



National  
Native Title  
Tribunal



# Reforming the claims resolution process: Opportunities and obstacles

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*This year numerous legislative and administrative changes have been made to key aspects of the native title system. Many of those changes affect how native title claims are resolved.*

*The statutory changes have re-oriented aspects of the relationship between the Federal Court and the National Native Title Tribunal, and have given the Tribunal additional powers and functions in relation to the mediation of native title claims.*

*This paper will outline the key changes and identify some of their implications, with opportunities for a more effective and efficient claims resolution process.*

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## 1. Introduction<sup>1</sup>

On 7 December 2006, Federal Attorney-General Philip Ruddock introduced the *Native Title Amendment Bill 2006* into the House of Representatives to 'provide a platform to enable more efficient and effective outcomes' from the native title system. The legislation was one part of a package of reforms to key aspects of the native title system that the Australian Government had foreshadowed in a series of announcements from September 2005 onwards.

In his second reading speech the Attorney-General noted that the reforms were designed to 'ensure the system delivers effective outcomes more expeditiously for all parties, and to encourage agreement-making in preference to litigation'.<sup>2</sup>

The Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report by 23 February 2007. The Bill passed through both Houses of Parliament with some amendments and, on 15 April 2007, most of the *Native Title Amendment Act 2007* commenced.

On 29 March 2007 Federal Attorney-General Ruddock introduced the *Native Title Amendment (Technical Amendments) Bill 2007* into the House of Representatives. That Bill was also referred to the Senate Standing Committee on Legal and Constitutional Affairs. The Committee's report on the Bill, which recommends various amendments, was tabled on 9 May 2007. The Bill was debated in the House of Representatives on 10 May 2007. The ALP foreshadowed moving amendments in the Senate, and the Government indicated that it would be carefully considering the Committee's recommendations and any Government amendments would be made in the Senate.<sup>3</sup>

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<sup>1</sup> Much of this paper draws on 'New powers and functions of the National Native Title Tribunal: An overview and analysis', a paper that I delivered to the Negotiating Native Title Forum in Melbourne on 26 February 2007. Some of the topics were also considered in G Neate, 'New powers and functions of the National Native Title Tribunal' April 2007, *Indigenous Law Bulletin*, volume 6, issue 26, pp10-12.

<sup>2</sup> Australia, House of Representatives, *Debates*, 7 December 2006, p16.

<sup>3</sup> See statements by Mr Nairn, Special Minister of State, in Australia, House of Representatives 2007, *Debates*, 10 May 2007, pp78, 79.

At the date this conference commenced, the Bill had not been debated in the Senate and it was not known whether it will be amended.

Accordingly, this paper concentrates on those aspects of the claims resolution process that were affected by the *Native Title Amendment Act 2007*, primarily those involving the agreement-making process. Other aspects which are the responsibility of the Native Title Registrar will be dealt with in more detail in a separate paper.

This paper will identify some obstacles to the resolution of native title determination applications (claimant applications) and will highlight how recent amendments to the *Native Title Act 1993* create opportunities to overcome those obstacles. In doing so, the paper will:

- briefly set the reforms in the current context, and
- explain the content of the reforms as they relate to institutional issues and the behaviour of parties, and foreshadow something of the practical operation and implications of the key reforms.

At the outset, the Tribunal indicated its support for the broad thrust of the amendments contained in Schedule 2 of the *Native Title Amendment Bill 2006*. It was submitted that the amendments had the potential to significantly improve the operation of the native title system, and offered the best chance of achieving improvements in performance within the current legislative framework.

In assessing the amendments to the Native Title Act and associated reforms, it would be unwise to focus unduly on the new powers and functions to be conferred on the Tribunal. Rather, the focus should be on how the parties can work together to secure just and enduring outcomes in a timely way.

The native title scheme needed improvement, and *all* system participants should address the way in which they operate so that more efficient and effective outcomes are achieved. The amendments, together with associated administrative changes, comprise a significant step in ensuring that the substantial public monies invested in the native title system<sup>4</sup> achieve reasonable outcomes within reasonable time frames.

The reforms to the native title system (including the legislative changes to the claims resolution process and the administrative changes to respondent funding) will assist the Tribunal to take more control of the process and focus parties on seeking negotiated outcomes. The Federal Court will continue to supervise the mediation process and the Tribunal will report to the Court. The two institutions will work closely together, and with the parties, in prioritising and progressing the resolution of claims.

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<sup>4</sup> Over the past nine financial years (1997-98 to 2005-06), the Commonwealth allocated over \$900 million to native title: G Hiley and K Levy, *Native Title Claims Resolution Review*, 31 March 2006, para 4.6.

## 2. The reforms in context

When the High Court delivered its historic judgment in *Mabo v Queensland (No 2)*<sup>5</sup>, there was a range of responses. For some Indigenous groups and others, the judgment was seen as offering enormous promise to deal with longstanding unresolved issues about land and waters. Some people were uncertain, even fearful or antagonistic, about the possible implications for them, and the nation, of the judgment and the subsequently enacted *Native Title Act 1993* (Cwlth).

In the 15 years since the *Mabo (No 2)* judgment, approximately 1,750 native title applications<sup>6</sup> have been made and more than 400 written judgments have been delivered by courts. The scope of what can be achieved, whether by judicial decisions or negotiated agreements, has become clearer.<sup>7</sup> Indigenous people have had to temper their hopes and expectations of what the native title system can deliver for them. The fears and apprehension of others have been reduced, if not removed, as they have come to realise that their interests are or can be accommodated in this legal regime.

Although there are still legal issues to be resolved by the courts and creative negotiating options still to be explored by the parties, we can take stock of how the system is performing and how it can be improved.

### (a) *Judicial criticisms of the native title system*

In recent years the native title system has been criticised, not least by some of our most senior judges. Their criticisms have been based on concerns that the law is unclear, the process is slow and expensive, and the results may be unsatisfactory.<sup>8</sup>

Judges have expressed concern about the significant impact felt when some parties' expectations of native title proceedings are not met. For example, Justice Callinan expressed the fear that 'the expectations of Indigenous people have been raised and dashed'<sup>9</sup> and Justice Merkel said that 'failure in a native title claim...can have devastating consequences for the claimant community'.<sup>10</sup>

Justice Merkel, having expressed his concerns, urged 'parties to other native title disputes to increase their endeavours to reach compromises'. His Honour continued:

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<sup>5</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>6</sup> 1,455 claimant, 33 compensation, 262 non-claimant applications.

<sup>7</sup> Arguably, until some leading judgments of the High Court were delivered in 2002 the law had not been 'clarified' in respect of some significant issues and consequently there were significant areas of uncertainty and hence disagreement.

<sup>8</sup> See e.g. *Western Australia v Ward* (2002) 213 CLR 1, 191 ALR 1 at [560] per McHugh J, [969] per Callinan J; *Attorney-General of the Northern Territory v Ward* (2003) 134 FCR 16, introductory statement of the Full Federal Court (Wilcox, North and Weinberg JJ); *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 at [164] per Merkel J; *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31, summary, per Lindgren J.

<sup>9</sup> *Western Australia v Ward* (2002) 213 CLR 1, 191 ALR 1 at [970].

<sup>10</sup> *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 at [167].

Those endeavours will necessarily involve give and take on the part of all parties. Native title litigation, like other litigation, need not be conducted on an “all or nothing” basis.<sup>11</sup>

In saying that, he expressed what some other judges had stated in previous decisions.<sup>12</sup>

Native title litigation is risky, expensive, and uncertain, with an imposed outcome. Such an outcome may resolve the issues. However, as the recent Wongatha judgment suggests, litigation may not result in a determination of native title and may leave the fundamental questions about native title unanswered.<sup>13</sup>

### *(b) Negotiated outcomes*

It must be acknowledged that there will continue to be native title litigation for at least two reasons:

- there will be outstanding legal issues which a party or parties consider to be of such significance that they will seek a judicial ruling, or
- parties will be unwilling or unable to agree and will seek a litigated outcome.<sup>14</sup>

In some instances, a trial or partial trial will lead to a settlement and a determination of native title.<sup>15</sup>

Experience shows that to proceed on a strict legal rights basis is to take too narrow a view of what can be achieved under the native title scheme, particularly when parties to native title proceedings genuinely engage with good will and negotiate in good faith. Agreements can be reached in native title proceedings, including complex and large scale matters, without a trial being required.

