Chapter 2
Changes to the claims resolution process

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.

If the process is working well, Indigenous peoples will have their native title applications resolved in an equitable, timely, fair and efficient manner. They will face minimal legal, bureaucratic and administrative hurdles. Human rights will govern the implementation of the process, the engagement people have with it, and the outcomes people gain. For Indigenous peoples the exercise and enjoyment of human rights will be increased.

If the process is working poorly Indigenous peoples' applications for recognition of their native title, and for compensation, will be delayed and frustrated. They will be subject to overwhelming legal complexity, convoluted and extensive bureaucratic requirements, and tensions between institutions. The process will inhibit the exercise and enjoyment of human rights of Indigenous peoples.

The process by which native title applications are resolved – referred to as the claims resolution process in this report – was changed during 2007. This was part of the government's wider changes to the native title system.

The changes are based on recommendations of the claims resolution review *(CR Review)*. The changes principally deal with the relationship between the Federal Court of Australia (the Federal Court or the court) and the National Native Title Tribunal (the tribunal) and the mediation of native title matters.

Whether the government's changes to the claims resolution process will resolve the problems identified by the *CR Review* will become clearer as the changes take effect.

Important concerns

- Recognition and protection of native title were not the main focus of the changes.
- Emphasis on efficiency and effectiveness, which is the focus of the changes, may limit Indigenous peoples' ability to fully pursue their native title rights.
- Needs of government to reduce the number of claims in the system drove the changes, rather than the needs of Indigenous people and their human rights.
- Issues identified by the review are the result of deep systemic problems that the review and the changes do not deal with.

Specifically, my main concerns with the changes are:

- the review was limited to the relationship between the Federal Court and the tribunal;
- the review failed to include representatives of native title claimants or holders on the steering committee;
- changes in who may be a party to native title proceedings may not be effective in excluding parties with only a minor interest in the area of a native title claim;
- the tribunal's effectiveness as a mediator may not be increased by its new powers;
- the tribunal's exercise of its new coercive powers to direct attendance and production may have a negative impact on mediation, making it a quasi-judicial process;
- expansion of the tribunal's powers may make the native title system slower, more bureaucratic and more litigious to the determent of Indigenous people realising their native title;
- the requirement to mediate in 'good faith' could be applied in an unjust way to native title claimants and their representatives;
- exercise by the tribunal of its new inquiry and review powers may significantly increase the amount of time and money spent in the mediation stage of proceedings without resolving issues;
- the Federal Court's powers to dismiss claims lodged in response to future act notices or that do not pass the registration test; and
- problems identified by the claims resolution review have not all been addressed.

The government's changes are an endeavour to tackle some of the issues identified by the *CR Review*. The wider issue of the operation of the whole system, as measured by its capacity to deliver on the objects of the *Native Title Act 1993* (Cth) (the Native Title Act), as understood by reference to the preamble to the Native Title Act, has not been tackled by the government.

It is this wider issue that is a central theme of this report: that the native title system may rightly be said to be gridlocked. It is not delivering fully on its objects as understood by the preamble. This is the basis for my overall recommendations set out in Chapter 1.

Background to the changes

The changes to the claims resolution process are based on the *CR Review's* recommendations. The *CR Review* considered a wide range of issues about the native title system, despite its restrictive terms of reference. These issues provide a reference point against which to measure the operation of the system. They also provide a reference point to measure the success of changes to the system.

The claims resolution review

The report of the review and the government response were released on 21 August 2006. The review suggested an option for institutional reform and made 24 recommendations. Most of these were accepted and acted upon by the government.

I am concerned that the *CR Review* was too narrowly focused on the roles of the tribunal and the Federal Court. It focused on measures for more efficient management of native title claims. The review did not focus on recognition and protection of native title. Proper consideration was not given to:

- the impact of the process on native title claimants and their representatives;
- making the process easier for native title claimants to have their native title claims determined in an equitable, fair, just and timely basis; and
- the preamble to the Native Title Act.

The Mineral Council of Australia considers that native title representative bodies 'are *the* fundamental component of the native title system'.[1] They were not given a central role in the review other than to be consulted. For a review of the claims resolution process to be comprehensive the claimants and their representatives needed to play a central part.

Purpose of the claims resolution review

The purpose of the review was to:

> … focus on the process by which native title applications are resolved. It will examine the role of the Native Title Tribunal (NNTT) and the Federal Court of Australia (the court) and inquire into and advise the Government on measures for the more efficient management of native title claims within the existing framework of the Native Title Act 1993 (the Act).
>
> The Review will consider how native title claims can be most efficiently and effectively resolved. The Review will asses how the NNTT and the Court can maximise the potential for native title claims to be resolved in a quicker and less resource-intensive manner, primarily through mediation and agreement-making and where appropriate with a greater degree of consistency in the manner in which claims are handled.[2]

Steering committee

A steering committee was appointed to advise and oversee the review. The steering committee had a significant role in the final report of the review. The consultants noting:

> In addition to receiving oral and written submissions during the course of the Review, we have had the benefit of testing ideas, submissions and our own analysis with the Steering Committee. The Steering Committee has played a significant role in providing feedback and focusing and streamlining the final Report.[3]

The steering committee comprised:

- a representative of the Attorney-General's Department;
- a representative of the Office of Indigenous Policy Coordination;
- the registrar of the Federal Court; and
- a member of the National Native Title Tribunal.

There was no representative from native title representative bodies.

Indigenous peoples claiming native title were not represented by their own organisations. They are the major users of the process in the Federal Court and the tribunal. The people for whom the Native Title Act was intended to be a special measure were given no central role in advising, focusing and providing feedback to the review—other than being offered the opportunity to make submissions.

Main aim of the consultants

In undertaking the review the consultants understood their main role to be:

> … to review the existing NNTT and Federal Court processes and to make recommendations as to how they might be modified in order to resolve outstanding claims more quickly and cheaply, preferably by agreement. We proceed on the basis that the main intent is to dispose of claims made under the NTA by way of determinations made under section 225, preferably consent determinations pursuant to section 87.[4]

This focus on efficiency and effectiveness, on claims being resolved more quickly and cheaply, may benefit Indigenous people peripherally. However it ought not to have been an end in itself. Achievement of the objects of the Native Title Act, in particular providing for the protection and recognition of native title, ought properly to have been the focus.

The consultants did not see their role as making recommendations about how the process might be changed to better provide for the recognition and protection of native title. Nor how they might be changed to better enable the people who are applying to the court to have their legal rights determined. This limited the outcomes from the review.

Findings of the review

The review found institutional reform was needed to facilitate more effective resolution of claims, particularly in the role of the tribunal.[5] The consultants suggested five options for institutional reform and made 24 recommendations. The options and recommendations, the government's response, and the main legislative changes made to the Native Title Act are set out in an appendix to this report.

The government accepted most of the recommendations. It implemented legislative changes to give effect to them. The Native Title Act has been amended by Schedule 2 (Claims resolution review) of the *Native Title Amendment Act 2007* (Cth) and by the *Native Title (Technical Amendments) Act 2007* (Cth).

