



## Native Title Amendment Bill 2009

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## Native Title Amendment Bill 2009

**Date introduced:** 19 March 2009

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:**

Sections 1 to 3 commence on Royal Assent.

Schedules 1-4, Schedule 5 Part 1 and Schedule 6 commence on the day after Royal Assent or 1 July 2009, whichever is the later.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

## Purpose

The purpose of the Bill is to amend the *Native Title Act 1993 (Cth)* (the Act or NTA) to implement institutional reform to give the Federal Court of Australia (the Court) a central role in managing native title claims. Notably Schedule 1 of the Bill will allow the Court to determine who should mediate a particular native title claim.

Schedules 2, 3 and 4 of the Bill will amend, replace and expand provisions relating to Court procedure and financial assistance for mediations. Schedule 5 seeks to consolidate existing arrangements for the registration of representative bodies. Schedule 6 makes minor and technical amendments to the Act.

## Background

### National Native Title Tribunal

The National Native Title Tribunal (the Tribunal) was established under the *Native Title Act 1993 (Cth)*. The Tribunal is administered by the Attorney-General's Department and performs the following functions:

- applies the registration test to native title claimant applications
- mediates native title claims under the direction of the Federal Court of Australia
- provides notification of native title applications and indigenous land use agreements

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- maintains the Register of Native Title Claims, the National Native Title Register and the Register of Indigenous Land Use Agreements
- makes arbitral decisions about some future act matters
- negotiates other sorts of agreements, such as indigenous land use agreements.<sup>1</sup>

### Further background

This Bills Digest does not cover the background to historical native title legislative developments. The author has assumed some knowledge and understanding of the area. For preliminary reading, see electronic sources such as:

- Bills Digest on the [Native Title Amendment Bill 2006](#)
- Bills Digest on the [Native Title Amendment Bill 1997 \[No.2\]](#)
- Bills Digest on the [Native Title Amendment Bill 1996](#)
- Native Title on Wikipedia: [http://en.wikipedia.org/wiki/Native\\_title](http://en.wikipedia.org/wiki/Native_title)

### Review of Claims Resolution Process

In 2005, the Howard Government commissioned Mr Graham Hiley QC and Dr Ken Levy to consider, and make recommendations on, the roles of the Court and the Tribunal in native title mediation.<sup>2</sup> Amendments to the Act were made in 2007 following this review of the claims resolution process. The amendments to the Act in 2007 made it clear that the Court could not mediate while an application was with the Tribunal for mediation.<sup>3</sup>

In their 2006 review, Mr Hiley QC and Dr Levy had disagreed on a key issue about which body should have ultimate control of native title alternative dispute resolution.<sup>4</sup> The Howard Government chose to implement Dr Levy's recommendation to give the Tribunal an exclusive mediation role with increased powers. The Rudd Government is of the view that this has not worked to create an efficient native title mediation process and has made a policy decision to follow Mr Hiley's recommendation to give the Court mediation powers.<sup>5</sup> The policy will not remove the mediation role from the Tribunal entirely; the

1. This information, and further detail, can be found on the Tribunal's website: <http://www.nntt.gov.au/About-The-Tribunal/Pages/tribunal.aspx> accessed 6 May 2009.
2. Further information about the Claims Resolution Process can be found here: <http://www.ag.gov.au/claimsresolutionreview> The Report of the Claims Resolution Review can be downloaded [here](#).
3. Bills Digest, Native Title Amendment Bill 2006, p.9, available [here](#).
4. Hiley, G and Levy, K, *Report on the Native Title Claims Resolution Process*, 2006, para 4.31, p. 24. Available electronically [here](#). Accessed 6 May 2009.
5. See the transcript of the Senate Legal and Constitutional Committee's Inquiry into the Native Title Bill 2009, p.48 available [here](#). See also Hiley, G and Levy, K, *Report on the*

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Court will be able to direct that the Tribunal hear particular matters as appropriate. In this light then, the Court will have an ‘overseer of workload’ role as well as a role in the mediation process through the Registrar, Deputy Registrar, District Registrar or Deputy District Registrar of the Court.