The statistics give part of the picture.

As at 4 June 2007 there had been 102 determinations of native title entered on the National Native Title Register. Of those, 68 were that native title exists (in part or all of the determination area), and most of those (almost 80 per cent) were made with the consent of parties, many without a trial. Of the 34 determinations that native title does not exist, most (more than 80 per cent) have been unopposed or made by consent.<sup>16</sup>

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<sup>11</sup> *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 at [166].

<sup>12</sup> See e.g. *Wik Peoples v Queensland* [2000] FCA 1443 at [9], per Drummond J; *Attorney-General of the Northern Territory v Ward* (2003) 134 FCR 16, introductory statement of the Full Federal Court per Wilcox, North and Weinberg JJ.

<sup>13</sup> Justice Olney has also observed that ‘despite the most earnest intentions of our legislators, the *Native Title Act* does not always deliver certainty’: *Holt v Manzie* (2001) 114 FCR 282 at 283-284.

<sup>14</sup> For example, there are various appeals currently before Full Federal Courts in relation to questions about connection and society.

<sup>15</sup> For example see G Hiley and K Levy, *Native Title Claims Resolution Review*, 31 March 2006, para 4.13.

<sup>16</sup> Most of the unopposed determinations that native title does *not* exist are made in New South Wales in relation to areas of Aboriginal land so that dealings may occur in relation to that land: see *Aboriginal Land Rights Act 1983* (NSW) s40AA.

On a positive note, a majority of the High Court expressed the view 11 years ago:

If it be practical to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the Court and the likely parties to the litigation are saved a great deal in time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach agreement, they are enabled thereby to establish an amicable relationship between future and neighbouring occupiers. To submit a claim for determination of native title to judicial determination before the stage of negotiation is reached is to invert the statutory order of disposing of such claims.<sup>17</sup>

That passage has been quoted with approval<sup>18</sup> and other judges have made similar observations.<sup>19</sup>

To quote Justice Merkel again:

If claimant communities and state parties can achieve a mediated outcome, they can ensure that a broad spectrum of mutual benefits can follow the resolution of native title claims. Those benefits can include indigenous land use agreements, traineeship programs and various forms of financial and other support for the native title holding body. ...[I]f compromises are able to be achieved, the cause of reconciliation between Australia's past and present will be greatly advanced and the economic, social and educational benefits available to all Australians may be better able to be accessed by members of claimant communities.<sup>20</sup>

Some of the consent determinations that native title exists are accompanied by other agreements, including indigenous land use agreements (ILUAs). Indeed of the 272 ILUAs currently on the Register of Indigenous Land Use Agreements, more than one quarter are associated with determinations of native title.

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<sup>17</sup> *North Galanjanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 617 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

<sup>18</sup> See *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1 at 24, 148 ALR 46, per Merkel J; *Fejo v Northern Territory* (1998) 195 CLR 96 at 134 per Kirby J; *Mitakoodil/Juhnjar People v Queensland* [2000] FCA 156 at [11] per Spender J; *Anderson v Western Australia* [2000] FCA 1717 at [8] per Black CJ.

<sup>19</sup> In *Fejo v Northern Territory* (1998) 195 CLR 96 at 139 [78], Kirby J noted 'The stated emphasis of the Act on the facilitation of agreement through negotiation rather than through instant recourse to judicial decision'. Madgwick J has described the objects of the Act as including 'arriving at agreement if possible as to who are the appropriate native claimants, or at least minimising the scope for such disputes': *Eora People – Brown v NSW Minister for Land and Water Conservation* [2000] FCA 1238 [27]. Emmett J has stated 'One important object and purpose to be found in the Act is resolution of issues and disputes concerning native title by mediation and agreement, rather than Court determination. Detailed procedures are set out in the Act to achieve those objects': *Munn v Queensland* (2001) 115 FCR 109 at [28]. Branson J has noted that the Act 'discloses an intention of encouraging and facilitating the resolution of native title claims by agreement': *Kelly v NSW Aboriginal Land Council* [2001] FCA 1479 at [23].

<sup>20</sup> *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 at [167], [168].

Determinations that native title exists cover some 8.5 per cent of the land mass of Australia – from the islands of the Torres Strait to large areas of Western Australia, and the banks of the Wimmera River in Victoria - and areas of waters in northern Australia.

The steady rise in determinations of native title and the accompanying increase in ILUAs demonstrate that the native title scheme can deliver, and has delivered, outcomes.<sup>21</sup>

### *(c) Improving the native title system*

On 7 September 2005, when announcing ‘a plan for practical reform to improve the performance of the native title system’, Attorney-General Ruddock stated that although the ‘increasing number of native title determinations and agreements demonstrate the system is working ... the current framework is still too costly and too time-consuming’. He said that the Australian Government was ‘committed to achieving better outcomes for all parties involved in native title’ and wanted to put in place ‘measures that will ensure native title processes work more effectively and efficiently’. The proposed reforms would address ‘all significant elements of the system’. According to the Attorney-General, a ‘coordinated and balanced approach across the entire system is necessary to ensure we do not simply shift existing bottlenecks from one part to another’.<sup>22</sup>

The six inter-connected aspects of the reform include:

- measures to improve the effectiveness of native title representative bodies
- amending the guidelines of the native title respondents’ financial assistance program to encourage agreement-making rather than litigation
- preparation of proposals for possible technical amendments to the Native Title Act to improve existing processes for native title litigation and negotiation
- an independent review of the claims resolution processes to consider how the National Native Title Tribunal and the Federal Court can work more effectively in managing and resolving native title claims
- an examination of current structures and processes of prescribed bodies corporate, including targeted consultation with relevant stakeholders, and
- increased dialogue and consultation with the state and territory governments to promote and encourage more transparent practices in the resolution of native title issues.

## 3. Reforms to the claims resolution process

The fourth in that list of reforms involved a review of the claims resolution process in the native title system.

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<sup>21</sup> Note also that there has been a reduction of outstanding native title applications from 1750 to 584 (a reduction of 66%) with applications having been resolved, discontinued, withdrawn or combined.

<sup>22</sup> Attorney-General’s Department, ‘Practical reforms to deliver better outcomes in native title’, Media release 163/2005, 7 September 2005.

The Government engaged two consultants, Mr Graham Hiley QC and Dr Ken Levy, to conduct the review. Their terms of reference stated that the review would 'focus on the process by which native title applications are resolved' and would examine the respective roles of the Tribunal and the Federal Court. The consultants were to 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 emphasis was to be on finding ways to resolve native title claims 'most efficiently and effectively', including how the Tribunal and the Court could '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.'

The consultants received numerous written submissions from individuals and organisations involved in native title proceedings,<sup>23</sup> and spoke directly with participants in the system.<sup>24</sup>

In their report, dated 31 March 2006, the consultants made 24 recommendations, some of which would involve administrative action and some legislation.

Having considered the respective powers and functions of the Tribunal and the Court in relation to the mediation of native title claimant applications, and the ways in which each institution operates, the consultants concluded:

there appears to be no reason to assume that another body with the same constraints as those which presently exist in relation to NNTT mediation could have been more effective than the NNTT.<sup>25</sup>

They considered that the Tribunal's 'present powers are inadequate for it to effectively perform its mediation role'.<sup>26</sup> Accordingly they recommended that the Tribunal be given various specified powers in relation to matters referred to the Tribunal by the Federal Court for mediation. The Australian Government accepted the recommendations.

The focus of much of the remainder of this paper is on the additional or expanded powers and functions of the Tribunal. It is important, however, to consider those powers and functions in context.

First, the amendments that directly involve the Tribunal are only part of the reforms to the claims resolution process, which in turn are only part of a 'package of reforms... designed to ensure the system delivers effective outcomes more expeditiously for all parties, and to encourage agreement-making in preference to litigation'. The Attorney-General has stated: 'Collectively, the legislative changes and other non-legislative reforms will promote performance across the system'.<sup>27</sup> Consequently, the amendments in relation to the Tribunal must be analysed in the context of other legislative and administrative reforms.

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<sup>23</sup> G Hiley and K Levy, *Native Title Claims Resolution Review*, 31 March 2006, Appendix 3.