The option for institutional reform adopted by the government was to provide the tribunal with an exclusive mediation role, with the Federal Court able to intervene at any time. An alternative option favoured by one of the consultants was to provide the Federal Court with greater flexibility in alternative dispute resolution.

I have concerns about the capacity of the tribunal to adequately perform this expanded mediation role. I am also concerned about the reduced role of the Federal Court in mediation. These concerns are dealt with later in this chapter.

Issues identified by the review

The review made general observations and identified issues about the claims resolution process. It is useful to set these out in this report. They are indicative of a system struggling to resolve matters. Tackling these issues may improve the system and result in the resolution of matters more quickly and cheaply but this is yet to be proven. My concerns are, however, that tackling these issues in the way the previous government did is really only 'tinkering' with the system.

The issues identified by the review are part of much wider concerns I have about the operation of the whole native title system and its ability to deliver on the object of providing recognition and protection of native title.

Observations made by the review:

- Native title mediation was at the centre of many complaints.[6]
- There was a failure to identify issues required for mediation or for resolution by the court.
- It is often unclear in early stages of a claim whether the claim encompasses a particular area of land. This causes concern to landowners.
- The determination of the tenure history of the land involved was an issue.
- Many applications do not clearly identify the people on whose behalf the claim is made. This creates uncertainty on part of some Indigenous people as to whether or not they are included.
- Many of the informational requirements for proving native title are almost never obtained until the matter is well progressed or is being set down for hearing by the court.
- Finding authoritative information about connection and extinguishment can be very time-consuming and expensive.
- There were suggestions the tribunal and Federal Court perceived themselves as operating in competition with one another.
- The dual management of claims by both court and the tribunal can cause frustration and confusion amongst parties. There is a need for institutions to coordinate their efforts.

From these observations the *CR Review* identified a range of issues with the resolution of claims.

Issues

- Duplication of mediation by the Federal Court and the tribunal;
- lack of tribunal mediation powers;
- a wide range of matters could be the subject of a tribunal inquiry to assist parties to clarify the issues;
- lack of good faith by parties to mediation;
- poor communications between the Federal Court and the tribunal;
- inefficient litigation process;
- tribunal reporting to the Federal Court;
- uncertainty about the claim;
- the 'connection' issue occupies most of the time and resources;
- delay in conducting tenure research;
- requirement for re-registration of claim after amendment of claim;
- authorisation and inter-Indigenous and intra-Indigenous disputes;
- difficulties caused by notification requirements;
- backlog of claims;
- unregistered claims;
- uncertainty about the law;
- the role of third party (non-government) respondents;
- gathering of evidence;
- retention of tribunal inquiry power under Section 137 of the Native Title Act; and
- need for guidelines, protocols and/or model orders and precedents for use across the country.

The *CR Review* made recommendations dealing with each of these. The *CR Review* also made suggestions, without recommendations, to deal with:

- overlapping claims; and
- lack of resources and adequate funding for claimants.

Other suggestions were:

- greater use of the tribunal's assistance services;
- rigorous case management; and
- use of pleadings.

In submissions to the *CR Review*, suggestions and comments were made on how to improve the system, including:

- relax the laws of evidence; and
- comments on the adversarial nature of the litigation process.

Changes to the process

The main changes made by the government to the claims resolution process are to the roles of the Federal Court and the tribunal. Changes have also been made to the functions of the Native Title Registrar (the registrar).

Other changes to the native title system also impact on the claims resolution process. These are considered in other chapters of this report. They include changes to:

- representative Aboriginal and Torres Strait Islander bodies;
- respondent funding (under Section 183 of the Native Title Act); and
- prescribed bodies corporate.

Parties to native title proceedings

The rights of people to become and remain as respondent parties to native title proceedings and compensation applications have been changed.

The changes seek to address concerns that:

> Third party respondents are sometimes perceived as seeking unreasonable outcomes in the native title mediation process, which can delay the resolution of a claim that may otherwise be agreed between the major parties. Similarly, some respondent parties (including some self-funded respondents) are perceived as taking a disproportionately active role in a claim, despite having only a minor interest in the area of the claim.[7]

Changes have also been made to respondent funding under Section 183 of the Native Title Act (dealt with in a later chapter of this report). Whether these changes reduce the number and involvement of parties in any significant way will only be seen over time. My concern is that they will not.

Previously a person had a right to become a party if their 'interests' may be affected by a determination in the proceedings. Now, a party's interest must be in 'relation to land or waters'.[8]

The Federal Court previously had the power to join a party to the proceedings whose interest may be affected by a determination (whether or not it is an interest in relation to land or waters). When considering whether to join a party the court is now required to consider whether it is in the interests of justice to do so.[9] This requirement is welcome, however, I have some reservations about the degree to which it will be effective in limiting parties to the proceedings to those who might properly be said to have an interest that warrants becoming a party to the proceedings.

During mediation of an application the tribunal may refer to the Federal Court a question about whether a party should cease to be a party to a proceeding. This is on the basis that the person no longer has a 'relevant interest'.[10] A person has a relevant interest in a proceeding if the person's interests may be affected by a determination in the proceeding.[11] The court may dismiss a party as no longer having an interest affected by a determination in the proceedings.[12]

Native title and compensation applications (Native Title Act, Section 61)

Applications that may be made under Section 61 of the Native Title Act are:

- native title determination application – for a determination of native title in relation to an area;
- revised native title determination application – for revocation or variation of an approved determination of native title; and
- compensation application – for a determination of compensation.

Affected persons who are parties to native title proceedings

As well as the applicant, the following are affected persons who are parties to native title proceedings:[13]

- any registered native title claimant in relation to any of the area covered by the application;
- any registered native title body corporate in relation to any of the area covered by the application;
- any representative Aboriginal/ Torres Strait Islander body for any of the area covered by the application;
- any person who when the notice is given holds a proprietary interest, in relation to any of the area covered by the application, that is registered in a public register of interests in relation to land or waters maintained by the Commonwealth, a State or Territory (provided the registrar does not consider that, in the circumstances, it would be unreasonable to give notice to the person);
- persons claiming to hold native title in relation to land or waters in the area covered by the application; and
- persons whose interest, in relation to land or waters, may be affected by a determination in the proceedings.

Relationship between the tribunal and the Federal Court

The review considered there was a need for greater, improved communication between the tribunal and the Federal Court. It recommended that the:

- court should convene regular user-group meetings and regional call-overs involving the tribunal; and
- the tribunal and the court should actively seek new methods of improved institutional communication.

The Federal Court and the tribunal have acted on these recommendations. They have taken actions to improve communication between the two institutions. These are considered later in the chapter. Whether the outcomes of these actions will

assist in the resolution of native title claims in a way that promotes recognition and protection of native title will be seen over time.

While the recommendations may assist, the issues are far deeper systemic ones.

My concern is that there may be tension between the two institutions arising from the enhanced powers and role given to the tribunal in meditations. Differing perceptions of the role to be played by each institution and the effectiveness of the tribunal in exercising its mediation role may be to the detriment of native title claimants seeking recognition of their native title.

