Native Title Amendment Bill 2006

Kirsty Magarey
Law and Bills Digest Section

Contents

Purpose........................................................................................................................................1

Background..................................................................................................................................1

   Basis of policy commitment .................................................................................................1

   Position of significant interest groups/press commentary .................................................4

General Concerns ..................................................................................................................4

Review Mechanisms/Government Control ..........................................................................4

Limited Periods of Recognition ............................................................................................5

Indigenous bodies/bodies incorporated under the Corporations Act 2001..........................6

Registration Test and dismissal of claims ..........................................................................7

The role of the National Native Title Tribunal ....................................................................7

Financial implications ..........................................................................................................7

Main provisions ...................................................................................................................8
Native Title Amendment Bill 2006

Date introduced: 7 December 2006
House: House of Representatives
Portfolio: Attorney-General

Commencement: The majority of the provisions will commence on Royal assent, but Schedule 3, item 5 will commence immediately before Schedule 1 of the Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006 (currently scheduled to be 1 July 2007).

Purpose

− to amend the rules of recognition for Native Title Representative Bodies and make other changes to their regulation;
− to make changes to the Claims Resolution Review, including giving the National Native Title Tribunal power to make directions;
− to increase the fluidity of the Prescribed Bodies Corporate, and
− to amend the scope of the respondent funding scheme.¹

Background

Basis of policy commitment

In September of 2005 the Attorney-General announced his intention of modifying a range of provisions in the mechanics of the Native Title process.² He emphasised that the changes were not designed to effect the substance of the Native Title legislation, but would be focussed on ensuring quicker, more satisfactory outcomes for all concerned.³

Having made the announcement in September 2005 the Attorney-General and his Department (and the Department of Family, Community Services and Indigenous Affairs) engaged in extensive consultations before introducing this Bill in the subsequent year.

On 7 December 2006, the Senate referred the provisions of the above Bill to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 23 February 2007. Submissions were called for and required to be submitted by 19 January 2007.

The submission by the Attorney-General’s Department to the enquiry by the Senate Legal and Constitutional Affairs Committee detailed their consultations and commented:

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
The reforms have been advanced through a consultative and participatory process. Extensive consultation informed the preparation of the Claims Resolution Review, the examination of PBCs and the review of the respondent funding guidelines. The process for the development of technical amendments has involved the public circulation of two discussion papers, and has been strongly informed by proposals from stakeholders across the system [The Government has foreshadowed the introduction of a ‘technical amendments’ Bill in early 2007]. Key stakeholders have also been consulted on the proposals to ensure NTRBs operate effectively.

The Mineral Council of Australia nevertheless identify a lack of consultation with respect to this Bill’s particular set of changes, which they contrast with other elements of the Attorney-General’s proposed changes and the consultation involved. Furthermore the time-frame for the inquiry into the final form of this legislation and its precise approach to implementing policies is arguably too short, in contrast to the more consultative nature of some of the government’s other preparatory work.

The Submission of the National Native Title Council to the Senate Legal and Constitutional Affairs Committee's Inquiry into the provisions of this Bill, pointed out that despite the fact there are still many unresolved claims for native title, progress had been made in the resolution of native title claims and that the Native Title Claims Resolution Review (the Hiley-Levy Report, 31 March 2006) reported that as at 17 January 2006, of a total of 1683 claims filed, 1062 have been resolved in one way or another, leaving current applications at only 621.

There are two primary bodies dealt with in this Bill: Native Title Representative Bodies (NTRBs) which represent the native title interests of Indigenous Australians in a particular region. In general NTRBs play a more active role in the establishment phase of native title claims, assisting and allocating funds and priority to the various native title claims in the area. The other bodies the Bill deals with are ‘prescribed bodies corporate’ (PBCs). When the court makes a determination that native title exists, native title holders are required by the Native Title Act 1993 (the NTA or the Native Title Act) to establish a body corporate to represent them as a group and manage their native title rights and interests.

The Annual Report of the National Native Title Tribunal observed that, at the end of its most recent reporting period [2005-2006] there were 21 representative body areas with 14 recognised representative bodies for 15 of those areas. (See Map at Attachment A). There continued to be no representative body for southern Queensland, New South Wales or Victoria. Much of the representative body work, however, was undertaken by Queensland South Native Title Services Ltd, New South Wales Native Title Services Ltd and Native Title Services Victoria Ltd respectively. The Annual Report also observed with respect to PBCs:

there were [currently] 60 registered determinations that native title exists. As more such determinations are made and large areas of the country are subject to those determinations, … PBCs are assuming increasing importance as the bodies with whom other people should negotiate in relation to use of those areas of land.

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
The level of funding (and the arrangements between the PBCs and the NTRBs) has been an issue over quite a period. Again the Native Title Tribunal’s most recent Annual Report observed:

For some years, there have been concerns about the perceived inadequacy of the human and financial resources available to representative bodies to perform their functions. In March 2006 the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account (the PJC) reported on the operation of representative bodies…

The Majority Report of the Parliamentary Committee referred to above recommended:

that the Commonwealth immediately review the adequacy of the level of funding provided by the [Office of Indigenous Policy Co-ordination] to NTRBs for capacity building activities including management and staff development, and information technology.