The idea of moving the mediation role to the Federal Court is not without criticism:

One complaint made against giving the Court control of the mediation process is that the judges, because of their very independence, are apt to be inconsistent in their approach.<sup>6</sup>

However,

the Federal Court, with its collegiate appellate structure, national allocation of judges and Commonwealth jurisdiction with powers of cross vesting, is suited to developing consistent national approaches that are still sufficiently flexible to have proper regard to the circumstances of particular States, regions and matters.<sup>7</sup>

Note though that this comment, while it might be true, is a little misguided in this context because it is not the *Judges* who will be conducting any mediation proceedings; that role will be undertaken by Registrars or similar persons, as indicated above.

The current system of having the Tribunal manage all mediation processes has not worked to produce efficient native title determinations.<sup>8</sup> The cost and delays will likely be curbed significantly if the Federal Court is given a role in overseeing and participating in some of the mediation processes. Further, the Court will reduce the Tribunal’s workload by being able to make determinations on matters other than native title.

### **The future of the Native Title Tribunal’s role in mediation**

During the Senate Legal and Constitutional Affairs Committee’s Inquiry into the provisions of the Bill, the Registrar (and Chief Executive Officer) of the Federal Court were asked about the role of the Native Title Tribunal in mediation once the Bill is passed:

Senator TROOD —But you still see the tribunal as having a critical and important role in the whole process of resolution. After all, there is a very considerable resource there. There is an already established institution with a great deal of expertise in

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*Native Title Claims Resolution Process*, 2006, para 24 of Executive Summary. Available electronically [here](#). Accessed 6 May 2009.

6. Chalk, A. ‘Redefining the Role of the Federal Court in Settling Native Title Matters’, Paper presented to the 3<sup>rd</sup> Annual Negotiating Native Title Forum, Melbourne 19-20 February 2009, p.13. Used with permission.
7. *ibid.*
8. McClelland, R. MP *Second Reading Speech*, Native Title Amendment Bill 2009, p. 1.

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mediation. I am sure the government has told you there are no more resources available for exercising this responsibility. You cannot expect any more resources so you are going to have to manage the additional powers that you are undertaking within your existing resources. Perhaps that means that the tribunal will end up with more work than it previously had.

Mr Soden —We expect the tribunal to continue to perform a very important role in mediating native title matters and in providing the other facilities that it undertakes. But to be frank it would be wrong to assume that every matter that is presently before the tribunal will remain with the tribunal. The process that I mentioned, of the court looking at every case that is pending, will result in some things changing.<sup>9</sup>

Of particular note in this transcript is the expectation that the Tribunal will continue to mediate native title matters. It is likely that the workload of the Tribunal might diminish as more mediation conferences are conducted by the Court. At the time of publication of this Digest, it is not clear whether there are long-term plans to cut back the role of the Tribunal further or to allocate extra funding to the Court to perform the additional function. The Tribunal will require funding to continue for mediation proceedings.

### **Committee consideration**

The Bill has been referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 7 May 2009. Details of the inquiry are at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/native\\_title/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/native_title/index.htm)

### **Position of significant interest groups/press commentary**

Submissions to the Senate Legal and Constitutional Affairs Committee's Inquiry into the provisions of this Bill show a general support for the Bill, welcoming the proposed changes. This Bills Digest does not analyse the specific detail of the views presented in the submissions to the Inquiry. The Tribunal's submission was less supportive and expressed concern about the system or processes becoming ad hoc, fragmented, less efficient and more expensive to the Commonwealth if the amendments proceed.<sup>10</sup>

The Tribunal, as a significant stakeholder, further noted that there could be confusion and

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9. Transcript from the Senate Committee on Legal and Constitutional Affairs, Inquiry into the Native Title Amendment Bill 2009, 16 April 2009, p.45, available [here](#). Accessed 4 May 2009.