The relationship between the Federal Court and the tribunal is crucial from the point of view of Indigenous people using these institutions to gain recognition and protection of their native title. Poor institutional communication, duplication, disharmony and rivalry only add to the great difficulties native title claimants already have in gaining recognition of their native title.

The relationship between the two institutions will be affected by the enhanced powers given to the tribunal and the changes to the Federal Court powers. This is particularly so in the mediation of native title proceedings. The tribunal has been given exclusive powers to mediate where the court has referred native title proceedings to it for mediation. The policy intent behind the changes was to remove duplication and improve claims management between the two bodies. Whether this is achieved will become clearer as the changes take effect.

The effect of the changes may be to create friction in the relationship between the court and the tribunal. The view of the Federal Court is that the changes to the native title system have not changed the underlying principle that native title determination applications are proceedings in the court. Mediation is an adjunct to those proceedings and directed to their prompt resolution. As such, in the view of the court, the changes do not involve a significant departure from the existing roles and responsibilities of the court in the resolution of claims.[14]

Justice French, one of the most experienced Federal Court judges in the area of native title, in a speech titled 'Plus ça change, plus c'est la même chose' (the more things change the more they are the same) observed:

> These new provisions may all be regarded as intended to enhance the powers and effectiveness of the Tribunal in the conduct of mediation proceedings. They do not affect the constitutional distinction between the functions of the Court and those of the Tribunal. They do not alter the essential character of the native title proceedings as proceedings in the Court and subject to its supervision and control. Nor do they overcome the inescapable burdens and costs associated with the application of the Mabo rules as transmogrified by the Native Title Act. In their effect upon the role of the Tribunal and the Court the amendments represent a partial return to the pre 1998 Native Title Act in that the Tribunal is again given exclusive authority in relation to mediation while mediation is on foot.[15]

In the National Native Title Tribunal's 2006-2007 annual report the president, Graeme Neate, stated (perhaps in response to Justice French's observations):

> It is incumbent on all parties to use the reforms to reach the objectives of a more effective and efficient native title system, so that it cannot be said about these reforms in years to come 'Plus ça change, plus c'est la même chose' – the more things change the more they are the same.

The extent to which the court exercises its power to supervise and control native title proceedings may also create tension with the tribunal exercising its new mediation powers. This may also impact negatively on native title claimants having their applications for native title dealt with efficiently and with minimal bureaucratic constraints.

Perhaps these comments by Justice French and Graeme Neate suggest an underlying concern, throughout the native title system, that the changes are just 'tinkering' with the system. This is the view of this report. The fundamental problems with the system remain.

Action taken by the Federal Court and the tribunal

In response to the recommendations of the review, the Federal Court and the tribunal have jointly convened Native Title User Group meetings in Western Australia, Victoria and South Australia in July and August 2007. A national protocol addressing the administrative relationships between the court and the tribunal (in place since 2003) has been updated.

The Chief Justice of the Federal Court issued a 'Notice to Practitioners' on 8 June 2007 setting out revised arrangements for the conduct of native title cases. The arrangements reflect a greater emphasis by the court on the regional management of native title cases. This allows the progress of cases to be coordinated and streamlined across a region or regions.

In particular, the notice provides for:

- regional management of the national native title list by Native Title List Judges in each State; and
- identification of priority cases for trial that could act as lead cases for a region by resolving legal questions or factual issues of general application.

It is envisaged that this process will ensure that:

- groups of applications in a particular region be reviewed together regularly;
- a specific and credible mediation timetable on a case specific and/or regional basis is prepared and complied with;
- those cases filed directly in response to future act notices and by which the applicant seeks to gain procedural rights are identified; and
- a timely resolution of cases is pursued.[16]

The tribunal has provided a number of regional mediation progress reports and regional work plans to the court. The Native Title Registrar has provided two quarterly reports to the court under Section 66C of the Native Title Act. Since the legislative changes, the President of the National Native Title Tribunal has issued a series of Procedural Directions relating to specific changes to the claims resolution process. The tribunal is implementing a national case flow management scheme. This has a strong regional focus and involves the creation of three separate lists of claimant applications:

- *The registrar's list:* Applications waiting to undergo, or in the process of undergoing, registration testing, or notification, or awaiting referral by the Federal Court for tribunal mediation. As well as applications filed within three months after the notification day specified in a future act notice.
- *Regional list:* Applications referred to the tribunal for mediation but insufficiently developed for substantive mediation. As well as applications that are likely to be withdrawn, dismissed or struck out or for some other reason should be placed in abeyance.
- *Substantive list:* Applications sufficiently developed for substantive mediation, particularly where negotiations are likely to lead to an outcome within the next 12-24 months.[17]

This new regional approach to the management of native title cases is likely to improve the efficiency and effectiveness of the system.

Mediation of native title proceedings

Mediation of native title claims was one of the main problem areas identified by the review.

The government sought to deal with concerns about mediation by giving additional powers to the tribunal. It is by no means clear that the changes will improve the efficiency and effectiveness of the native title system in reducing the cost and time taken to resolve native title matters, let alone providing for the recognition and protection of native title. The extent of these changes and how they work in practice will be seen over 2007-2008 and subsequent reporting periods.

The Federal Court has expressed concerns about some of the changes to the powers of the court and the new powers proposed for the tribunal.[18] The registrar noted that 'the challenge is to ensure that the roles of the tribunal and the court are complementary and integrated in dealing with the jurisdiction'.[19]

Speaking about the additional powers and functions given to the tribunal the president, Grahame Neate, commented:

> … significantly as the additional powers and function are, they alone will not expedite the resolution of native title claims by consent. The Tribunal has contended that any improvement to the processes and practices of the Tribunal and the Federal Court will have a negligible effect on the resolution of native title claims by agreement if the parties to the proceedings are unwilling or unable to participate productively or in a timely manner. Important as the Tribunal and the Court are to the operation of the system, it is the parties that determine whether, what and when any outcomes are agreed.[20]

Given this understanding, it is unfortunate that the claimants or their representative bodies were not more involved in the claims resolution review.

Mediation by the tribunal

Changes have been made to the mediation of native title claims. The intent is that all native title claims should be referred promptly to the National Native Title Tribunal for mediation, subject to specific exceptions.[21] And that mediation is not to be carried out by both the Federal Court and the tribunal at the same time. The changes reflect the review's recommendation that mediation should not be duplicated.

I am concerned that the tribunal may not be an efficient and effective mediator of native title claims; and that the interests of native title claimants will be adversely affected by the curtailment of the Federal Court's mediation role. I am also concerned that, overall, the increased mediation role and powers given to the tribunal will make the native title system slower, more bureaucratic and more litigious.

Native title proceedings remain Federal Court proceedings and these proceedings are adversarial by their nature. I am concerned that this is at the heart of the problems with the native title system. In order to get recognition of their native title rights, claimants are required to prove in an adversarial context every element of their case. The non-Indigenous respondents in the *Wongatha* case put the claimants to proof of every element of their claim.[22] There were 1,426 objections made by the respondents just to the experts' reports (of which there were 30).[23] In the *Jango* case certain anthropologists' reports were the subject of in excess of 1,000 objections by the respondents.[24] (These cases are considered in detail in a later chapter of this report.)