The Minority Report was more strongly worded, saying:

The evidence submitted to the Committee on the impact of chronic NTRB underfunding was prolific, forceful and emanated from a variety of stakeholders including the minerals sector. The Minerals Council of Australia noted that while reporting requirements had increased significantly in the past few years, there had been no real increase in operational funds since 1995. This meant that NTRBs had less money to carry out its functions on the ground. The Council also commented that the workload of NTRBs had risen steadily as the number of native title claims and mining applications proliferated.

The [Majority] Report canvasses a wide range of these concerns, noting the impact of under-resourcing on the minerals sector, the native title system and community development in Indigenous communities. But this acknowledgement did not translate into a recommendation for an immediate increase in funding. The weight of the evidence presented to the inquiry warrants a recommendation that the level of funding be increased immediately, and then reviewed.

The Minerals Council has again raised their concerns over funding in the course of the inquiry into the current Bill, while the Human Rights and Equal Opportunities Commission’s Aboriginal and Torres Strait Islander Social Justice Commissioner (HREOC) summarised his concerns in the following manner:

Inadequate funding of representative bodies has had the cumulative effect of undermining NTRB’s capacity to protect Indigenous interests in the native title process. Accordingly, it has diminished the extent to which Indigenous people can enjoy their land, their culture, and the social, economic and political structures built upon them. In effect, it has diminished Indigenous peoples’ enjoyment of their human rights.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments. This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*
The need to increase NTRB funding has been recommended in the reports and reviews of government agencies, parliamentary committees, state governments and industry. Despite the recommendations to this effect of the Parker Report (1995), the Love-Rashid Review (1999) and the Miller Review (2002), NTRBs have not received funding increases. In fact, if these reforms are implemented, NTRBs will require further funds, as it is likely that their obligations and functions will change.  

The Native Title Act 1993 (NTA) does not envisage that the Government funds native title claims directly, but instead funds the representative bodies. The Government does, however, fund respondent bodies and this Bill broadens that process. There were guidelines approved by the Attorney-General in relation to applications for financial assistance for native title matters. One of the key features of the guidelines has been that assistance is available to a person or organisation for mediation of native title matters and for negotiation of Indigenous land use agreements. Other key features were that:

- Assisted parties were not required to make their own contributions.
- The 'hardship' test [was] removed from the Act.  

The Attorney-General’s Department has issued new draft funding Guidelines which will modify these rules again and introduce more strenuous consideration of whether respondent parties are in a position to self-fund.

Position of significant interest groups/press commentary

A number of submissions to the Senate Committee inquiring into this Bill have indicated satisfaction with the Bill as it stands. The National Farmers Federation, the Australian Petroleum and Exploration Association Limited, and the Western Australian Local Government Association are all happy with the Bill as it stands. Furthermore a broader range of parties are also approving of individual amendments the Bill seeks to introduce, for instance the provisions allowing for greater fluidity in PBC boundaries and responsibilities seems generally approved. However there are also a number of submissions expressing concerns over a range of issues.

General Concerns

Review Mechanisms/Government Control

There are concerns expressed by a range of bodies that there may be insufficient mechanisms for a review of Ministerial or bureaucratic decisions in this area. HREOC expressed concerns that, while appropriate accountability for NTRBs is important, they have already been subjected to an unusual amount of scrutiny, and the de-recognition process needs to be done according to ‘clearly defined and transparently adjudicated’ criteria. In particular they were concerned regarding the rights of review that NTRBs will have under the changes. There are currently minimal rights of review over Ministerial

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
discretion, and while those decisions must be taken according to set criteria, the proposed amendments would remove some of the considerations to be included in those criteria.

The Office of Native Title – Western Australia, amongst its thoughtful set of nine recommendations concerning the Bill, suggest that the Commonwealth should give further information about why the statutory criteria, which previously underpinned the Minister’s decisions regarding recognition of a NTRB (i.e. satisfactory representation and consultation), have been removed by the Bill.

These amendments regarding the recognition and the withdrawal of recognition of representative bodies are declared by the Bill as ‘legislative instruments’. Standardly a legislative instrument is subject to disallowance (unless the Legislative Instruments Act 2003 (LIA) applies to exempt them from the disallowance provisions, or unless Regulations under the LIA have introduced an exception to the principle that instruments are disallowable). The amendments specify that three types of decisions by the Minister are legislative instruments:

**proposed ss.203AD(1)** (under which a Minister can recognise a representative body),

**proposed ss.203AH(1)** (under which a Minister withdraws recognition from a defunct body or a body which has asked to have recognition withdrawn); and

**proposed ss.203AH(2)** (under which a Minister withdraws recognition due to unsatisfactory performance or financial irregularities).

Only ss.203AH(1) falls within the exemption to the disallowance provisions.19 Thus decisions under ss.203AD(1) and ss.203AH(2) will be disallowable instruments, providing some form of review for such decisions.