<sup>24</sup> G Hiley and K Levy, *Native Title Claims Resolution Review*, 31 March 2006, Appendix 2.

<sup>25</sup> G Hiley and K Levy, *Native Title Claims Resolution Review*, 31 March 2006, paragraph 4.33.

<sup>26</sup> G Hiley and K Levy, *Native Title Claims Resolution Review*, 31 March 2006, paragraph 4.34.

<sup>27</sup> Australia, House of Representatives 2006, *Debates*, 7 December 2006, p 16.

Second, significant as the additional powers and functions 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. That point is dealt with later in this paper.

## 4. Obstacles to, and opportunities for, resolving native title applications

The eight obstacles that I will focus on – and the opportunities that the amended Native Title Act provides to overcome these obstacles – are:

- parallel mediation processes in different forums
- resolving issues about connection to areas of land or waters covered by claimant applications
- people who are, but should not be, parties to native title claim proceedings
- the requirement for all parties to consent to consent determinations over parts of areas covered by claimant applications
- lack of Tribunal power to direct parties to attend mediation and produce documents
- conduct of some parties, especially the lack of good faith in relation to the mediation of outcomes
- lack of a regional perspective to planning and prioritising the resolution of claimant applications
- inadequate communication between the Tribunal and Federal Court.

### (a) *Parallel mediation processes in different forums*

Before the Native Title Act was amended this year, the Federal Court had power to mediate in respect of a native title application whether or not the application had been referred to the Tribunal for mediation. That power was not found in the Native Title Act but in section 53A of the *Federal Court of Australia Act 1976*, which enables the Court to refer matters to a Court-appointed mediator for mediation. The Court also had a broad discretion not to refer applications to the Tribunal for mediation. As a consequence, it was possible that matters would be mediated concurrently by both the Court and the Tribunal, or were not referred to the Tribunal until some aspects had been mediated by the Court.

The consultants recommended that the Act be amended to provide that mediation should not be carried out by more than one body at one time.<sup>28</sup> That recommendation and a related option for

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<sup>28</sup> G Hiley and K Levy, *Native Title Claims Resolution Review*, 31 March 2006, Recommendation 1, paras 4.28-4.32.

institutional reform<sup>29</sup> were adopted and the effect of the relevant amendments to the Act can be summarised as follows:

- The previous general discretion of the Court<sup>30</sup> not to refer matters to the Tribunal for mediation has been removed, thus strengthening the presumption that mediation in native title proceedings should take place in the Tribunal. The issue of non-referral will instead be determined under an amended subsection 86B(3) which, among other things, allows the Court not to refer the whole or part of a proceedings to the Tribunal if the Court considers that there is no likelihood of the parties reaching agreement in the course of mediation by the Tribunal.<sup>31</sup> In such circumstances the Court could refer the matter to mediation by say, a Court registrar. The Court will be obliged to take into account any submission by the Tribunal in deciding whether there should be no mediation by the Tribunal.<sup>32</sup>
- While a matter is referred to mediation by the Tribunal, the Federal Court is prevented from conducting mediation under the *Federal Court of Australia Act 1976* or holding certain conferences by a Court registrar under the Federal Court Rules to determine whether all reasonable steps have been taken by the parties to achieve a negotiated outcome.<sup>33</sup> This new provision is to ensure that mediation cannot be conducted by both institutions at the same time. The prohibition is limited to mediation. It does not, for example, prevent the Court from using other forms of alternative dispute resolution at the same time a matter is in mediation with the Tribunal.
- The provisions about the cessation of mediation allow the Court, among other things, to order that mediation by the Tribunal cease if it considers that 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 subsections 86A(1) or (2).<sup>34</sup> In other words, if mediation by the Tribunal is not working, the Court can order that mediation by the Tribunal cease and refer it to another mediator.

### (b) *Connection issues*

For native title claim groups, one of the most difficult aspects of the claims process is establishing that they have native title rights and interests<sup>35</sup> in relation to the land or waters claimed. That is often referred to as proving 'connection' to those areas.<sup>36</sup>

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<sup>29</sup> Option 2 that the Tribunal be provided with an exclusive mediation role with no time limitations on Federal Court intervention: G Hiley and K Levy, *Native Title Claims Resolution Review*, 31 March 2006, Chapter 5.

<sup>30</sup> *Native Title Act 1993* s86B(2). The subsection has been repealed.

<sup>31</sup> *Native Title Act 1993* s86B(3)(b).

<sup>32</sup> *Native Title Act 1993* s86B(4)(ea).

<sup>33</sup> *Native Title Act 1993* s86B(6).

<sup>34</sup> *Native Title Act 1993* s86C(1)(b).

<sup>35</sup> For the definition of 'native title' and 'native title rights and interests' see *Native Title Act 1993* s223.

<sup>36</sup> The term 'connection' is probably a shorthand expression for that part of the definition of 'native title' that refers to people, by their traditional laws and traditional customs, having 'a connection with the land or waters': *Native Title Act 1993* s223(1)(b).

There has been much debate about the best process to be adopted in (or outside) mediation for establishing a group's traditional connection. Practices vary around the country. Although Justice French has ruled that the Tribunal 'has the responsibility ... to undertake mediation of all aspects of the application' and that the mediation process covers the exchange of information between parties, including connection information (rather than the provision of connection evidence being outside or antecedent to the mediation process),<sup>37</sup> that approach is not taken universally.

The role of State or Territory governments in assessing connection material remains the subject of ongoing debate. As part of his reasons for the recent consent determination in relation to the Guditjmara People's native title application, Justice North referred to 'the importance placed by the Act on mediation as the primary means of resolving native title applications'.<sup>38</sup> He stated that when considering the appropriateness of an agreement for a consent determination, the Court needs to be satisfied that the State party 'has taken steps to satisfy itself that there is a credible basis for the application'. His Honour continued:

There is a question as to how far a State party is required to investigate in order to satisfy itself of a credible basis for an application. One reason for the often inordinate time taken to resolve some of these cases is the overly demanding nature of the investigation conducted by State parties. The scope of these investigations demanded by some States is reflected in the complex connection guidelines by some States. ... The Act does not intend to substitute a trial, in effect, conducted by State parties for a trial before the Court. Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of credible evidence for an application. The Act contemplates a more flexible process than is often undertaken in some cases.<sup>39</sup>

Such judicial statements demonstrate the need for proper process to deal with connection in the course of mediation.

The amendments to the Native Title Act have enhanced the Tribunal's existing role in the mediation of connection, by enabling the Tribunal, in certain circumstances, to:

- carry out a review of whether there are native title rights and interests, or
- hold an inquiry in relation to a matter or issue relevant to a determination of native title.

**Review of whether there are native title rights and interests:** The President of the Tribunal is empowered, on the recommendation of the Tribunal member presiding over the mediation, to refer for review by another member (or Presidential consultant) the issue of whether the native title claim group holds native title rights and interests in relation to land or waters within the application area.<sup>40</sup> The presiding member can only make the recommendation if he or she considers that the review would assist the parties reach agreement in relation to matters listed in subsection 86A(1) of the Act.<sup>41</sup> Those matters include:

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<sup>37</sup> *Frazer v Western Australia* (2003) 128 FCR 458, 198 ALR 303 at [27], [28].

<sup>38</sup> *Lovett on behalf of the Guditjmara People v Victoria* [2007] FCA 474 at [36].

<sup>39</sup> *Lovett on behalf of the Guditjmara People v Victoria* [2007] FCA 474 at [37], [38].

<sup>40</sup> *Native Title Act 1993* s136GC(1), (2), (4).

<sup>41</sup> *Native Title Act 1993* s136GC(3).

- (a) whether native title exists or existed in relation to the area of land or waters covered by the application;
- (b) if native title exists or existed in relation to the area of land or waters covered by the application:
  - i. who holds or held the native title;
  - ii. the nature, extent and manner of exercise of the native title rights and interests in relation to the area;
  - iii. the nature and extent of any other interests in relation to the area;
  - iv. the relationship between the native title rights and interests and any other interests in relation to the area (taking into account the effects of the Act);
  - v. to the extent that the area is 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.

Parties who give documents or information to the review can participate in the process.<sup>42</sup> According to the Explanatory Memorandum, '[i]t will be essential to have at least one participating party to a review, although it may only be necessary to have one such participating party'.<sup>43</sup> Presumably a review would not be conducted unless the applicant agrees to participate.