Important concern

The process is not an inquiry into whether native title exists in an area and who holds it. It is a contest between parties where the onus is on the Indigenous people – to prove they have what is required by the Native Title Act – as understood by the common law.

In this context, mediation by an institution that does not have the power to determine native title is always going to be difficult. Parties undertaking mediations in the tribunal are fully aware of the wider adversarial context in which their claims sit. While the tribunal may use its new coercive powers to make parties attend mediation and produce documents it cannot force parties to mediate.

Decisions of the tribunal exercising its new powers to review and conduct inquiries – are not binding on the parties – nor are they on the Federal Court. Issues considered by the tribunal after review or inquiry may have to be dealt with again in the Federal Court. The overall effect may be that parties lose trust in the tribunal as a mediator. They may approach mediation before the tribunal as if it were a hearing because of the reporting by the tribunal to the Federal Court. Yet because the tribunal's decisions are not binding, parties may choose to raise the matters again in the Federal Court. Native title proceedings may become even more drawn out, more litigious and the subject of more bureaucracy.

The new powers given to the tribunal 'beef up' what it can do. It still doesn't have the power or the gravitas of the Federal Court. Without these I am concerned that mediation by the tribunal will not be as effective as increasing the role of the Federal Court in applying alternative dispute resolution processes to native title proceedings. This was the alternative option for institutional reform preferred by one of the consultants conducting the review.

The changes to the native title process have not altered the general requirement that the Federal Court must refer every application under Section 61 of the Native Title Act to the tribunal for mediation. However, the court no longer has a general discretion not to refer matters to the tribunal for mediation. This is unless it makes an order under Section 86B(3) of the Native Title Act. [25]

Under Section 86B(3) the court must order that there be no mediation by the tribunal if the court considers that:

- any mediation (whether or not by the tribunal) will be unnecessary because of an agreement between the parties about the proceeding or for any other reason;
- there is no likelihood of the parties being able to reach agreement in the course of the mediation by the tribunal on any of the matters that may be mediated under Section 86A of the Native Title Act; and
- the applicant in relation to the application under Section 61 has not provided sufficient detail about certain matters in Section 86A of the Native Title Act.

Factors the court is to take into account when deciding if there is to be no mediation are set out in Section 86B(4) of the Native Title Act.

The tribunal has a right to appear before the Federal Court at a hearing to determine whether to make an order under Section 86B(3) (that there be no mediation by the tribunal) in relation to the proceedings.[26]

If the court orders that there be no mediation by the tribunal this does not appear to preclude the court from referring the matter to a court-appointed mediator or a court registrar.

While a matter is in mediation by the tribunal no aspect of the proceedings is to be mediated by the Federal Court under the *Federal Court of Australia Act 1976* (Cth). Nor is any order to be made by the Federal Court requiring the parties to attend before a registrar of the Federal Court for a conference, with a view to satisfying the registrar that all reasonable steps to achieve a negotiated outcome of the proceeding have been taken.[27]

The Federal Court can order mediation by the tribunal to cease if the court considers that:

- any further mediation (whether or not by the tribunal) will be unnecessary in relation to the proceedings; or

- there is no likelihood of the parties being able to reach agreement in the course of mediation by the tribunal on, or on facts relevant to, any of the matters set out in Section 86A(1) or (2) of the Native Title Act in relation to the proceedings. It may do this of its own motion, at any time in a proceeding.[28]

This suggests the proceeding may be referred to another mediator after the court has ordered the tribunal to cease mediation.

A party to a proceeding may apply to the court for an order that the mediation cease in relation to the whole of the proceeding or a part of the proceeding.[29] A party may do this at any time after three months from the start of mediation. If the party making the application is:

- the applicant in relation to the application under Section 61; or
- the Commonwealth, a State or a Territory;

the court must make an order that mediation by the tribunal is to cease. This is unless the court is satisfied that the mediation is likely to be successful in enabling parties to reach agreement on any of the matters set out in Section 86A(1) or (2).[30]

There have been significant concerns expressed about the tribunal's ability to conduct mediations effectively. A number of submissions made to the *Inquiry into the Native Title Amendment Bill 2006*[31] (by the Standing Committee on Legal and Constitutional Affairs) raised issues about the effectiveness of the tribunal in conducting mediation.[32]

In response to these concerns the committee in its report expressed the view that:

> there should be a more focussed approach by the NNTT to mediation, especially given that the amendments in the Bill propose to strengthen the powers of the NNTT in relation to mediation. This could be achieved by enlarging the mediation training provided to members. In the committee's view, the two weeks' training referred to at the hearing, even for people who bring extensive dispute resolution experience to the NNTT, seems inadequate in a specialised area of dispute resolution.[33]

The committee recommended that the tribunal develops an ongoing mediation training program for its members, having particular focus upon the characteristics and requirements of mediating native title matters.[34]

The minority of the committee in their report expressed the view that:

> 1.41 Fundamentally, the granting of these expanded powers to the NNTT conflates the NNTT's role as a mediator with determinative, quasi-judicial functions. The Office of the Registrar of the Federal Court submitted that these powers involved:
>
> [a] confusion of the mediation role of the NNTT with other functions of a determinative nature, particularly the power to make coercive directions.
>
> 1.42 Similarly, the Northern Land Council made the following comments:
>
> … the proposal that the Court's mediation and case management function be curtailed in favour of the Tribunal is extraordinary, cannot be justified, and is a fundamental policy error.

> 1.43 Labor and the Greens consider that the proposed expansion of the NNTT's powers will make the native title system slower, more bureaucratic, and more litigious. Further, like a majority of stakeholders, Labor and Greens Senators are not convinced that the NNTT is capable of exercising these expanded powers effectively or properly. Labor and the Greens Senators are concerned that the NNTT is not guided by the same standards of impartiality and independence as the courts. While Recommendations 3 to 7 of the majority report offer some piecemeal improvements to the proposals in Schedule 2 of the Bill, they do not fix a fundamentally flawed scheme.[35]

Given these concerns of the minority, government needs to keep a close watch on how the tribunal is exercising its expanded mediation powers. Special attention is needed to determine the extent that mediation is providing for the protection and recognition of native title.

Tribunal given right of appearance in the Federal Court

The tribunal has been given a right of appearance in the Federal Court at a hearing that relates to any matter currently before the tribunal for mediation. The right of appearance is for the purpose of assisting the court.[36] The *CR Review* recommended this. It reflects the review's assessment that the litigation process could be more efficient if the tribunal played a more active role in court hearings. This change is likely to be beneficial to the resolution of native title proceedings.

Regional mediation progress report and regional work plan

The Federal Court may request the tribunal to provide reports on the progress of mediations being undertaken by the tribunal. These reports are to 'assist the Court in progressing proceedings'.[37] The reports are:

- *a regional mediation progress report* – on the progress of all mediations conducted by the tribunal for areas of State, Territory or region; and
- *a regional work plan* – setting out the priority given to each mediation being conducted by the tribunal for areas of State, Territory or region.