10. Submission No.3 to the Senate Committee on Legal and Constitutional Affairs Inquiry into the Native Title Amendment Bill 2009, p. 1, available [here](#). Accessed 28 April 2009.

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lack of clarity, about the respective powers and functions of the Court and the Tribunal – especially the extent of the court’s capacity to direct the Tribunal to do things’.<sup>11</sup>

Nonetheless, the Tribunal noted an inevitability of the Bill proceeding and suggested some change to improve the operation of amendments which it considers to be unnecessary and potentially counterproductive.<sup>12</sup>

The proposed legislation appears to have widespread support from native title practitioners and academics. Explicitly,

the current system for resolving matters has not been successful. It has certainly failed the taxpayer. But more importantly it has failed Indigenous people. It has allowed a once in a century opportunity to redress one of the fundamental scars of our country to slip away. In this regard, we all suffer from the failure.<sup>13</sup>

The changes now proposed by the Government do not succumb to the fallacy that giving the Court responsibility for supervising the resolution of native title matters is incompatible with mediation or other forms of alternative dispute resolution.

Whatever shortcomings the Federal Court of individual judges may have, it remains the most competent, transparent, independent and accountable institution in the system.

... Unjamming the system, slowly building region, state and nationwide momentum towards settlements will be a major challenge for the Court. It will undoubtedly require a level of coordination and consistency in approach if it is not to end in tears<sup>14</sup>.

The Tribunal is accepting of the policy change to give the Court a role in native title mediation but has expressed some concerns about the administrative arrangements and about the ability for the Court and Tribunal to coexist and complement each other in the native title framework:

Broadly speaking, the tribunal is concerned that, because individual judges will have broad discretionary power about who will conduct mediation, the system or processes may become ad hoc or fragmented, less efficient and potentially more expensive to the Commonwealth. We are also concerned that there could be confusion and lack of

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11. *ibid.*

12. *ibid.*, p. 2.

13. Chalk, A. ‘Redefining the Role of the Federal Court in Settling Native Title Matters’, Paper presented to the 3<sup>rd</sup> Annual Negotiating Native Title Forum, Melbourne, 19–20 February 2009, p. 2, used with permission.

14. Chalk, A. ‘Redefining the Role of the Federal Court in Settling Native Title Matters’, Paper presented to the 3<sup>rd</sup> Annual Negotiating Native Title Forum, Melbourne, 19–20 February 2009, p. 13, used with permission.

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clarity about the respective powers and functions of the court and the tribunal, especially the extent of the court's capacity to direct the tribunal to do things and possibly to allocate tribunal members to mediate particular matters and to direct how mediation is to be conducted, which raises legal and resource issues. There are issues about how mediators other than the court or the tribunal are to be identified, paid and supported administratively and with specialist geospatial, research, legal and other resources.<sup>15</sup>

Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma has welcomed the proposed reforms but has further emphasised the need to address funding issues for claimants and their representative bodies.<sup>16</sup>

Further amendments to native title law may be on the agenda following the High Court's Chief Justice Robert French comments that it is necessary to reverse the onus of proof in some circumstances. The Attorney-General and the Prime Minister have indicated their in principle support to the idea.<sup>17</sup>

## Financial implications

The Explanatory Memorandum states that there is no direct financial impact on Government revenue from this Bill. However, there is some ancillary debate about the level of financial assistance available to applicants in native title matters that are, or will be, either before the Court or the Tribunal. This is likely to be addressed in the 2009-2010 Budget.

## Key issues

Many of the changes to the provisions of the Act are technical and administrative. However, the Bill raises three key issues:

- the new role of the Federal Court in the mediation of native title matters,
- the ability of the Court to make determinations on other matters, and
- the streamlining of processes relating to Native Title Representative Bodies.