Unless the parties agree otherwise, any word spoken or act done in the course of the review will be subject to without prejudice privilege.<sup>44</sup>

Mediation may continue during the conduct of the review<sup>45</sup> and the member undertaking the review may give progress reports to the presiding member if the reviewer considers that providing the report would assist in progressing the mediation.<sup>46</sup>

The member conducting the review can prohibit disclosure of:

- information given or statements made in the course of the review, or
- the contents of any document produced in the course of the review.<sup>47</sup>

The written report of the review *must* be made available to the presiding member and the participating parties.<sup>48</sup> A copy *may* also be given to the Court and the other parties to the proceeding,<sup>49</sup> that is, such a provision is discretionary.

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<sup>42</sup> *Native Title Act 1993* s136GC(6).

<sup>43</sup> *Native Title Amendment Bill 2006*, Explanatory Memorandum para 2.136.

<sup>44</sup> *Native Title Act 1993* s136GC(7).

<sup>45</sup> *Native Title Act 1993* s136GC(9).

<sup>46</sup> *Native Title Act 1993* s136GE(3).

<sup>47</sup> *Native Title Act 1993* s136GD.

<sup>48</sup> *Native Title Act 1993* s136GE(1).

<sup>49</sup> *Native Title Act 1993* s136GE(2).

The member conducting the review cannot direct the production of documents. Only a member presiding at a mediation conference has that power.<sup>50</sup> Nor can that member compel parties to participate in a review. Participation is purely voluntary. Reviews are meant to be done 'on the papers'. There is no facility for holding hearings and if these are required an inquiry would be preferable.

If a native title application inquiry (see below) is being held, the Tribunal cannot conduct a review at the same time in relation to the same area.<sup>51</sup>

**Native title application inquiries:** The President of the Tribunal (on his or her initiative, at the request of a party, or at the request of the Chief Justice of the Federal Court) may direct the holding of an inquiry by the Tribunal in relation to a matter or an issue relevant to the determination of native title under section 225 of the Act. Those matters include:

- (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.

The direction can only be made if the applicant agrees to participate and the President is satisfied that the resolution of the matter or issue concerned would be likely to lead to:

- an agreement on findings of fact
- the resolution or amendment of the application, or
- something else being done in relation to the application.<sup>52</sup>

Before the President directs the holding of an inquiry, at least seven days written notice that the Tribunal intends to hold an inquiry must be given to the applicant, the Chief Justice of the Federal Court, the Commonwealth and relevant State or Territory Ministers, the native title representative body (or a person or body performing the functions of a representative body) and any other person who is a party to the proceeding.<sup>53</sup>

Inquiries may only be undertaken where the relevant proceeding is in mediation with the Tribunal and the proceeding raises an issue relevant to a determination under section 225. Note, however, that a request to hold an inquiry may be made before the proceeding is referred to the

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<sup>50</sup> *Native Title Act 1993* s136CA.

<sup>51</sup> *Native Title Act 1993* s138E(2).

<sup>52</sup> *Native Title Act 1993* s138B(1), (2).

<sup>53</sup> *Native Title Act 1993* s138D.

Tribunal.<sup>54</sup> While inquiries can cover more than one proceeding, each proceeding must have been referred to the Tribunal for mediation.

Participation in an inquiry will be entirely voluntary. Unlike other inquiries conducted by the Tribunal, there will be no capacity to subpoena witnesses or documents.<sup>55</sup>

The parties to an inquiry are the applicant, the relevant State or Territory Minister and the Commonwealth Minister (if they advise in writing that they wish to be a party) and, with leave of the Tribunal, 'any other person' who notifies the Tribunal in writing that they wish to become a party.<sup>56</sup>

As these inquiries are intended to assist in the mediation of applications, hearings are generally to be held in private. The Tribunal may direct instead that they be held in public. The customary and cultural concerns of Aboriginal peoples and Torres Strait Islanders must be given due regard in making such a direction.<sup>57</sup>

Mediation may continue while an inquiry is underway if the presiding member considers that it is appropriate.<sup>58</sup> An inquiry must cease if the relevant part of the proceeding ceases to be in mediation with the Tribunal.<sup>59</sup> It may also cease if the President so directs on the basis that a party to the inquiry no longer wishes to participate.<sup>60</sup> The latter is discretionary and whether or not a direction is made will depend upon a variety of factors including the importance of the party to the inquiry and the stage the inquiry has reached.

The report of an inquiry must state findings of fact and may make recommendations but these are not binding on the parties to the inquiry.<sup>61</sup> A copy of the report must be given to the Federal Court and each of the parties to the inquiry.<sup>62</sup> The Court must consider whether to receive into evidence the transcript of evidence of an inquiry and may adopt any recommendation, findings of fact, decision or determination of the Tribunal in relation to the inquiry.<sup>63</sup>

### *(c) People who are, but should not be, parties to native title proceedings*

It has been clear for some years that before there can be a consent determination of native title, every party to the proceeding must agree to it.<sup>64</sup> In some cases (particularly where there are scores, if not hundreds, of respondent parties) it can be difficult to obtain the consent of all parties and the requisite documentation of that agreement. For logistical as well as substantive reasons it is important to ensure that only those people with a relevant interest become, or remain, parties

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<sup>54</sup> *Native Title Act 1993* s138B(3).

<sup>55</sup> *Native Title Act 1993* s156(7).

<sup>56</sup> *Native Title Act 1993* s141(5).

<sup>57</sup> *Native Title Act 1993* s154A.

<sup>58</sup> *Native Title Act 1993* s138E(1).

<sup>59</sup> *Native Title Act 1993* s138F(1), (2).

<sup>60</sup> *Native Title Act 1993* s138F(3).

<sup>61</sup> *Native Title Act 1993* s163A.

<sup>62</sup> *Native Title Act 1993* s164(2) and existing s164 (to be renumbered s164(1)).

<sup>63</sup> *Native Title Act 1993* s86(2).

<sup>64</sup> *Munn v Queensland* (2001) 115 FCR 109.

to the proceeding. Given the many years that often elapse between the notification of a claimant application and its resolution, it is possible that some parties will not retain relevant interests in the claimed area. This may be, for example, because they have sold their interest or because the claim area is reduced in such a way that their interests are no longer affected. If people who should not be parties retain that status, a consent determination might be delayed or even denied.

**The previous scheme:** Before the recent amendments, the Native Title Act provided that:

- Certain categories of persons or bodies were entitled to be parties to native title proceedings, as long as they notified the Court in accordance with the Act.<sup>65</sup>
- Others could be joined as parties by the Federal Court, if the Court was satisfied that 'the person's interests may be affected by a determination in the proceedings'.<sup>66</sup> The Federal Court has taken 'a somewhat generous view of what may constitute an interest' for that purpose, which is a 'broad but not unlimited approach' to the application of that provision.<sup>67</sup>
- Any party (other than the applicant) could, with leave of the Federal Court, cease to be a party.<sup>68</sup>
- The Federal Court could at any time order that a person (other than the applicant) cease to be a party, including where the Court was satisfied that a person never had, or no longer had interests that may be affected by a determination in the proceedings.<sup>69</sup>

**New limitations on who can become a party:** Although much of the scheme remains, section 84 of the Act has been 'tightened up' to make it more difficult to 'automatically' become a party to proceedings. Some persons who previously could become parties by giving notice to the Court will now only become parties if they have an 'interest, in relation to land or waters' that may be affected by a determination in the proceedings.<sup>70</sup>

Further, the power of the Court at any time to join a person as a party has been amended so that being joined as a party requires not only that the person's interests may be affected by a determination but also that 'it is in the interests of justice' that the person be so joined.<sup>71</sup>

These new provisions apply only to applications lodged on or after the 'commencing day'.<sup>72</sup>

**Remaining a party—referral of a question about whether a party should cease to be a party:** If the Tribunal member presiding at a mediation conference considers that a party does not have a relevant interest in the proceeding, the member may refer to the Federal Court the question of

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<sup>65</sup> *Native Title Act 1993* s84(3).

<sup>66</sup> *Native Title Act 1993* s84(5).

<sup>67</sup> See *Mamu v Queensland* [2006] FCA 1563 per Dowsett J at [7], [10] citing *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1.