A regional mediation progress report and a regional work plan may be provided to the Federal Court, without a request, if the president of the tribunal considers that either or both would assist the court in progressing proceedings.[38]

I have concerns about the potential for regional plans to be made, and priorities set, without proper regard to the objectives and priorities of the relevant native title representative body. There is a need for coordination between the court, the tribunal, and the native title representative bodies. This is to ensure that the reports and plans the court requests from the tribunal, will support the objectives and priorities of the relevant representative Aboriginal and Torres Strait Islander body. Including with any strategic and operational plans they may have. (I note that as a result of the changes native title representative bodies are no longer required to have strategic plans. I consider this in the chapter on representative Indigenous bodies in this report).

The establishment by the Federal Court of the native title user's group may alleviate some of these concerns. It is a matter of observing the change over subsequent reporting periods.

Federal Court to have regard to tribunal reports

When deciding whether to make an order in relation to an application referred to it for mediation, the Federal Court must take into account:

- mediation reports;
- a written report setting out the results of the mediation (it must be provided by the presiding member to the court);
- a written report on the progress of the meditation (it must be provided by the presiding member if the court requests it, or if the presiding member considers it would assist the court in progressing the matter); and
- regional mediation progress reports and regional work plans (regional mediation progress reports and regional work plans must be provided by the tribunal if the court requests them).[39]

i Presiding member

A presiding member is a member of the National Native Title Tribunal presiding over a mediation conference. The presiding member at a conference may be assisted by another member of the tribunal or by a member of staff of the tribunal.[40]

Tribunal power to direct attendance and production of documents

The tribunal has been given new powers of direction. Under the changes the presiding member of the tribunal in a mediation conference may:

- direct a person to attend a mediation conference;[41] and
- direct a party to produce to the presiding member, for the purposes of a mediation conference, a document in its possession, custody or control, if the presiding member considers that the document may assist the parties to reach an agreement on any matters[42] they are mediating under the Native Title Act.[43]

The presiding member may report to the Federal Court if the member has given a direction to appear or produce documents and it has not been complied with. The report sets out the details of the direction and the reasons for giving the direction.[44] The Federal Court may make orders in similar terms to the subject of the report.[45] That is, to appear or produce documents.

Failure to comply with the Federal Court order may result in proceedings for contempt of court. This carries a severe penalty. Failure to comply with the direction of the presiding member of the tribunal may amount to contempt of the tribunal which attracts a maximum penalty of 40 penalty units.[46] (A penalty unit is a dollar amount that is adjusted over time.)

These changes give effect to recommendations of the *CR Review*. They seek to address the perception that the tribunal had insufficient legislative powers of compulsion to effectively conduct mediation.

Concern

I am concerned about the place of compulsory powers in the conduct of mediation. Any attempt to compel people to mediate threatens the very nature of mediation. Applicants must be free to pursue whatever mediation strategy they consider is in their interests. These changes, along with the provisions requiring parties to act in good faith in the conduct of mediation, potentially compromise this freedom.

The forced production of evidentiary material in mediation could disadvantage and possibly be prejudicial to an applicant in the event that the matter proceeds to trial. Power to give directions to produce documents may result in mediation becoming unnecessarily formal and even adversarial in character. Giving the tribunal these compulsive powers may prove counter-productive to providing a forum in which parties can explore the settlement of native title claims without being distracted by legalistic argument.

The government should keep a close watch on the exercise of these new powers by the tribunal.

Obligation to mediate in good faith

A new 'good faith' requirement has been inserted into the Native Title Act. Each party and each person representing a party must act in good faith in relation to the mediation.[47]

The presiding member may report the failure of a person to act in good faith in relation to the conduct of the mediation to:

- the Federal Court;
- the body that funded the party not acting in good faith; and
- the legal professional body (who issued the practising certificate to the legal practitioner considered not to have acted in good faith).

A copy of the report must be provided to the person to whom it relates. The Native Title Act is silent on what the Federal Court is to do with such a report.[48]

Where the tribunal considers that a government party or its representative did not act in good faith in relation to a mediation, it may include that failure in its annual report.[49]

This change gives effect to one of the recommendations of the *CR Review*. It is to address the problem reported to the review of a growing tendency for parties to mediation to exhibit a lack of good faith during mediation. A 'good faith' requirement was perceived to be necessary to ensure 'parties act responsibly'.[50]

In practice, the obligation to act in good faith may not easily be enforced. Some native title representative bodies have expressed concerns about how the good faith provisions will be acted upon and what conduct will be considered to be not in good faith. Concerns have also been expressed about what the Federal Court will do with any report that a party has not acted in good faith. Experience with the 'good faith' requirements in future act negotiations has led some native title representative bodies to be concerned about an added administrative burden on them if they are required to defend an allegation that they did not act in good faith.

Both the President of the National Native Title Tribunal and the Commonwealth Attorney-General's Department have provided guidance to parties on the good faith provisions:

- Procedural Direction No 2 of 2007, 26 September 2007, by the President of the National Native Title Tribunal: Party or party's representative failing to act in good faith in relation to the conduct of mediation.
- *Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal Mediation* put out by the Commonwealth Attorney-General's Department in October 2007.
- Attorneys-General have put together a code of conduct, including commentary.

The government must monitor the implementation of the 'good faith' requirements.

The tribunal's reviews and inquiries

The tribunal has been given a new review function. It has also been given broad powers to conduct a new type of inquiry (in addition to the tribunal's inquiry power under Section 137 of the Native Title Act). I have concerns about both these functions.

Review by the tribunal

Under the new review function,[51] the president of the tribunal may refer for review by the tribunal, the issue of whether a native title claim group (who is a party in a proceeding) holds native title rights and interests (as defined in Section 223(1) of the Native Title Act) in relation to land or waters within the area the subject of the proceedings.

The issue may only be referred if:

- it arises in the course of mediation by the tribunal; and
- the member presiding at the mediation conference[52] recommends that the review be conducted. The presiding member may only make the recommendation if the member considers that a review of the issue would assist the parties to reach an agreement on any of the matters required for a determination of native title (under Section 225 of the Native Title Act). This is after consultation with the parties to the proceeding.

Purpose of mediation

(in proceedings not involving compensation) (Native Title Act, Section 86A(1))

The purpose of mediation by the National Native Title Tribunal (in a proceeding that does not involve a compensation application) is to assist the parties to reach agreement on some or all of the matters required for a determination of native title. These matters are:

- whether native title exists or existed in relation to the area of land or waters covered by the application;
- if native title exists or existed in relation to the area of land or waters covered by the application;
- who holds or held the native title;
- the nature, extent and manner of exercise of the native title rights and interests in relation to the area;
- the nature and extent of any other interest in relation to the area;
- the relationship between the native title rights and interests in relation to the area and any other interest in relation to the area; and
- to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer or conferred possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others.