As the decisions by the Minister are made by legislative instrument they are no longer subject to review under the Administrative Decisions (Judicial Review) Act 1977(ADJR Act). HREOC have raised concerns regarding these arrangements. They argue that by removing such decisions from the operation of the ADJR Act the Bill does severe damage to representative bodies. They argue that the only avenue for judicial review when a legislative instrument has been utilised is by prerogative writ, which is cumbersome and expensive. Furthermore by subjecting them to disallowance proceedings:

> the proposed amendment would politicise recognition decisions, making them vulnerable to inappropriate public comment and potential political disruption in what should be a principled and predictable administrative process.20

**Limited Periods of Recognition**

Another area of concern has been the length of time for which a representative body is recognised. The Mineral Councils of Australia has also recommended that the periods of

---

**Warning:**

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
recognition for a representative body be 3-6 years rather than the proposed 1-6 years. For reasons of capacity building, certainty and stability, they are concerned that recognition for periods of under three years would be inadequate.21 AIATSIS have said the same, while John Basten has commented more broadly that:

Representative bodies require a range of skills and expertise to perform their functions properly. Internally, managerial, accounting and administrative skills are at a premium. In addition, they require specialist professional services from anthropologists, land managers and lawyers. It is likely that such organizations will take years to develop critical levels of administrative competence, not merely to perform their functions adequately, but to provide a work environment in which trained professionals will feel comfortable and will remain without unduly high levels of turnover.22

HREOC has previously suggested that NTRBs should be closely consulted about de-recognition processes. In particular they have highlighted their concerns as follows:

It is essential that unsatisfactory performance and financial irregularities be clearly defined and transparently adjudicated. If not, de-recognition processes could place NTRBs in the invidious position of having to find legal representation themselves in order to defend their existence as well as provide legal representation to their clients. Should this occur, the drain on capacity and resources will have a detrimental effect on native title outcomes for Indigenous peoples.23

Indigenous bodies/bodies incorporated under the Corporations Act 2001

HREOC has expressed concerns with respect to the extension of recognition to bodies incorporated under the Corporations Act 2001. In particular they say there is a danger that indigenous people's right to effective participation may be compromised where the body playing the role of a NTRB is not representative.24

One of the submissions to the Senate Committee is from Dr James Weiner, an anthropologist with an academic history who has worked in the area of native title for many years. As well as expressing concern at the Bill’s provisions which may ‘place further fissiparous pressures on claim groups already struggling to maintain collective unity in the face of a variety of native title related demands,’25 he also suggests that centralising PBC administration ‘may encourage a degree of amalgamation of authority at odds with the more locally-acquired and exercised forms of authority more in keeping with Aboriginal law and custom as it operates today.’26

The National Native Title Council, representing NTRBs and native title service providers, ‘absolutely opposes the idea that non-Indigenous bodies should take up the role of representative bodies.’27

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
Registration Test and dismissal of claims

HREOC’s submission to the Senate Inquiry is detailed and closely argued and it rejects a large number of the proposed amendments for a variety of reasons, while recommending amendments to a number of others. Possibly their most significant concern regards what they call the ‘summary dismissal of certain native title applications.’ They regard the provisions as singular and possibly racially discriminatory in that they provide a uniquely limiting function, including restricting the Federal Court’s discretion to dismiss applications that are, effectively, not well formulated. Courts generally have a power to dismiss an ill-prepared application in any event, and there are already specific provisions in the NTA to allow inappropriate claims to be dismissed. HREOC also considers that the presumption that claims are being made for the wrong reasons (i.e. to attract a right to negotiate rather than in the hope of actually establishing a claim) is inappropriate.

The role of the National Native Title Tribunal

The Federal Court, echoing the concerns in some other submissions, argue that the amendments giving the National Native Title Tribunal (the NNTT) greater directive powers is an inappropriate legal/constitutional arrangement because it is likely to both increase administrative costs (because ultimately the Court will need to enforce the NNTTs new powers if they are to be effective) and may violate the Constitution by giving judicial powers to a body which is primarily administrative in nature. They also argue that coercive powers are inappropriate in a mediation setting and that the Court’s power to mediate should not be restricted while the Tribunal is mediating a matter (as the amendments propose to do).

There are a wide range of other concerns, but these will presumably be examined more closely in the Senate Report. Unfortunately debate in the House is scheduled for a time when the Report is still in its preparatory stages.