<sup>68</sup> *Native Title Act 1993* s84(7).

<sup>69</sup> *Native Title Act 1993* s84(8), (9).

<sup>70</sup> *Native Title Act 1993* s84(3)(a)(iii). The phrase 'interest, in relation to land or waters' is defined in s253.

<sup>71</sup> *Native Title Act 1993* s84(5).

<sup>72</sup> *Native Title Amendment Act 2007*, Item 78.

whether a party should cease to be a party to the proceeding.<sup>73</sup> A ‘relevant interest’ for this purpose is an interest that may be affected by a determination in the proceeding.<sup>74</sup> The procedural requirements for referring such a question are being finalised with the Court.

If such a question has been referred to the Federal Court, the presiding member may continue the mediation if he or she considers that it is appropriate.<sup>75</sup>

The Tribunal might, for example, refer such a question to the Federal Court where a claimant application has been amended to remove certain areas or categories of land from the claim area and as a consequence some parties’ interests are no longer affected by the claim. Analysis of current tenures in the claim area or the tenure history of the area might also disclose that some parties do not have interests that could be affected. Such analysis can be, and often is, conducted by the Tribunal’s geospatial specialist staff under the Act.<sup>76</sup>

*(d) Consent determinations over part of an area covered by a native title application require consent of all parties*

Although a consent determination may be negotiated over part of a claimed area, the Act previously required that every party to the proceeding consent to the determination, even if some parties had no interest in relation to the proposed determination area.<sup>77</sup>

The Act has been amended to make it easier to obtain a consent determination over part of the area covered by a native title application.

Subject to it being within power and appropriate, the Court may make a determination of native title in relation to the area in the terms sought by the following persons:

- the applicant
- each registered native title claimant in relation to any part of the determination area who is a party to the proceeding when the agreement is made
- each native title representative body for the area that is a party to the proceedings
- each person with a proprietary interest in relation to any part of the determination area that is registered in a public register at the time the agreement is made and who is also a party to the proceedings at that time<sup>78</sup>
- each person who claims to hold native title to the area who is also a party to the proceedings at that time

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<sup>73</sup> *Native Title Act 1993* s136DA(1).

<sup>74</sup> *Native Title Act 1993* s136DA(6).

<sup>75</sup> *Native Title Act 1993* s136DA(5).

<sup>76</sup> *Native Title Act 1993* ss78(2)(b), 108(3)(a).

<sup>77</sup> *Munn v Queensland* (2001) 115 FCR 109 at [9]-[12], [16].

<sup>78</sup> *Native Title Amendment (Technical Amendments) Bill 2007* contains an amendment to s87A(1)(c)(v) that would broaden the category of parties from a person with a registered proprietary interest to a person who holds ‘an interest in relation to land or waters in any part of the determination area’ at the time when the agreement is made and who is also a party at that time.

- any relevant State or Territory Minister and local government body who is a party to the proceedings at that time, and
- the Commonwealth Minister, if the Minister is a party at that time or has intervened in the proceedings before then.<sup>79</sup>

This means that a consent determination may be made without the consent of a party to the proceedings where that party does not hold the relevant registered proprietary interest in the determination area and who is not otherwise listed above. That includes:

- parties with lesser interests in the determination area, and
- those parties who have an interest in the area covered by the application but outside the determination area.

Such parties may object to the Court making a determination in the terms sought. In deciding whether to make the consent determination the Court must take into account any objections from those parties.<sup>80</sup>

When a consent determination is made under this scheme, the application will be deemed to be amended to reduce the area covered by the application to what is left.<sup>81</sup> The registration test will not be applied to these ‘amended applications’, and if the application is registered, the Register entry can be amended to reflect the change in the area covered by the application.<sup>82</sup>

### *(e) Tribunal’s lack of powers to direct attendance and production of documents*

As noted earlier, the consultants conducting the claims resolution review considered that the Tribunal did not have adequate powers to effectively perform its mediation role. The Act has been amended to give the presiding Tribunal member power to:

- direct a party to attend a mediation conference<sup>83</sup>
- for the purposes of a mediation conference, direct a party to produce a document on or before a specified day if the member considers that the production of the document (in the party’s possession, custody or control) may assist the parties to reach agreement on any of the matters in s86A(1) or (2).<sup>84</sup>

These powers are quite limited in their scope. Members conducting reviews or inquiries will not be able to use them. Further, the power to direct that documents be produced cannot be used to compel a party to create a document, nor can it be used to obtain documents subject to legal professional privilege.<sup>85</sup> That exception could cover many documents of relevance to mediation.

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<sup>79</sup> *Native Title Act 1993* s87A(1).

<sup>80</sup> *Native Title Act 1993* s87A(5).

<sup>81</sup> *Native Title Act 1993* s64(1B), (1C).

<sup>82</sup> *Native Title Act 1993* ss190(3)(a), 190A(1A).

<sup>83</sup> *Native Title Act 1993* s136B(1A).

<sup>84</sup> *Native Title Act 1993* s136CA.

<sup>85</sup> *Native Title Amendment Bill 2006*, Explanatory Memorandum para 2.102.

The power to direct a party to attend a mediation conference does not extend to directing a party's representative to attend a conference. Where a direction is given to a party, the direction cannot be complied with by attendance by the party's legal representative.

There is no power to enforce such directions. The Tribunal will continue to have to rely upon the Court to make appropriate orders. Where a party refuses to comply with the direction, the presiding member may report to the Federal Court that the direction has not been complied with.<sup>86</sup> Where that report is given to the Court, the Court may make orders in similar terms to the directions that were given.<sup>87</sup> A failure to comply with the Court orders may give rise to cost orders or contempt proceedings.

Such powers could be used, for example, to give effect to regional work plans that have been endorsed by the Federal Court at a regional directions hearing or case management conference. The general timetable having been set by the Court, the Tribunal could ensure that the timetable is met by directing that specified parties attend mediation conferences or produce specified documents. That would build on a coordinated approach between the Court, the Tribunal and the parties.

The potential for such an approach is found in the recent judgment of Justice French in *Franks v Western Australia*.<sup>88</sup> In that case a 'chronic problem of delay' had arisen in the mediation of native title claimant applications in various regions of the state, due largely to 'limitations on both the human and financial resources available to carry out the necessary work', including resolving overlapping claims and preparing 'connection material'.<sup>89</sup> Previously established mediation protocols and timetables had not been adhered to.

In its regional reports to the Court, the Tribunal expressed the view that parties had to adopt a more rigorous adherence to the protocols if the applications in the region were to be resolved within reasonable timeframes. The Tribunal proposed draft orders for applications grouped according to sub-regions. The draft orders were intended to expedite the resolution of applications with a particular focus on overlaps. The Tribunal sought to achieve:

- greater use of the Tribunal in the resolution of overlaps
- more intensive mediation of key strategic applications, and
- increased commitment to adherence to mediation protocols.

In indicating that he would make orders substantially in terms of the Tribunal's proposals, Justice French said that the mediation of native title determination applications 'is primarily a matter for the Tribunal'<sup>90</sup> and that Tribunal mediation is 'a central part of the legislative scheme of the

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<sup>86</sup> *Native Title Act 1993* s136G(3B).

<sup>87</sup> *Native Title Act 1993* s86D(3).

<sup>88</sup> [2006] FCA 1811.

<sup>89</sup> [2006] FCA 1811 at [2].

<sup>90</sup> *Franks v Western Australia* [2006] FCA 1811 at [3], see also [4] and *Frazer v Western Australia* (2003) 128 FCR 458.

Act'.<sup>91</sup> Although mediation 'is necessarily consensual', the Court could take appropriate steps 'to ensure the timely progress of mediation under the Act', such as 'orders of reasonable specificity calculated to assist mediation to proceed expeditiously'.<sup>92</sup>

### (f) *Conduct of the parties*

**Parties and agreed outcomes:** The native title scheme expressly favours resolution of claims by agreement. But the Act and the structures created by it cannot compel agreement.<sup>93</sup> It is the parties who will determine whether, what and when any outcomes are agreed in relation to native title claimant applications. What they are willing to put on the table in their negotiations, as well as how they behave towards each other, are critical to the outcomes.

