object.[92]

320. These amendment provide another example of how by treating Aboriginal peoples' and Torres Strait Islanders' traditional laws and customs as a form of the western legal property right, the Native Title Act unwittingly destroys many of the *sui generis* characteristics of the very laws and customs it was apparently designed to recognise and protect.

321. One of these characteristics is the notion of controlling access to and activities on traditional estates, which is a consistent feature of Indigenous law. It is 'what a

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[87] See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Human Rights and Equal Opportunity Commission (2008) chapter 3, for more information.
[88] [2008] HCA 20.
[89] Under s 43(1) of the *Lands Acquisition Act* (NT).
[90] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996*, Human Rights and Equal Opportunity Commission (1996) p 19.
[91] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1997*, Human Rights and Equal Opportunity Commission (1997) p 96-100.
[92] S Brennan, 'Compulsory acquisition of native title land for private use by third parties' (2008) 19 *Public Law Review* 179.

Pitjantjatjara man once defined as "the first law of Aboriginal morality – always ask"'.[93]

322. The Commission considers that the basis for the right to control access as an intrinsic right of native title to traditional estates seems to have been overlooked as the procedural rights attached to native title have been amended or removed. In the end, although native title can now be acquired in the same way as any other interest in land, because of the nature of native title rights and interests, and the type of land the rights are recognised over (that is, in many cases, crown land), governments are more willing and more likely to acquire native title rights and interests than any other property interest.[94]

323. The Commission recommends that the Attorney-General, through the Council of Australian Governments, pursue consistent legislative protection of the rights of Indigenous peoples to give consent and permission to use and to access their lands across all jurisdictions. A best practice model would be to legislatively protect the right of native title holders to give their consent to any proposed acquisition.

324. A second best option would be to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city. That is, amend s 26 of the Native Title Act.

19 Costs – s 85A

325. The significant financial costs of pursuing a native title claim are of great concern. The Commission is also informed that inappropriate behaviour of parties has often contributed to such costs, by adding to delays.

326. In his concluding comments in *Rubibi*[95]*,* Justice Merkel recommended one way the Court could use costs orders to encourage parties to act in a flexible manner which promotes negotiation. He suggested that after a determination of native title has been made, formal and confidential offers of settlement that were made between the parties in the course of mediation should be presented to the trial Court so that it can decide whether adverse costs consequences should follow for the parties for whom the final outcome was not greater than that offered in the mediation.

327. Given the unique nature of native title rights and interests it may be a difficult task for the Court to determine which outcome was 'greater'. Requiring parties to put offers made before the Court may also act as a disincentive for parties to make formal offers during negotiation.

328. However, the Commission considers that providing the Court with the power to consider offers made during negotiation in determining costs, may act as a useful

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[93] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1997*, Human Rights and Equal Opportunity Commission (1996) p 18.
[94] See for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2008) chapter 3.
[95] Rubibi Community v Western Australia [2001] FCA 607.

incentive for parties to negotiate fairly and avoid such an adverse costs finding. The Commission therefore recommends that the Native Title Act be amended to include a mechanism by which the Court can have regard to settlement offers when making an order for costs.

20 The role of the NNTT in education – s 108

329. The native title system is indisputably complex. Lawyers and government Ministers often have difficulty grappling with the Native Title Act, even after many years of experience with the jurisdiction. It is virtually impenetrable for some Indigenous peoples to comprehend, particularly when English is a second or third language and native title is the first time they have had direct contact with the Western legal system. Respondent parties also have great difficulty and often still hold strong, but at times baseless, concerns that native title poses a significant threat to their property.

330. As a result, proceedings are sometimes initiated and impeded because a range of parties lack an understanding of how the Act operates and what outcomes can be achieved under it. The Commission considers that education and information about the native title system is therefore essential to ensuring its effective operation and to ensuring that Indigenous peoples have a proper understanding of what to expect from the process. Surprisingly, however, no body in the native title system has a formal educative role.

331. Part 6 of the Native Title Act provides the functions and operation of the NNTT. Section 108 sets out the NNTT's functions, some of which are related to education and providing information, such as its research function and the function to assist proceedings and inquiries and the like. Under these provisions, the NNTT has undertaken some education responsibilities, but it has done so in a limited way. The NNTT has also commented on the importance of greater dissemination of information and education in improving the native title system.