Financial implications

The Explanatory Memorandum reports there will be no direct financial impact on Government revenue, however the question of Government funding in this area is very much a live issue for interested parties (see further in ‘Background’).
Main provisions

There are four areas of amendment introduced by the Bill, dividing into the four Schedules of the Bill:

- Schedule 1—Amendments relating to representative Aboriginal/Torres Strait Islander bodies
- Schedule 2—Claims resolution review
- Schedule 3—Amendments relating to prescribed bodies corporate
- Schedule 4—Funding under section 183 of the Native Title Act 1993

Schedule 1: Amendments relating to representative Aboriginal/Torres Strait Islander bodies

The constitution, role and recognition of representative bodies

**Item 1 of Schedule 1** introduces a new definition of an ‘executive officer’ which covers not only a director or manager of a representative body but also someone (or a corporation) playing a similar role in a corporate body. This corporate body need not be a representative body (i.e. the functions could be played by any incorporated body under the *Corporations Act 2001*) but must be performing some or all of the functions of a representative body (a representative body has formerly been a representative Aboriginal/Torres Strait Islander body which has represented the interests of the native title holders of the relevant area and performed other functions under the NTA). This provision plays an important role in the existing s.203FD which provides that an executive officer is not personally liable in relation to an act done in good faith in the performance of the representative body’s functions.

**Items 2—4** are mechanical amendments which stipulate the ‘transition period’ as starting on commencement (i.e. on Royal Assent) and ending on the 30 June 2007. **Item 6** also defines the ‘transitional’ areas for which a representative body is (or is not) responsible and provides that if these areas are varied the relevant area to consider is the area as varied.

A crucial change is made by **item 5**, which introduces a new criteria which can qualify a body to be an “eligible body”, a definition which is subsequently used to define which bodies can apply and be accepted by the Minister to be representative bodies. As mentioned above, a new criteria for qualification as an eligible body under s.201B is incorporation under the *Corporations Act 2001*.

**Item 7** gives the Minister, when issuing an invitation to apply to be a representative body, a discretion to stipulate a period of recognition of between one year and six years.

---

**Warning:**
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
In contrast with item 7, item 8 (which deals with inviting applications from pre-existing representative bodies) mandates the requirement that the Minister must specify the period (once again between 1-6 years) for which recognition of the representative body will be extended. Item 8 also provides that, as soon as possible (but not necessarily all at once) invitations must be issued to the pre-existing representative body, using a definition of a ‘transitionally affected area’, i.e. that if there have been modifications to the areas represented by particular bodies then the Minister must issue his/her invitation in accordance with the modified boundaries. No other invitations are to be issued for these areas, although under proposed subsection 203AA(6), the Minister may make further invitations if the relevant body does not apply for recognition within the ‘relevant application period’ (ss.203A(3) provides that this application period is to be specified by the Minister and must be at least 28 days). According to modifications proposed by item 9, it is only the representative body to which an invitation has been made who may apply for recognition (once again it is taken to apply as if for a transitionally affected area).

Pre-existing section 203AC has provisions regarding the time-frame within which the Minister must make a decision regarding an application to be a representative body. Item 10 inserts a provision (ss.203AC(1A)(b)) which governs appropriately issued invitations and requires the Minister’s decision to be made before the end of the transition period.

Items 11-17 modify section 203AD. In a change which applies across a number of provisions, the Minister is required to issue legislative instruments when recognising representative bodies (rather than simply doing so in writing, e.g. item 12). The requirement that the representative body ‘will satisfactorily represent persons’ who hold native title and will be able to ‘consult effectively’ with Aboriginal and Torres Strait Islanders living in the area is removed. The provisions which remain define who the Commonwealth Minister may recognise as a representative body by providing that the body must be satisfactorily performing its functions as a representative body or would be able to do so (the functions of a representative body are itemised in s.203B and include facilitation and assistance functions, certification functions, notification functions, dispute resolution functions and internal review functions). There are also provisions governing the timing of the recognition of representative bodies and providing that only one representative body will be recognised for a particular area.

Items 18 and 19 allow the Minister, after due consultation and consideration, to unilaterally extend or vary the area of a representative body. While the Minister is required to consult the relevant bodies, and the public, before making these changes (and must give 60 days notice regarding these modifications) there is no requirement that the views of the relevant representative bodies be a concluding feature of the matter, although it should be noted that his/her considerations must lead him/her to be satisfied that ‘the body will satisfactorily perform its functions in relation to the extended/[varied] area’ (proposed ss.203AE (2) and proposed ss.203AF(2)). Furthermore, before reducing the area of a representative body the Minister must be satisfied that the representative body is ‘not satisfactorily performing its functions in relation to’ the area to be removed from their

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
jurisdiction and that they will be able to perform those functions for the remainder of the area (proposed ss.203AG(1) and (2), item 20). For similar reasons the Minister may withdraw recognition of a representative body (i.e. they’re not satisfactorily performing their functions) but in this case it can also be on the basis that ‘there are serious or repeated irregularities in the finances of the body (item 24, proposed ss.203AH(2)). The amended version of this subsection removes the need for the Minister to be satisfied that the representative body can’t satisfy the appropriate requirements within a ‘reasonable period’.

The standard time frame in which representative bodies are required to respond under a variety of sections has been shortened from 90 days to 60 days (e.g. items 18, 19, 21 & 25).