That much was recognised in the Attorney-General's second reading speech on the Native Title Act Amendment Bill where he said: 'Reform of the institutional framework is only part of the solution to achieving more expeditious claims resolution. The Bill introduces measures directed at ensuring parties act responsibly' and making it clear that 'all parties and their representatives must mediate in good faith'.<sup>94</sup>

That proposition echoed statements in a speech made on behalf of the Attorney-General at the native title conference on 26 May 2006 in which he said 'Although it is possible for Governments to adjust the statutory and institutional frameworks, the key to securing efficient and enduring outcomes lies in the behaviour of the parties'.<sup>95</sup>

Before looking at the reforms that relate to parties' behaviour, it might be useful in this context to note the various factors that influence the pace and content of native title mediations. These include:

- the state of readiness of the application (e.g. some applications will need to be amended significantly, or connection reports or comparable information will have to be prepared, before a negotiated outcome can be reached)
- whether claimants want a determination that native title exists (e.g. some claims are lodged to secure procedural rights, and the claimant may not want to proceed to a determination or mediate the claim at that time)
- the number of parties (often scores, sometimes hundreds), and the range of interests and variety of issues involved
- the willingness of the parties to participate in the process (e.g. some parties will be reluctant participants and may resent the process or claim)
- the capacity of parties (and their representatives) to participate in the process (e.g. the financial, professional and other resources available to them, and the priority the

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<sup>91</sup> *Franks v Western Australia* [2006] FCA 1811 at [36].

<sup>92</sup> *Franks v Western Australia* [2006] FCA 1811 at [37], [38].

<sup>93</sup> As Justice French noted recently: 'Mediation is necessarily consensual. No party can be directed to reach agreement about a pending application or any part of it.' *Franks v Western Australia* [2006] FCA 1811 at [37]

<sup>94</sup> Australia, House of Representatives 2006, *Debates*, 7 December 2006, p 17.

<sup>95</sup> 'Native title: the government's proposals for reform', Native Title Conference, Darwin, 26 May 2006, para 25.

representatives give to claims relative to each other and relative to future act and ILUA negotiations)

- the extent to which parties participate personally in the process
- different government policies (between jurisdictions, and within a jurisdiction when governments change)
- the predictability or consistency of the parties' approach to the mediation
- the resolution of threshold issues (e.g. disputed overlapping claims)
- external time constraints or deadlines (e.g. court orders)
- changes in the external environment (e.g. major judicial decisions, pending appeals in test cases, or changes to legislation)<sup>96</sup>
- the operation of state or territory laws.

All those factors are outside the control of the Tribunal, and most of them are within the control of one or more of the parties.

Furthermore, as the consultants observed, there are many claims where the parties have no interest in seeing the matter moved to resolution. The applicants are content to enjoy certain procedural rights without seeking to progress their claim, especially if there is a risk that the claim will not be successful and they will lose procedural rights.<sup>97</sup>

**Good faith requirement:** One of the reforms that has attracted considerable interest and comment is the proposed requirement in relation to 'good faith' mediation.

The scheme contained in the amended Act is, in essence, as follows:

- Each party and each party's representative 'must act in good faith' in relation to the conduct of the mediation.<sup>98</sup>
- If the presiding member of the Tribunal considers that a party or a party's representative 'did not act or is not acting in good faith' in relation to the conduct of a mediation, the presiding member may report that failure to the person or body specified.<sup>99</sup>
- If the presiding member considers that a party or a party's representative 'did not act or is not acting in good faith' in relation to the conduct of a mediation, the presiding member may report that failure to the Federal Court.<sup>100</sup>
- The protection of 'without prejudice privilege' provided in relation to words spoken or acts done at a mediation conference<sup>101</sup> does not apply to those reports to the Federal Court or a legal professional body.<sup>102</sup>

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<sup>96</sup> The decisions of the High Court in 2001 and 2002 on the final appeals in a series of test cases (after many years of litigation) clarified the law on key issues, opening the way for potential settlements in other cases. The implications of those judgments for governments' policies took some time to settle. The subsequent contentions by some parties that judges of the Federal Court have not correctly applied the principles set out by the High Court have led to a further series of appeals.

<sup>97</sup> G Hiley and K Levy, *Native Title Claims Resolution Review*, 31 March 2006, paras 4.120-4.122.

<sup>98</sup> *Native Title Act 1993* s136B(4).

<sup>99</sup> *Native Title Act 1993* s136GA(1)-(3), (7), (8).

<sup>100</sup> *Native Title Act 1993* s136GA(4), (7), (8).

<sup>101</sup> *Native Title Act 1993* s136A(4).

<sup>102</sup> *Native Title Act 1993* s136GA(3), (4).

- If the presiding member considers that a Commonwealth, state or territory government party or that party's representative 'did not act or is not acting in good faith' in relation to the conduct of a mediation, the annual report of the Tribunal may include details of that failure and 'the reasons why the presiding member considers that the conduct was not in good faith'.<sup>103</sup>

The obligation to act in good faith will provide an incentive to improve behaviour and to focus the attention of the parties and their representatives on the seriousness of the mediation process and the need to approach mediation in a professional manner and with a spirit of good will.

Because a number of concerns have been expressed about the good faith provisions, it might be useful to refer briefly to:

- the current good faith requirement in the Native Title Act
- requirements to mediate in good faith in other Australian legislation, and
- the potential content of the good faith obligation.

**Current good faith requirement in the Native Title Act:** The inclusion of a good faith requirement in relation to native title proceedings is not new. The Native Title Act already requires, in the context of the right to negotiate regime, all negotiation parties (the government party, the native title party and the grantee party) to negotiate in good faith.<sup>104</sup> The Tribunal is regularly required to rule on whether parties have negotiated in good faith in order to ascertain if the Tribunal has jurisdiction to arbitrate in relation to the dispute.<sup>105</sup>

The content of the obligation to negotiate in good faith in that context has been the subject of numerous Federal Court decisions and Tribunal determinations.<sup>106</sup> As early as 1996 the Tribunal outlined indicia for guidance in determining if a party was negotiating in good faith.<sup>107</sup>

The indicia of good faith for the mediation of claimant applications have yet to be developed. Some of those indicia may be different from the indicia in relation to shorter, more targeted commercial negotiations with respect to high impact exploration or the right to mine. Nonetheless, the concept of acting in good faith has been embedded in the Native Title Act since its commencement, and practitioners operating in the native title system would, or should, be aware of the concept of good faith. The requirement to act in good faith in claim mediation is simply the extension of a well settled and accepted concept in the right to negotiation scheme.

**Requirement to mediate in good faith in other Australian legislation:** The requirement to negotiate or mediate in good faith has increasingly been inserted in legislation at both a Commonwealth and State level.

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<sup>103</sup> *Native Title Act 1993* ss136GB, 133(2A).

<sup>104</sup> *Native Title Act 1993* s 31.

<sup>105</sup> *Native Title Act 1993* s 36(2).

<sup>106</sup> The most significant Federal Court decisions are: *Risk v Williamson* (1998) 87 FCR 202, *Strickland v Minister for Lands (WA)* (1998) 85 FCR 303, *Walley v Western Australia* (1999) 87 FCR 565 and *Brownley v Western Australia (No 1)* (1999) 95 FCR 152.

<sup>107</sup> *Western Australia v Taylor* (1996) 134 FLR 211, at 225.

The *Administrative Appeals Tribunal Act 1975* was amended in 2005<sup>108</sup> by inserting a requirement that when a matter is referred for alternative dispute resolution 'each party must act in good faith in relation to the conduct of the alternative dispute resolution concerned'.<sup>109</sup>

In almost every Australian state there were provisions in industrial relations and other legislation requiring negotiations to be done in good faith. There is also a requirement to mediate in good faith in the New South Wales *Farm Debt Mediation Act 1994*. Of more significance is the requirement for good faith mediation which has been a feature of the New South Wales Supreme Court since 1994. In that state a judge may refer any proceedings for mediation by a mediator. It is the duty of each party to participate in good faith in the mediation.<sup>110</sup> The relevant provisions in the New South Wales legislation have been the subject of judicial interpretation.