The tribunal member conducting the review must provide a written report setting out the findings of the review to the presiding member in the mediation and the participating parties.[53] The member may provide a copy to the Federal Court and other parties in the proceedings.[54]

The findings of the review are not binding on any of the participating parties. The findings are not a determination of native title rights and interests. Statements at a review are without prejudice. In proceedings before the court, unless the participating parties otherwise agree, evidence may not be given, and statements may not be made, concerning any word spoken or act done in the course of the review.[55]

The new review power is in response to a recommendation of the *CR Review*. It is arguably broader than the power recommended by the review. The review recommended that the tribunal be given power to 'conduct a review of material provided by the applicant (or any other party) to establish whether the native title claim group has, by its traditional laws and customs, connection to the land or waters claimed'.[56]

Reviews do not require the consent of the parties although the presiding member must consult with the parties before recommending to the president of the tribunal that a review be undertaken.

I have a general concern that reviews may increase the time and money spent on the mediation stage of proceedings without resolving the issues between the parties. I refer to my recommendations at the end of this chapter.

Inquiry by the tribunal

The tribunal has been given a broad power to conduct a new type of inquiry referred to as a *native title application inquiry*. The inquiry relates to a matter or an issue relevant to the determination of native title under Section 225 of the Native Title Act.[57] It is in addition to any inquiry the tribunal may be directed by the Commonwealth Minister to hold under Section 137 of the Native Title Act.

The president of the tribunal may direct the tribunal to hold a native title application inquiry where the Federal Court has referred a proceeding to the tribunal for mediation. This is provided the proceeding raise a matter or an issue relevant to the determination of native title under Section 225.[58]

The president may direct a native title application inquiry:

- on his own initiative; or
- at the request of a party to a proceeding; or
- at the request of the Chief Justice of the Federal Court.

The president of the tribunal may only direct that such an inquiry be held if satisfied that resolution of the matter or issue concerned would be likely to:

- lead to agreement on findings of fact; or
- lead to action that would resolve or amend the application to which the proceeding relates; or
- lead to something being done in relation to the application to which the proceeding relates; and
- the applicant in relation to any application that is affected by the proposed inquiry agrees to participate in the inquiry'.[59]

A request for an inquiry may be made before the court refers the proceeding to the tribunal for mediation.[60]

i Determination of native title (Native Title Act, Section 225)

A determination of native title is a decision of the Federal Court whether or not native title exists in relation to an area of land or waters.

If native title does exist the determination includes:

- who the persons, or each group of persons, holding the common or group rights comprising native title are; and
- the nature and extent of the native title rights and interests in relation to the area; and
- the nature and extent of any other interests in relation to the area; and

- the relationship between the native title rights and interests in relation to the area and the other interest in relation to the area (taking into account the effect of the Native Title Act); and
- to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease-whether; the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

The changes to the tribunal's powers implement recommendations of the *CR Review*. The review thought a wide range of matters could be the subject of an inquiry by the tribunal. These included overlapping claims, authorisation and other kinds of inter-Indigenous and intra-Indigenous disputes. The review envisaged that '[c]onceivably, an inquiry could be ordered even before a matter is referred for mediation, for example, to attempt to resolve some preliminary issue such as an authorisation question or an overlap'.[61] This is at odds with the intent behind the legislative changes as expressed in the Explanatory Memorandum. That is, while a request may be made prior to referral of an application for mediation, a formal referral by the Federal Court of the relevant proceedings is necessary before the president can direct an inquiry be held.[62]

Concern

I am concerned that use by the tribunal of its new inquiry and review powers will significantly increase the amount of time and money spent in the mediation stage of proceedings without resolving issues. The results of a review or inquiry will not bind the parties or the Federal Court.

Consent determination dealing with part of a claim area

The Native Title Act provides for the Federal Court to determine native title to part only of a claim area on the agreement of the parties to the proceedings. (They must be parties to the proceedings at the time of the agreement). The agreement of all of the following parties to native title proceedings is needed for such a determination:

- the applicant; and
- each registered native title claimant in relation to any part of the area over which the determination is being made; and
- each representative Aboriginal/ Torres Strait Islander body for any part of the area over which the determination is being made; and

- the Commonwealth Minister; (if the minister is a party to the proceedings at the time the agreement is made, or has intervened in the proceeding at an time before the agreement is made); and
- the relevant State or Territory Minister; and
- any local government body for any part of the area over which the determination is being made.

The changes to the Native Title Act have limited the other parties who must be a party to an agreement to:

- parties who hold an interest in relation to land or waters, at the time the agreement is being made, in any part of the area over which the determination is being made; and
- parties who claim to hold native title in relation to land or waters in the area over which the determination is being made.[63]

It is not necessary to gain the agreement of parties to proceedings whose interests in land or waters is outside of the area over which parties have agreed to a determination of native title (even where the interest is within the wider claim area). Where the native title claim has been registered and the partial determination results in the claim being amended,[64] the amended claim is exempt from having the registration test applied again.[65]

This change could have a positive effect on the resolution of native title claims allowing the partial settling of claims without the agreement of all the parties to the proceedings for the whole claim.

Registration test not to apply to some amended claims

A number of amendments to the Native Title Act have been made reducing the necessity for the registration test to be applied to some amended claims. These are welcome administrative changes.

Dismissal of native title applications

As a result of the changes the Federal Court may dismiss:

- certain classes of application for native title determinations which are lodged in response to future act notices. This is where the question whether the future act can be done is resolved in some way. This is unless there are compelling reasons not to dismiss the application.[66]
- claims the Native Title Registrar refuses to register because they fail the registration test on merit grounds under Section 190B of the Native Title Act.[67]

These changes are targeted at reducing the backlog of claims in the system. The review commented on the backlog and ways to reduce it. They looked at claims lodged in response to future act notices, where they considered there may be a lack of incentive to proceed, and unregistered claims.

I have concerns about the dismissal of native title applications by the Federal Court. Native title proceedings appear to be treated differently from other proceedings in the Federal Court. The standard for dismissal applied to native title proceedings

appears not to be the same as for other cases. The dismissal of applications is prejudicial to the interests of applicants.

Dismissing claims lodged in response to a future act notice

The Federal Court *must* dismiss an application for a determination of native title in relation to an area, unless 'there are compelling reasons not to do so', if:

- the application is for a determination of native title in relation to an area; and
- it is apparent from the time of the application that it is made in response to a future act notice given in relation to land or waters within the area; and
- the future act requirements are satisfied in relation to each future act identified in the future act notice; and

either

- the person fails to produce evidence in support of the application despite a direction by the court to do so, or to take other steps to have the claim sought in the application resolved despite a direction by the court to do so; or
- (in the case where the situation of the person failing to produce evidence above doesn't apply) the court considers that the person has failed, within a reasonable time, to take steps to have the claim sought in the application resolved.[68]

The legislation sets out when it is considered apparent from the timing of an application that it is made in response to a future act notice. This may also be prescribed by the regulations.[69]

The court must not dismiss the application without first ensuring that the person is given a reasonable opportunity to present a case about why the application should not be dismissed.[70]

The *CR Review* formed the view that about a third of the claims in the system appear to have been lodged in response to future act notices. The *CR Review* expressed the opinion that they are often only lodged to obtain procedural rights.[71]

> Once future act claims are registered, there appears to be little incentive for the claimants to seek to progress their claim – indeed there is considerable risk that the claim will not be successful and the claimants will lose the procedural rights conferred by registration of the claim. Registration under the NTA can also confer procedural rights under other legislation, such as the *Aboriginal Cultural Heritage Act 2003* (Qld)). Registration also gives claimants a basis for holding themselves out as the traditional owners of the relevant land.
>
> Where there appears to be no desire on the part of the applicant (or anyone else) to proceed with the claim and no real prospect of the claim proceeding any further, there is no point in actively managing the claim towards a determination. The time and resources of the Court, the NTRB [native title representative body], the NNTT and other parties should not be used for claims that the applicants do not wish to progress. Those claims are sometimes placed into an 'abeyance list' or otherwise not progressed.