The references in the current Act to the need for a representative body to:

- satisfactorily represent the native title holders (or those who may be native title holders); and
- consult effectively with Aboriginal people and Torres Strait Islanders living in the area

have generally been abandoned in favour of a shorter formulation which is focussed on whether the representative body is ‘satisfactorily performing its functions’. Item 27 introduces a new ss.203AI(1) which, like other provisions, removes the focus from satisfactory representation and effective consultation and focuses on whether the body’s ‘organisational structures and administrative processes’ will operate in a fair manner.

Financial Accountability

Item 29 introduces a modified ss.203CA(1)(d) which requires that, when giving funding to a representative body, the Secretary must require the production and publication of financial statements. At the same time items 30 and 31 remove the need for a ‘strategic plan’ that is currently required by s.203CA and s.203D.

Item 32 expands on the accountability requirements by requiring accounts and records to be kept in such a way that they can be conveniently audited, while items 33 and 34 repeal sections 203DC-DE which contain the requirements for representative bodies to provide annual reports.

Item 35 expands the conditions under which the Minister can appoint an inspector or auditor. The current requirement stipulates there must have been a serious and repeated failure to perform the functions of the representative body, whereas proposed ss.203DF(2)(b) simply requires a failure to ‘satisfactorily’ perform its functions. Meanwhile items 36 & 37 clarify that when a representative body has had its recognition removed or modified this should not stop an inspection, audit or investigation.

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments. This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
In contrast to item 35, item 39 tightens up the conditions under which the Secretary of the Department must let the Minister know that there may be problems with a representative body. In the past any irregularities in their financial affairs required notification, whereas under proposed s203F(d) it will only be after ‘serious or repeated’ irregularities in their financial affairs that the Secretary of the Department must notify the Minister.

Native Title Service Providers

Items 42 and 43 amend ss.203FE and introduce a new ss.203FE(1A) in such a manner that the Secretary of the Department may make funding available to a non-representative body if an area does not have a representative body and there are representative body functions which would not otherwise be performed in an ‘efficient and timely’ manner.

Item 45 introduces four new proposed sections 203FEA-203FED. Proposed sections 203FEA and FEB both make provisions for a non-representative body to be treated in the same manner as a representative body when it has been funded to perform some or all of the functions of a representative body (and when there is no, or no funded, representative body operative in the area in question). The sections single out particular applications of the Act which must apply as if the body or person with funding to play the role of the representative body is the representative body, for instance:

• their existence may make indigenous land use agreements possible under s.24DD;
• they can take on consultation, mediation, negotiation or proceeding for adjoining areas under s.203BD;
• they can be required to return documents when their role as a representative body has ceased under s.203FC; and
• they are required to comply with s.203FCA which stipulates that they must, when dealing with traditional materials or information, make all reasonable efforts to comply with the wishes of the traditional custodians.

Both sections provide that inspections, audits and investigations will continue even if funding has been ceased and that further regulations may be made in relation to the Act’s application to the relevant body.

Proposed section 203FEC creates exceptions to the principle that non-representative bodies funded to perform the functions of a representative body are to be treated on the same footing. These exceptions apply to funding arrangements, monitoring for inappropriate performance, and reviews of a decision not to provide funding.

Proposed section 203FED mirrors the exemption from liability that is created for executive officers by s.203FD, i.e. it provides that actions taken in good faith when performing functions under the legislation are not personally liable.

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments. This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
The proposed changes to s.203FF in item 46 mean that representative bodies can no longer combine reports required for the purposes of accountability with other reports for the Commonwealth Minister. This change must be viewed in the light of a proposed lessening in requirements for reporting under the Act. There is no further requirement for strategic plans or annual reports. There is a requirement to keep separate accounts for the purposes of the Act under existing ss.203DA(2).

Part 2 – Application of Schedule 1 covers the commencement day of Schedule 1. Items 48—62 define the commencing day for earlier sections in Part 1 of Schedule 1 as the day the Act receives Royal Assent. The exception to this pattern is item 59, which stipulates that items 33 and 34 apply to the financial years beginning on or after 1 July 2006.

Schedule 2: Claims resolution review

Items 3-5 amend s.84 to reduce the number of grounds entitling a person to become a party to Native Title proceedings. The previous procedure was that the Registrar notified a range of potential parties to the proceedings. In order to join, all that was required was for the party to reply to the Registrar in the required time frame. The amendments limit the range of people to whom the Registrar will give notice of proceedings and stipulate a slightly more restrictive range of those who are automatically a party to proceedings (the amendment requires an ‘interest in relation to land or waters’ whereas previously it was simply an ‘interest’). The Court retains a capacity to join parties if it is satisfied a person’s interests may be affected by the proceedings, and adds it is in the ‘interests of justice’ to do so (proposed ss.84(5)).

Item 7 introduces a new subsection, ss.86(2). Section 86 currently allows the Federal Court to utilise information or evidence gathered by the NNTT. The new subsection will require the Court to consider admitting this evidence although it imposes no requirement that any particular conclusions be drawn from the evidence.