**Content of the obligation:** The Bill does not define what constitutes 'good faith'. Acting on a recommendation of the claims resolution review, the Attorney-General's Department is currently working on a proposed code of conduct. The Tribunal is cooperating with the Department in the preparation of such a code. The Tribunal considers that if there is to be an obligation to act in good faith, the parties and their representatives should be provided with guidance on what will be expected of them. The Department is preparing a draft document to send to the States and Territories, the representative bodies, industry bodies, the Federal Court, the Tribunal and the Aboriginal and Torres Strait Islander Social Justice Commissioner for comments.<sup>111</sup>

In addition to any code that may be developed, the President of the Tribunal is preparing a direction pursuant to section 123 of the Native Title Act that will give guidance to Tribunal members on the procedures to be followed when deciding whether a party or their representative has not acted or is not acting in good faith, or whether to make a report on an alleged breach of good faith pursuant to new sections 136GA and 136GB.

The Tribunal will adopt transparent practices aimed at ensuring a consistency of approach amongst members and in a manner that will ensure that all parties and their representatives are accorded procedural fairness.

Some general observations can be made at this stage. It is not a failure to act in good faith if there is a legitimate basis for a party behaving in a particular manner. For example, a party may refuse to mediate on the basis that there are points of law requiring clarification before substantive mediation could proceed or because the native title application is fundamentally flawed. However, the party refusing to mediate should explain their position to the presiding member.

Any lawyer appearing at a mediation conference should be able to clearly and properly articulate the party's position in relation to the issues to be discussed at the conference. If they cannot do so,

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<sup>108</sup> The amendment was made by Act No 38 of 2005.

<sup>109</sup> *Administrative Appeals Tribunal Act 1975* ss 34A(5), 34B(4).

<sup>110</sup> *Civil Procedure Act 2005* (NSW) s 27.

<sup>111</sup> See Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Estimates, Proof Committee Hansard*, 24 May 2007, p 37.

they should say so and explain why they have not obtained or have been unable to obtain instruction.

It is conceded that the insertion of an obligation to act in good faith is not a 'silver bullet' that will immediately turn around all mediations. Importantly, however, the Tribunal sees the insertion of an obligation to act in good faith as bolstering the chance of a successful mediation. Accordingly, the reporting of a breach of this obligation is a serious step to be taken only when necessary to preserve the integrity of the mediation process.

*(g) Lack of a regional perspective to planning and prioritising the resolution of claimant applications*

Experience has shown that the most effective and efficient way of managing hundreds of native title applications through the native title system is to adopt a state-wide or regional approach. Although each native title application is unique, there are many common factors affecting the potential resolution of each claim in a state or region. For example, each native title representative body has numerous claims in its area, each State or Territory is a respondent to every claim in its jurisdiction, many claims overlap one or more other claims, and some parties or their representatives are involved in numerous claims. The Federal Court and the Tribunal recognise that limits on financial and human resources and a range of other factors affect the progress of individual claims or clusters of claims.

The Federal Court and the Tribunal are moving toward a more regional approach to claim management. The Tribunal is assessing every claimant application as part of its new National Case Flow Management Scheme. Each claimant application will be allocated (or reallocated) to the Registrar's List, Regional List or Substantive List. The process will ensure that the Tribunal operates from a regional basis in adopting a nationally consistent approach to case flow management and the allocation of its resources.

Recent amendments to the Native Title Act empower the Tribunal to provide the Federal Court with:

- a report on the progress of all mediations conducted by the Tribunal in relation to areas within a State, Territory or region (a 'regional mediation progress report')
- a work plan setting out priority given to each mediation being conducted by the Tribunal in relation to areas within the State, Territory or region (a 'regional work plan').<sup>112</sup>

Such reports are provided to assist the Court in progressing proceedings in a State, Territory or other region of Australia<sup>113</sup> and may be provided on the initiative of the Tribunal or at the request of the Court.<sup>114</sup>

The preparation and presentation of regional work plans and regional mediation progress reports have the potential to substantially improve how claimant applications are prioritised and

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<sup>112</sup> *Native Title Act 1993* s136G(3A).

<sup>113</sup> *Native Title Act 1993* s136G(3A).

<sup>114</sup> *Native Title Act 1993* ss86E(2), 136G(2A).

progressed in regions. The amendments to the Act formalise a useful practice that has developed in parts of the country in recent years.<sup>115</sup> It will confirm the role of the Tribunal in working with native title representative bodies and parties in a region to prioritise work on claims and optimise the allocation of scarce resources. Such planning takes the focus off the progress of individual claims and onto the relationship between claims in a region, allowing longer term prioritisation and planning to be more transparent for all the participants. It may be appropriate to involve the relevant funding agencies in such planning to secure programs that can be delivered. The support of the Court will be necessary for this regional process to succeed.

### *(h) Communication between the Tribunal and the Federal Court*

The consultants made various recommendations about improving communication between the Tribunal and the Federal Court. Such communication, by formal and informal means, can improve coordination between the institutions.<sup>116</sup> The Attorney-General has also stressed the need for better communication between the Tribunal and the Court. Various amendments are aimed at formalising and facilitating such communication.

**Tribunal's right of appearance before the Court:** The Tribunal has been given the right to appear before the Court at a hearing in relation to a matter while that matter is with the Tribunal for mediation for the purpose of assisting the Court in relation to a proceeding.<sup>117</sup> The Tribunal may also appear at a hearing to determine whether a matter should be referred to the Tribunal.<sup>118</sup> The President of the Tribunal has the power to direct who will appear before the Court to represent the Tribunal.<sup>119</sup>

The right to appear is not subject to the leave of the Court. In some circumstances the person who appears on behalf of the Tribunal will be subject to the agreement of relevant parties.<sup>120</sup> A person appearing before the Court on behalf of the Tribunal is subject to the 'without prejudice' privilege in relation to what is said or done at a mediation conference or in the course of a review.<sup>121</sup>

**Tribunal's reports to the Court:** The types of reports that the Tribunal may (or must, as the case may be) make to the Court has been expanded. In addition to mediation progress reports in relation to individual claimant applications,<sup>122</sup> the following reports may be made:

- regional mediation progress reports<sup>123</sup>
- regional work plans<sup>124</sup>

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<sup>115</sup> See e.g. *Franks v Western Australia* [2006] FCA 1811.

<sup>116</sup> G Hiley and K Levy, *Native Title Claims Resolution Review*, 31 March 2006, paras 4.43-4.56, Recommendations 5-8.

<sup>117</sup> *Native Title Act 1993* s86BA(2).

<sup>118</sup> *Native Title Act 1993* s86BA(1).

<sup>119</sup> *Native Title Act 1993* s123(1)(ca).

<sup>120</sup> *Native Title Act 1993* s136GC(8) and (12) (a member who has conducted a review or assisted in the conduct of a review of whether a native title claim group holds native title rights and interests), s138C(2) (a member who has conducted or assisted at a native title application inquiry).

<sup>121</sup> *Native Title Act 1993* ss136A(4), 136GC(7), 86BA(3).

<sup>122</sup> *Native Title Act 1993* ss86E(1), 136G(1), (2) and (3).

<sup>123</sup> *Native Title Act 1993* ss86E(2)(a), 136G(2A), 136G(3A)(a).

- reports concerning a failure to comply with a direction of the presiding member<sup>125</sup>
- reports on the failure to act in good faith in relation to a mediation.<sup>126</sup>

The Court is required to take the reports or work plans into account in determining whether mediation should cease.<sup>127</sup> More significantly, the Court is required to take into account any Tribunal reports made under the relevant section of the Act when it decides whether to make an order relating to an application that has been referred to the Tribunal for mediation.<sup>128</sup>

**Other communication:** The consultants recommended that other means of communication be used to improve coordination between the Court and the Tribunal. These could include individual user group meetings and regional call-overs involving the Tribunal, as well as informal meetings between the Chief Justice, provisional docket judges and the President and members of the Tribunal.

Various options for improved communication are being discussed by representatives of the two institutions including jointly convened user group meetings.

## 5. Other changes to law and practice

It is useful to highlight the interrelationship of various other parts of the proposed legislative and administrative reforms to assess possible practical implications for the system.

### *(a) Registration testing applications, dismissal of claims that fail merit conditions*

In the first year or so after the amendments commence, the Native Title Registrar is required to apply the registration test to categories of claimant applications that have been registration tested and are not on the Register of Native Title Claims, or that have never been registration tested. Particular focus will be on whether each application satisfies all of the ‘merit’ conditions in section 190B of the Act.