> We consider that the Court should be required to dismiss these claims unless satisfied that there are compelling reasons not to do so. We are aware that many parties are reluctant to seek the dismissal of such claims due to their desire to maintain good relations with the applicants.

As well as my general concerns about the provisions allowing for dismissal of native title applications, I am concerned at the lack of discretion given to the Federal Court whether to dismiss claims lodged in response to future act notices. The court is obliged to dismiss such applications.

Dismissing claims that do not pass the registration test

New provisions have been inserted in the Native Title Act enabling the Federal Court to dismiss applications that do not meet the merit conditions of the registration test (set out in Section 190B of the Native Title Act).[72] The court is not compelled to dismiss these claims.

For the court to be able to dismiss the claim, the claim must not be accepted for registration either because:

- it does not satisfy all of the merit conditions; or
- it is not possible to determine whether all of the merit conditions have been satisfied because of a failure to satisfy the procedural conditions about procedural and other matters (set out in Section 190C of the Native Title Act).

The court must also be satisfied that certain avenues for reconsideration and review (set out in the Native Title Act) have all been exhausted and the claim not registered.

An application for dismissal of a claim may be made by a party or by the court on its own motion and provided:

- the court is satisfied the application has not been amended since consideration by the Native Title Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Native Title Registrar; and
- in the court's opinion there is no other reason why the application should not be dismissed.

These changes are based on proposals (in the *CR Review*) for dealing with unregistered claims. Their proposals centred on giving the Federal Court power to dismiss certain claims that failed to meet the merit conditions of the registration test.

> The proposals are aimed at removing at an early stage those applications which appear to have little prospect of success, avoid the cost of notification and the unproductive identification and involvement of respondent parties. These proposals:
>
> - would not result in any loss of procedural rights (as the claimant application is not registered), and
> - would not result in any loss of native title rights and interest (as the claimant group could file another, better prepared application).[73]

The *CR Review* also proposed that the Native Title Register:

- re-apply the registration test to applications that had previously failed the registration test; and
- apply the test to applications that did not have to undergo the registration test.

The government has acted on these proposals.

I have concerns about using the registration test to dismiss applications. An administrative officer, not a judicial one, applies the test. The considerations in Section 190B are relevant to the merits of a claim, yet they are not the same as the matters the court determines when deciding the native title case. Further the interpretation given to Section 190B by delegates of the Native Title Registrar has varied over time. The provisions for reconsideration and review of the decision that the application does not meet the merit conditions are welcome. However, they are likely to add to the drain on resources of applicants.

Outstanding issues

The changes have not dealt with a range of issues raised by the *CR Review*. Some of these are central to the operation of the system and the resolution of claims.

Overlapping claims

Overlapping claims for native title result in extensive delays and make it very difficult for negotiations to proceed, even where the parties are willing to do so. The review made no recommendations, only some suggestions, to dealing with this very important area (see page 27 of the *CR Review*).

Connection

Connection with country is usually the most controversial issue in a native title matter and therefore occupies most of the time and resources of all participants in the process. To deal with this the *CR Review* recommended that more use should be made of the tribunal's research facilities and, in particular, its ability to produce research reports.

There needs to be detailed consideration of the whole subject of providing connection reports: when they are prepared and by whom, and the level of connection material required by the states and territories before they will engage in serious mediation. This is a matter that needs to be on the agenda when considering Commonwealth-State relationships.

Delay in conducting tenure research

Early research into tenure may narrow the issues between the parties significantly. It is a fundamental task that should be completed as early as possible.

> It would be preferable for this to be done prior to a claim being lodged, but often it is not done until much later. It may be prudent for State and Territory governments to target their resources towards determining the tenure history of the area claimed at an early stage.[74]

The attitude and approach of states and territories to making tenure information available, is crucial to more efficient resolution of native title matters.

The *CR Review's* answer to this was to recommend that consideration be given to assisting the tribunal to continue to develop a database of current tenure material.

Lack of resources

The need for more resources and funding for claimants has been stated over and over by many reviews and reports into the native title system (see the chapter in this report on representative Aboriginal and Torres Strait Islander bodies).

The *CR Review* noted:

> Lack of adequate funding, especially for claimants, is a common cited reason for claims not progressing. As claimants must perform much of the preliminary work, resource constraints can limit their ability to carry out such work as quickly and thoroughly as others might wish.[75]
>
> It is essential that NTRBs [Native title representative bodies] are properly resourced so that they can engage experienced lawyers, anthropologists and other experts to ensure that those resources which they do have are efficiently used.

The review also presented other suggestions for dealing with the lack of resources available to claimants including:

- use of tribunal's assistance services;
- rigorous case management; and
- use of pleadings.

Uncertainty about the law

The law is still being developed on important connection issues like:

- the relevant 'society';
- the degree and kind of connection sufficient to sustain a claim; and
- the extent to which traditional laws and customs may change before they cease to be 'traditional'.

There are also legal questions yet to be determined, particularly about extinguishment, because of differences in tenures between states.

In response to these outstanding legal issues the *CR Review* recommended that the tribunal and parties be encouraged to make greater use of the provisions of the Native Title Act and of the Federal Court Rules such as Order 29 rule 2 to refer particular issues of fact and law to the court for determination.

Concern

Encouragement to make greater use of the law does not address the essence of the problem. The way the common law has evolved and interpreted the Native Title Act has placed almost insurmountable burdens in the way of Indigenous people in their endeavours to obtain protection and recognition of their native title.

In Chapter 1 of this report I have recommended a comprehensive review of the legal issues – and the common law – and their impediments to native title. After that, where necessary, legislative change are needed to reverse the narrowing and constraining of native title that has taken place from the *Wik* amendments in 1998 and through the High Court decisions in *Yorta Yorta*[76] and *Ward*.[77] These matters are considered later in this report in the chapter on significant court decisions.

Gathering of evidence

Preservation of evidence hearings and limited evidence hearings represent an excellent opportunity for relevant connection evidence to be tendered and examined.

The *CR Review* recommended that the court and other relevant participants be encouraged to give greater priority to the holding of limited evidence and preservation hearings, coupled with contemporaneous dispute resolutions. The extent to which this is occurring needs to be assessed by government.

Section 137 inquiries

There is power under Section 137 of the Native Title Act to require the Commonwealth Minister to give written notice to the tribunal to hold an inquiry (this is separate to the new inquiry power). As I understand it, the Section 137 power has never been invoked. Little thought appears to have been given to using this mechanism, perhaps because it needs to be triggered by the minister. The *CR Review* considered there were many attractive aspects to Section 137 inquiries. The review recommended that the section not be amended. They offered no suggestions for how to promote its use.