Items 10—28 modify sections 86B and 86C and introduce a new section 86BA. These sections deal with mediation (predominantly by the NTTT). New section 86B(6) specifies that proceedings will not be referred to mediation in the Federal Court unless mediation has ceased in the NNTT. They clarify that in nearly all cases the mediation referred to in the sections is mediation by the NNTT, with new subsection 86B(6) specifying that unless mediation has ceased in the NNTT the proceedings will not be referred for mediation in the Federal Court. Item 12 removes some discretion for the Court to order that mediation be ceased, restricting such an order to cases where an agreement has already been reached or ‘there is no likelihood of the parties being able to reach agreement’ in an NNTT mediation, or where an applicant has failed to provide sufficient details. Item 20 inserts new section 86BA which gives the NNTT the right to appear before the Federal Court at a hearing to determine whether mediation should be ceased. Item 31 inserts a new subsection 86D(3), which allows the Federal Court to effectively

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
replicate orders made by the Tribunal in cases where a party has not appeared at a conference or has failed to produced documents.

There is a new subsection 86E(2) inserted by item 33 which allows the Federal Court to request a regional mediation progress report or a regional work plan from the NNTT. The ‘regional mediation progress report’ is a report on the progress of all mediations by the NNTT for a particular area, while the ‘regional work plan’ sets out the priorities being given to each mediation in the area.

In order to encourage more efficient resolution of native title matters, a new s.87A (item 35) allows the Federal Court to make a native title determination over an area when a range of the more relevant parties, who must all be parties to the agreement, agree and sign off on a proposed determination. This would mean an agreement could be entered into which does not involve all the parties to a proceeding. There are procedural safeguards to ensure this provision functions fairly and effectively. Item 1 inserts new ss.64(1A) which will function to automatically amend an application by removing the area of the determination.

Proposed section 94B will require the Federal Court to take cognisance of Reports made to it by the NNTT. There are already provisions requiring a Report to be prepared, but this amendment will mandate it being considered (though not necessarily adopted). Proposed s.94C, (also included in item 36) gives the Federal Court the power to dismiss an application for Native Title if various criteria are satisfied, more specifically if the applicant fails to produce evidence in support of the application or to take other steps to resolve the application, despite directions by the Court. In combination the criteria would function to prevent, what the Government considers to be, applications that are lodged because a ‘future act application’ has been lodged and a claim to native title gives the claimant certain procedural rights.

Items 44-47 give the Tribunal significant new powers. Parties are required to act in good faith in mediations (proposed section 136B), and the Tribunal may include details of any failure to so act in its annual report (proposed ss133(2A)). If it is proposed to include such details in the annual report the presiding member must inform the Government party before doing so (proposed ss.136GB, item 52). Apart from documenting the issue in the annual report the presiding member may report the matter (under proposed s.136GA) to (along with the perpetrator of bad faith):

- the relevant Commonwealth, State or Territory Minister;
- the relevant Secretary of a Department
- the relevant legal professional body; and
- the Federal Court.

Furthermore the presiding member of the Tribunal may direct a party to attend a conference and/or to produce documents (proposed ss.136B(1) and s.136CA

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
respectively), and may report any failure to comply to the Federal Court (proposed s.136G(3B), item 51). Failing to comply with directions of the Tribunal could result in the Federal Court taking action to enforce the direction. The Tribunal may also refer the question of whether a party to a proceeding has a sufficient interest in the proceeding or whether they should cease to be a party (proposed s 136DA) to the Federal Court.

There is a new Division 4AA which allows the Tribunal to conduct a ‘review’ into whether there are native title rights/interests. The review cannot be conducted on a compulsory basis – it can only occur if at least one party is prepared to participate/supply papers (proposed ss.136GC). The review would be done on the papers without a hearing. There are also provisions protecting information conveyed during the course of the review. It cannot be used as evidence in subsequent proceedings (proposed ss.136GC(7)), and can also be given additional confidentiality protections (proposed s.136GD and 176(1)). Furthermore, the Tribunal member who conducts the review cannot take any further part in the proceedings (proposed ss.136GC(8)). A review can only take part when there is a mediation on foot, and at the end of it the member can provide a written report to participating parties, the member presiding over the mediation and, where appropriate, the Court. The intention of the Bill is that the review process would only take place if it would assist in ‘progressing the mediation.’ (proposed ss.136GE(3)) There are a range of associated more technical or financial amendments in items 37, 38, 40-43 and 55-57.

The other new feature in the range of the Tribunal’s approaches to a proceeding is the ‘native title application inquiry’ (item 57). Such an inquiry can only take place with respect to matters which may involve a determination of native title and which the President believes may assist the proceedings (e.g. an agreement on findings of fact). Such an inquiry can take place at the initiative of the President, or the request of a party to the proceedings or the Chief Judge of the Federal Court (proposed s 138A and B). Like the review process, the member who conducts or assists at an inquiry cannot take further part in the proceedings (proposed ss.138C(2)). There are requirements for notice to be given to quite an extensive list of people/parties (proposed ss.138D(1)) and while mediation can continue during an inquiry, a review cannot take place at the same time (proposed s.138E). In contrast to the previous provisions governing hearings, under which there is a presumption that hearings will be held in public, hearings held in the course of a native title inquiry are presumed to be held in private (proposed s.154A). The inquiry can be undertaken with respect to more than one proceedings (proposed s.138G).