These provisions are aimed at removing native title applications from the system where the claims made in the applications do not meet (and are not amended to meet) the merit requirements of the registration test and, in the opinion of the Court, there is ‘no other reason why the application in issue should not be dismissed’.<sup>129</sup>

It is clear that the Court will have considerable discretion in this matter and it remains to be seen how the Court will exercise that discretion. The net result could be either that some claimant

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<sup>124</sup> *Native Title Act 1993* ss86E(2)(b), 136G(2A), 136G(3A)(b).

<sup>125</sup> *Native Title Act 1993* s136G(3B).

<sup>126</sup> *Native Title Act 1993* s136GA(4).

<sup>127</sup> *Native Title Act 1993* s86C(5).

<sup>128</sup> *Native Title Act 1993* s94B.

<sup>129</sup> *Native Title Act 1993* s190D(7).

applications are amended to comply with the registration test and hence be in better shape for substantive mediation or they will be removed from the system, with potential for better prepared claims to be made in the future. However, the process will necessarily divert some of the resources of the native title claim groups whose claims are affected, their representatives, the Registrar and potentially the Federal Court. Where native title claim groups are represented or supported by a representative body, that body will presumably be using resources that would otherwise be directed to its other statutory functions, such as progressing claimant applications.

### *(b) Dismissal of some applications lodged in response to future act notices*

Another provision relates to certain registered native title applications lodged in response to future act notices under section 29 of the Act (or alternative state or territory provisions).

Subject to specified conditions, if the future act(s) in respect of which the application was filed is finalised the Court must, on its own motion or on application of a party, dismiss the application.<sup>130</sup> The conditions are either that:

- the applicant has failed:
  - to produce evidence in support of the application despite a direction of the Court to do so; or
  - to take other steps to have the claim resolved despite a direction of the Court; or
- in other cases, the Court considers the applicant has failed, within a reasonable time, to take steps to have the claim resolved.<sup>131</sup>

The application must not be dismissed before the applicant is given a reasonable opportunity to present their case about why the application should not be dismissed.<sup>132</sup> Further, the application must not be dismissed if there are compelling reasons not to do so. The fact that further future act notices have been given over any of the area covered by the application and those future acts have not been finalised is not, of itself, a compelling reason.<sup>133</sup>

The Native Title Registrar will be empowered to seek advice from the relevant government officials as to whether a future act, the notice of which triggered the filing of an application, has been finalised. The Registrar may then advise the Registrar of the Federal Court of any application which satisfies the statutory requirements.<sup>134</sup>

The administration of those aspects of the amended scheme will also use some of the resources of the applicants and their representatives, governments, the Tribunal and the Court.

### *(c) Funding of respondent parties*

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<sup>130</sup> *Native Title Act 1993* s94C.

<sup>131</sup> *Native Title Act 1993* s94C(1)(e).

<sup>132</sup> *Native Title Act 1993* s94C(2).

<sup>133</sup> *Native Title Act 1993* s94C(3).

<sup>134</sup> *Native Title Act 1993* ss66C, 94C(1).

Section 183 has been amended to allow funding to be given to grantee parties and prospective grantee parties to allow the development and review of standard form agreements in relation to right to negotiate future acts.

That modest legislative change should not be taken as indicating the extent of the change to respondent funding under that section of the Act.

One of the potentially most significant reforms in terms of the behaviour of parties is the new set of *Guidelines on the provision of financial assistance by the Attorney-General under s 183 of the Native Title Act 1993*.

The Guidelines are administrative procedures which did not require amendment of the Act. They came into force on 1 January 2007 and replaced guidelines which had operated since 30 November 1998. The aim of revising the Guidelines was to encourage the resolution of native title matters through agreement-making, rather than litigation, wherever possible.

The Guidelines relate to financial assistance that the Attorney-General may make to respondent parties in relation to native title inquiries, mediations or proceedings, or persons entering into an ILUA or an agreement about rights under subsection 44B(1) of the Act (rights of access for traditional activities), who are not members of the native title claim group concerned.<sup>135</sup>

The Guidelines specify:

- the scope of assistance that can be applied for under section 183 eligibility criteria;
- the form and requirements of making applications for assistance;
- the type of assistance that can be authorised under section 183; and
- the conditions applicable to any assistance that is authorised and rights of review on decisions in relation to applications for assistance.

The type of assistance that may be authorised includes:

- assistance to a group representative or a native title officer engaged by a group representative
- costs of legal services, including paralegal and articulated clerk costs
- reasonable travel costs
- anthropologist fees.<sup>136</sup>

The Guidelines have been revised and strengthened to incorporate a number of features designed to encourage agreement-making in preference to litigation including:

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<sup>135</sup> Section 183 of the *Native Title Act 1993* prohibits the Attorney-General from providing assistance to government Ministers, native title holders or claimants and claimants for compensation in relation to native title. Their funding is dealt with under Div 4, Pt 11 of the Act.

<sup>136</sup> Part 8 of the Guidelines.

- authorising assistance in stages of six to 12 months, or shorter timeframes, to facilitate improved and more transparent planning by funded parties focussed on achieving outcomes<sup>137</sup>
- varying or terminating assistance if a grant recipient fails to act reasonably by not endeavouring to reach a reasonable agreement with a claimant<sup>138</sup>
- limiting the circumstances in which financial assistance for court proceedings is provided<sup>139</sup>
- strengthening reporting requirements imposed on grant recipients to include strategies to resolve issues in dispute,<sup>140</sup> and
- assisting in the drafting and development of an agreement or ILUA through access to agreements and ILUAs funded under the scheme, in which the Commonwealth retains a licence to use, adapt and exploit.<sup>141</sup>

The new Guidelines require reports to the Attorney-General's Department, generally at the end of each grant period. A report must be provided at the conclusion of a stage or upon settlement of the matter. Reports at the conclusion of a stage must contain information about:

- (a) what has happened during a stage or since the last report; and
- (b) what is anticipated to happen in the next stage; and
- (c) what issues are still in contention and the reason why they are still in contention; and
- (d) how it is proposed to resolve those issues; and
- (e) whether agreement is likely in respect of those issues; and
- (f) what legal advice has been provided about the prospects of reaching agreement on those issues.<sup>142</sup>

By accepting the grant, the applicant agrees to disclose to the Department the terms of any settlement in relation to the matter for which the provision of assistance has been authorised. This may require the reporting of information concerning mediation conferences, ILUA negotiations or future act inquiries. I am currently preparing directions for Tribunal members about how that might be managed.

## 6. Conclusion

Fifteen years after the High Court's historic *Mabo (No 2)* judgment, the native title system has delivered a range of positive outcomes for many Indigenous Australians. The judgments delivered and the agreements reached have provided a platform for future developments. But they have come at significant financial and emotional costs. As has often been observed, many people have died before seeing their native title claims resolved.

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<sup>137</sup> Guidelines sections 36-38.

<sup>138</sup> Guidelines sections 43-46.

<sup>139</sup> Guidelines section 19.

<sup>140</sup> Guidelines sections 81-83.

<sup>141</sup> Guidelines sections 96-98.

<sup>142</sup> Guidelines section 9.2.2.

The challenge for all of us is to find ways to reach just and enduring outcomes in a timely and more efficient manner for the hundreds of current native title applications and those that are to come.

The current legislative and administrative reforms have the potential to assist in achieving that objective.

The aim of the amendments is to create a more transparent process and to ensure that a spotlight is directed towards the mediation performance of *all* concerned, thereby providing some incentive to move matters forward.

It would be unwise to focus too much on the institutional aspects of the reforms (such as the powers and functions of the Tribunal) as providing the way forward. Rather the focus should be on how the parties can work together to secure just and enduring outcomes in a timely way. The additional powers and functions are tools to assist parties to reach that objective. The Tribunal and the Court will work with each other and with the parties to promote just and enduring outcomes by agreement where possible.

The history of long and expensive litigation (some of which has resulted in the insolvency of some native title representative bodies) informs the need for a more rigorous agreement-making regime.

The parties, their representatives, the Federal Court and the Tribunal must work together so that, where possible, just and enduring outcomes can be agreed and we can together play a part advancing what the Preamble to the Native Title Act calls 'the process of reconciliation among all Australians'.