And I commend

This chapter and indeed all of this report make numerous recommendations. All of them, I sincerely believe, can contribute to the improvement to the native title system. There is however no doubt that the native title ship needs to return to port for a major refit. I strongly commend the convening of a national summit on native title that will consider how to reform the Native Title Act and system to ensure that it is simple, understandable, and in accordance with the preamble to the Native Title Act.

Recommendations

2.1 That funding be made available for or through the National Native Title Council to develop plain English guides for Indigenous people to understand the recent changes to the native title system, and how to claim native title after the changes.

2.2 I support Recommendation 8 of the Senate Standing Committee on Legal and Constitutional Affairs, in its report on the Native Title Amendment Bill 2006, (February 2007).

That the Attorney-General monitor the operation of proposed Division 4AA of Part 6 of the Native Title Act (the review power) and prepares a report to Parliament after two years of operation to assess the following:

- the extent to which these measures are used;
- the effect they have on the cost and time for the resolution claims;
- the extent, if at all, to which the parties' rights are compromised by this process; and
- the extent to which there is duplication between the functions of the Federal Court and the National Native Title Tribunal in this area.

2.3 That Section 94C of the Native Title Act be amended so that the Federal Court is not obliged to dismiss an application under Section 61 of the Act, in accordance with Section 94C.

1 Mineral Council of Australia, *Submission to the Joint Parliamentary Committee on Native Title Representative Bodies*, July 2004.
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3 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, p13, para 2.7.
4 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, p12.
5 Ruddock, P., (Attorney-General), *Hansard*, House of Representatives, 7 December 2006, p16.
6 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, p20.
7 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, p41, para 4.134.
8 *Native Title Act 1993* (Cth), s84(3)(a)(iii).
9 *Native Title Act 1993* (Cth), s84(5).
10 *Native Title Act 1993* (Cth), s136DA.
11 *Native Title Act 1993* (Cth), s136DA(6).
12 *Native Title Act 1993* (Cth), s84(9)(b).
13 *Native Title Act 1993* (Cth), s84(3). A State or Territory may also be a party to the proceedings (*Native Title Act 1993* (Cth), s84(4). The Commonwealth may intervene in proceedings. If it does so then for the purposes of the institution and prosecution of an appeal from a judgment in the proceedings it is taken to be a party to the proceedings (*Native Title Act 1993* (Cth), s84A).
14 Anderson, I., National Registrar, Native Title, Federal Court of Australia, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2007*, 15 October 2007.
15 French, J., *Plus ca change, plus c'est la meme chose? – The 2007 Amendments to the Native Title Act 1993* (Cth), Address given at the Native Title Representative Bodies Conference in Cairns, 8 June 2007, para 14.
16 Anderson, I., National Registrar, Native Title, Federal Court of Australia, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2007*, 15 October 2007.
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19 Federal Court of Australia, *Submission to the inquiry by the Standing Committee on Legal and Constitutional Affairs into the Native Title Amendment Bill 2006*, 25 January 2006.
20 Neate, G., *New powers and functions of the National Native Title Tribunal: An overview and analysis*, paper delivered to the Negotiating Native Title Forum, Rendezvous Hotel, Melbourne, 26 February 2007.
21 Ruddock, P., (Attorney-General) *Hansard*, House of Representatives, 7 December 2006, p16.
22 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* (No 9)(2007) 240 ALR 75.
23 *Risk v Northern Territory and Quall v Northern Territory* [2006] FCA 404, per Mansfield J. at para 456 referring to *Harrington-Smith on behalf of the Wongatha People* v *State of Western Australia* (No 9)(2007) 240 ALR 75.
24 *Risk v Northern Territory and Quall v Northern Territory* [2006] FCA 404, per Mansfield J. at para 458 referring to *Jango v Northern Territory* (2006) 152 FCR 150.
25 *Native Title Act 1993* (Cth), s86B(1).
26 *Native Title Act 1993* (Cth), s86BA(1).
27 *Native Title Act 1993* (Cth), s86B(6).
28 *Native Title Act 1993* (Cth), s86C(1).
29 *Native Title Act 1993* (Cth), s86C(2).
30 *Native Title Act 1993* (Cth), s86C(3).
31 Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill 2006*, Commonwealth of Australia, February 2007.
32 Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill 2006*, Majority report, paras 4.14 to 4.29.
33 Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill 2006,* majority report, para 4.29.
34 Senate Standing Committee on Legal and Constitutional Affairs, *Report on Native Title Amendment Bill 2006 [Provisions]*, February 2007, Recommendation 7.
35 Standing Committee on Legal and Constitutional Affairs, *Minority report into the Native Title Amendment Bill 2006,* paras 1.41, 1.42, 1.43, p65.
36 *Native Title Act 1993* (Cth), s86BA.
37 *Native Title Act 1993* (Cth), s86E, s136G(2A).
38 *Native Title Act 1993* (Cth), s86E(2), s136G(3A).
39 *Native Title Act 1993* (Cth), s136G, s86E and s94B.
40 *Native Title Act 1993* (Cth), s136A.
41 *Native Title Act 1993* (Cth), s136B(1A).
42 The matters are those mentioned in s86A(1) or (2) of the *Native Title Act 1993* (Cth).

43 *Native Title Act 1993* (Cth), s136CA, s86A(1), (2).
44 *Native Title Act 1993* (Cth), s136G(3B)
45 *Native Title Act 1993* (Cth), s86D(3).
46 *Native Title Act 1993* (Cth), s177.
47 *Native Title Act 1993* (Cth), s136B(4).
48 *Native Title Act 1993* (Cth), s136GA.
49 *Native Title Act 1993* (Cth), s136GB.
50 Native Title Amendment Bill 2006, *Explanatory Memorandum*, p17.
51 *Native Title Act 1993* (Cth), s136GC to s136GE.
52 Held under s136A of the *Native Title Act 1993* (Cth), in relation to the proceedings.
53 *Native Title Act 1993* (Cth), s136GE(1).
54 *Native Title Act 1993* (Cth), s136GE(2).
55 *Native Title Act 1993* (Cth), s136GC(7).
56 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, Recommendation 2.
57 *Native Title Act 1993* (Cth), s138A-138G.
58 *Native Title Act 1993* (Cth), s225: A determination of native title is a determination whether or not native title exists in relation to a particular area (the determination area) of land or waters and, if it does exist, a determination of:
(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
(b) the nature and extent of the native title rights and interests in relation to the determination area; and
(c) the nature and extent of any other interests in relation to the determination area; and
(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.'
59 *Native Title Act 1993* (Cth), s138B(2)(b).
60 *Native Title Act 1993* (Cth), s138B(3).
61 Hiley, G., Levy, K., *Report of the Claims Resolution Review,* 31 March 2006, para 4.1555.
62 Native Title Amendment Bill 2006, *Explanatory Memorandum*, paras 2.162, 2.163.
63 *Native Title Act 1993* (Cth), s87A.
64 *Native Title Act 1993* (Cth), s87A.
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