At the conclusion of the native title application inquiry the Tribunal is required to make a report which may contain findings of fact and recommendations, although the recommendations are non-binding. The report must be given to the Federal Court and the Court is required to consider whether to receive into evidence any transcript of evidence and whether to adopt any recommendations of the inquiry.31

Items 69-71 make provisions which allow the Native Title Registrar to amend the Register of Native Title claims without having to reassess a claim under the registration test when they have been amended as a result of a settlement under s.87A (which allows a

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
determination of a part of a claim when there is agreement between the main parties). By avoiding the need to undergo the registration test de novo it is hoped that parties will be more willing to agree to a settlement under s.87A (though it should be noted that claims which have not yet satisfied the registration test will not fall under this provision).

There are also new requirements (items 72-73) imposed on the Registrar to specify what the reasons are for finding that a registration has or has not been made out. If the claim has not been made out because of a failure under s.190C and the applicant doesn’t make a further application, then the Federal Court – once satisfied there is no reason why it shouldn’t do so – may dismiss such an application (s.190C sets out the extensive information that must be supplied in a native title application, including factual details of the traditional connection with the area, evidence the native title interests haven’t been extinguished anywhere in the area in the area of claim, that the group of people with a native title interest in the area are all committed, jointly and severally, to making the application and that an application by this group hasn’t been previously been made over this area). There are further, extensive requirements for a wide range of other information in this section.

Part 2 of this Schedule deals with the application and transitional provisions, and, like Schedule 1, will mostly come into affect on the Commencing Day which will be the day of Royal Assent.

Schedule 3: Amendments relating to prescribed bodies corporate

Proposed item 1 remedies a missing qualification in the definition of a ‘native title body corporate’ (i.e. to get the appropriate notice it must be registered – it is compulsory for the Commonwealth, State or Territory which wants to extinguish native title through a compulsory acquisition to notify the registered native title body corporate of their intention).

Proposed item 2 will allow registered native title bodies corporate to enter into agreements that bind the common law native title holder (as long as those agreements are made in accordance with the processes stipulated in the Regulations). This will mean that not all decisions are referred for consultation with common law native title holders.

The amendments proposed in item 3 introduce a new section 59A, which would make the constitution and constituencies of prescribed bodies corporate (PBC) more fluid. Thus a PBC may hold native title rights and interests in trust for a number of common law holders (as long as all the common law holders have agreed). The processes by which the consent of the common law holders must be obtained can be stipulated by regulations (proposed section 59A(3)).

Finally items 4 and 5 introduce an earlier form of a definition which has already been passed by the Corporations (Aboriginal and Torres Strait Islander) Consequential,
**Transitional and Other Measures Act 2006.** This definition will cover ‘agent PBC’s’ and these agent PBC’s will include an original PBC (i.e. one that came about as a determination of native title) and a replacement PBC (i.e. a PBC that has taken over the functions on an earlier PBC in accordance with regulations drawn up prescribing the procedures that must be followed in such a case). The new definition will allow any ‘agent PBC’ to become a registered native title body corporate, which means they can become a party to agreements and receive future act notices. (This is already a requirement in s.57).

**Schedule 4: Funding under section 183 of the Native Title Act 1993**

There are already provisions in the NTA to allow the Government to give funding to non-claimant bodies to assist them with their legal costs when involved in a Native Title claim or when negotiating an indigenous land use agreement. **Schedule 4** of the Bill would expand this capacity to provide assistance in the situation where a respondent body is developing a standard form agreement. The proposed provisions allowing funding applications to be made come into effect upon commencement of the Schedule (item 2). These amendments mirror the form of the principle section (s.183) which provides that the Attorney-General does not fund anyone making a claim or holding native title to an area. The new provisions reflect the asymmetry of the original provisions – only ‘grantees’ can be offered assistance in devising standard form agreements. (In summary ‘grantees’ are those who have been granted rights or interests in the land, rather than native title holders).

**Concluding comments**

HREOC makes a very grim assessment of the position of native title in Australia and the role of the NTA:

The concept of native title, as it has developed through the non-Indigenous legal system in the past twelve years, has not facilitated the recognition and protection of native title. Emerging from the High Court decisions in *Yarmirr*, *Miriwuung Gajerrong*, *Wilson v Anderson* and *Yorta Yorta* native title is not simply a vehicle for Indigenous people to enjoy their economic, social, cultural and political rights. Rather the common law and the *Native Title Act* (1993)(Cth) (NTA) have erected a barrier to the enjoyment and protection of these rights.

These developments in the law of native title are not the only barrier to Indigenous people enjoying their human rights through native title. A further barrier is erected when the institutions created and designed to represent Indigenous people in order to obtain recognition of their rights to land, are inadequately resourced and empowered to carry out this task.