332. For example, recently the NNTT translated a native title documentary into Mandarin:

> A Chinese translation of a native title documentary has been produced in response to the increasing number of Chinese investors in Australia's mining sector.
>
> The National Native Title Tribunal produced the Chinese subtitled version of its 15 years of native title documentary to promote Chinese investors' understanding of Australia's native title laws.
>
> …

> "Knowledge about native title, some of the history, the outcomes and the expectations will help Chinese investors to understand Indigenous peoples' native title rights and the process for negotiating agreements with them," …[96]

The Commission considers that the knowledge referred to in the passage above would also be of great benefit to Indigenous peoples in understanding their own rights and the processes for having those rights protected, yet there are no translations of the DVD into Indigenous languages.

333. The Commission recommends that s 108 be amended to confer on the NNTT a formal educative function. As the native title system was introduced as a special measure intending to advance and protect Aboriginal peoples and Torres Strait Islanders, the amendment should specify that this educative function should be directed primarily towards educating Aboriginal peoples and Torres Strait Islanders. The Commission recommends further that the Government ensure that the NNTT is provided with sufficient additional resources to undertake this education function.

21 Tabling Native Title Reports – s 209

334. Section 209 of the Native Title Act requires that the Aboriginal and Torres Strait Islander Social Justice Commissioner report annually on the operation of the Native Title Act and the effect it has on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islanders. This function is fulfilled through annual Native Title Reports.

335. However, there is not statutory mechanism that mandates the tabling of the Native Title Reports before Parliament.

336. By contrast, pursuant to s 46C(1)(a) of the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act) the Aboriginal and Torres Strait Islander Social Justice Commissioner is required to report annually on the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders. This function is fulfilled through annual Social Justice Reports. However, when these issues relate to land and waters, they form part of the Native Title Report. Section 46M of the HREOC Act requires the Attorney-General to table the Social Justice Reports in Parliament within 15 sitting days of receipt. The Minister must also provide all state and territory Attorneys-General with copies of the report.

337. The Commission recommends that s 209 of the Native Title Act should be amended along similar lines to the requirements under the HREOC Act in relation to the tabling of Social Justice Reports. The Commission also considers that the Native Title Act also include provisions requiring the relevant Minister to formally

[96] National Native Title Tribunal, 'Native title documentary translated into Chinese', (media release 10 December 2008). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Chinesesubtitles.aspx?Mode=PrintFriendly (viewed January 2009).

respond to the Native Title Report, along the lines of s 107 of the *Parliament of Queensland Act 2001* (Qld).[97]

22 Additional matters not addressed in this submission

338. The Commission notes that a number of significant issues with the native title system have not been discussed in this submission. This is because the discussion paper is focused on possible amendments to the Native Title Act, and does not contemplate significant changes to the underlying framework of native title. Additionally, due to time restraints, some significant topics have only been touched on or mentioned briefly in this submission, but which deserve more thorough policy development and consultation with Indigenous people.

339. The Commission notes for example that important topics such as the following have not been discussed in any great detail in this submission:

    a. Strengthening the procedural rights in the Act.

    b. Reducing the acts which extinguish native title.

    c. Assessing the impact of native title being found to be a 'bundle of rights'.

    d. Increasing the effectiveness of the compensation provisions.

    e. Assessing the appropriate role and standardisation of connection reports.

    f. Removing proceedings from an adversarial setting.

    g. Creating consistency between land rights legislation and native title.

340. The Commission considers that the above issues are important to the overall success and fairness of the native title system and require further consideration and consultation by the Government. The Commission would welcome the opportunity to participate in any such further inquiry.

[97] Section 107 of the *Parliament of Queensland Act 2001* (Qld), provides for Ministerial response to committee, and provides that a response that outlines recommendations to be adopted and how and in what time frame; recommendations that will not be adopted and the reasons for not adopting them; and compliance provisions for the response.

Attachment 1

United Nations Declaration on the Rights of Indigenous Peoples

Adopted by General Assembly Resolution 61/295 on 13 September 2007

The General Assembly,
Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their

rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights (2) and the International Covenant on Civil and Political Rights,2 as well as the Vienna Declaration and Programme of Action,(3) affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as

they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1
Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights(4) and international human rights law.

Article 2
Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3
Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4
Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5
Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6
Every indigenous individual has the right to a nationality.

Article 7
1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8
1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
(d) Any form of forced assimilation or integration;
(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9
Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10
Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11
1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12
1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the

use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13
1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14
1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15
1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16
1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17
1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's

education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18
Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20
1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21
1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22
1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23
Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24
1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28
1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29
1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of

hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30
1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31
1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32
1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33
1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34
Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35
Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36
1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37
1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38
States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39
Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40
Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41
The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42
The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall

promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43
The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44
All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45
Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46
1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

(2) See resolution 2200 A (XXI), annex.

(3) A/CONF.157/24 (Part I), chap. III.

(4) Resolution 217 A (III).