---

**Warning:**

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
Native title is still a relatively new and evolving area of law, so it is inevitable that its regulation will prove difficult. Another concern is that a recent examination of indigenous land use agreements also raises questions regarding their utility, finding that many Aboriginal groups were no better off, or even worse off, than in the absence of any agreement between the two parties.  

The amendments in the Bill seem to offer some administrative improvements but there are significant concerns regarding the range of provisions and the absence of sufficient consultation regarding the final form of the proposed changes. The Native Title Research Unit of the Australian Institute of Aboriginal and Torres Strait Islander Studies looked at the changes and concluded, in part, that the amendments will … alter the claims management practices for NTRBs. It is still unclear as to whether the proposed changes will make NTRBs more efficient or whether they will impose unnecessary burdens on them. Much will depend on how the discretion is exercised by the Minister and whether the old criteria for ‘satisfactory performance’ will still implicitly be applied.

The other factor that will clearly impact on the success or effectiveness of the proposed changes is the question of whether the bodies are funded to implement them effectively. John Basten QC, who has worked as a barrister in the area, comments with respect to proposals for NTRBs to be required to cover new areas:

to [confer further functions on representative bodies] without providing the human and economic resources necessary to enable them to carry out such functions would be an exercise in futility …it is axiomatic that nobody should be given additional functions without ensuring that relevant resources, training and finance are available to allow them to carry out properly their new functions.

Acknowledgements

Thanks to Mr Sean Brennan, Lecturer, Gilbert & Tobin Centre of Public Law for his immediate and in-depth grasp of the issues and his generosity in sharing this, and Ms Jessica Weir of the Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies for her valuable comments. The author remains responsible for any errors and omissions.

Endnotes

2. ‘Practical Reforms to deliver better outcomes in Native Title’, Attorney-General, the Hon. Philip Ruddock MP, Media Release 163/2005, 7 September 2005.

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments. This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
3. The Attorney-General’s website comments on the Bill: ‘The Government recognises that, following the amendments to the Native Title Act in 1998, the existing regime continues to provide a sound framework for the resolution of native title issues. The fundamentals of native title are settled. Nevertheless, stakeholders across the system acknowledge that the current processes remain expensive and slow. The proposed measures are intended to ensure that the existing processes work more effectively and efficiently in securing outcomes.’


5. Six weeks passed between the reference and the date set for submissions. Furthermore the period fell across the Christmas season, which is likely to result in further criticism from the Human Rights and Equal Opportunities Commission, who have twice expressed concern over the Attorney-General’s inadequate consultation periods, once when it was six weeks (Review of the Claims Resolution Process in the Native Title System Submission, Aboriginal And Torres Strait Social Justice Commissioner, Tom Calma, http://www.hreoc.gov.au/social_justice/submissions/claims_resolution_review_process.html accessed on 29 January 2007) and once when it fell across the Christmas break (Submission on Prescribed Bodies Corporate, January 2006, Aboriginal and Torres Strait Social Justice Commissioner, Tom Calma, http://www.hreoc.gov.au/social_justice/submissions/prescribed_bodies_corporate.html accessed on 29 January 2007).

   The Minerals Council of Australia put it quite bluntly when they said ‘The MCA also considers that the timeframes for this Senate Inquiry are inadequate and do not facilitate optimal input from stakeholders for improved outcomes.’ Minerals Council of Australia, Submission no. 4, Senate Legal and Constitutional Affairs Committee, Inquiry into the Native Title Amendment Bill 2006, p. 1.


8. ibid., p. 28.

9. ibid.

10. ibid., p. 12.

11. Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, Report on the operation of Native Title Representative Bodies, 2006, p. 44.

12. ibid., pp. 82–83.

**Warning:**

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.


22. Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, Submission to the Inquiry on the operation of Native Title Representative Bodies, June 2004, p. 5.


**Warning:**

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
25. Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Native Title Amendment Bill 2006, No. 11

26. ibid., p. 3.

27. Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Native Title Amendment Bill 2006, No. 9, p. 2.

28. Explanatory Memorandum, p. 3.

29. This requirement is subject to the rules of evidence (see ss.82(1)).

30. See: s.29 of the NTA.

31. It would appear that there is a typographical error in the drafting of item 67 in that the reference to the Federal Court is missing the definite article.


33. *Western Australia & o’rs v Ward & o’rs* [2002] HCA 28 (8 August 2002)

34. *Wilson v Anderson and or’s* [2002] HCA 29 (8 August 2002).


36. Submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Inquiry into the Capacity of Native Title Representative Bodies, 3 August 2004, p. 1.


39. John Basten QC, Submission to the Join Parliamentary Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, inquiry into Native Title Representative Bodies, 2004, p. 3.

*Warning:*

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
Attachment A

Reproduced by Permission

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.
Native Title Amendment Bill 2006

© Copyright Commonwealth of Australia 2007

Except to the extent of the uses permitted under the Copyright Act 1968, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

This brief has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Parliamentary Library, nor do they constitute professional legal opinion.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2680.

Warning:
This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.