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15 Transcript from the Senate Committee on Legal and Constitutional Affairs, Inquiry into the Native Title Amendment Bill 2009, 16 April 2009, p.2, available [here](#). Accessed 4 May 2009

16 Dorizas, A. 'Native Title is an uneven playing field: Calma' available electronically only at: <http://www.governmentnews.com.au/2009/04/16/article/Native-Title-is-an-uneven-playing-field-Calma/HJYVPCXFTV.html>, accessed 4 May 2009.

17. <http://www.news.com.au/story/0,27574,25313301-29277,00.html>. For the full text online of CJ French's article, click [here](#). (MPs, Senators and Parliamentary Staff only)

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These changes are likely to make aspects of native title litigation and mediation significantly more efficient and will reduce the delays currently experienced with native title determinations. High Court Chief Justice French has acknowledged that:

native title process was burdensome and can be likened to rolling a large rock uphill ... the effort seems relentless and sometimes the rewards elusive.’ ‘We may be a long way from the summit but we are beyond the point where the rock is likely to roll down the hill again.’<sup>18</sup>

### **Federal Court as mediator in native title matters**

As mentioned earlier, the Court will not replace the Tribunal as the sole mediation body. It will create an overseer role for the Court and this is intended to have the effect of managing the workload between the Tribunal and the Court. The Government is of the view that:

having one body control the direction of each case means that the opportunities for resolution can be more readily identified. This reform has the potential to significantly improve the operation of the native title system.<sup>19</sup>

### **The Court to make determinations beyond native title**

The second key issue of significance are the amendments that will enable the Court to make determinations that cover matters beyond native title. Currently, section 86F of the Act recognises that broad agreements can be negotiated ‘but does not clearly provide that it is within the Court’s jurisdiction to make determinations dealing with matters beyond native title, or recognise that the Court may be able to assist the parties to negotiate side agreements covering matters beyond native title.’<sup>20</sup>

The Australian Human Rights Commission, in its submission to the Senate Committee’s Inquiry into the Bill, wants other options to be considered and further consultation done in this area.<sup>21</sup>

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18. ‘Native Title goes to Federal Court’, *Australian Financial Review*, 24 October 2008, p. 51.

19. McClelland, R. *Discussion Paper: Proposed Minor native Title Amendments*, December 2008, available [here](#). See p. 3.

20. *ibid*, p. 4.

21. Submission to the Discussion Paper (see Note 17) from the Australian Human Rights Commission, p.7, available [here](#). Accessed 4 May 2009.

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## Representative Bodies

The Government sees a need to ‘streamline’ the provisions relating to recognition and re-recognition of Native Title Representative Bodies (NTRBs) in the Act. This streamlining will reduce the paperwork for NTRBs and therefore lead to more timely decisions. The provisions will be moved to one part (Part 11) of the Act.

## Main provisions

### Schedule 1 – Amendments relating to mediation

This Schedule amends the *Native Title Act 1993* on matters relating to mediation. **Item 1** will insert **new paragraphs 4(7)(aa) and 4(7)(ab)** which will provide (in the Overview of the Act) for the Federal Court to refer native title and compensation applications for mediation and allow the Federal Court to give effect to terms of agreements reached by parties to proceedings including terms that involve matters *other* than native title. This item is associated with the amendments in **item 6**, which give the Court a central role in the management of all native title claims.

**Items 2-4** make small amendments that allow for mediation to be dealt with by the Federal Court. **Item 3** adds mediation to the list of topics under Division 1A of the Act which contains the general rules on the following topics:

- (a) referring applications to the NNTT for mediation (see Division 1B);
- (b) agreements and unopposed applications (see Division 1C);
- (c) conferences (see Division 2);
- (d) orders (see Division 3).

Existing section 86A outlines when mediation procedures are available to native title applicants. **Items 5 and 7-11** will remove references to the Tribunal as the mediation body thus leaving it open for the Federal Court to have a mediation role in native title proceedings. **Item 6** will repeal existing subsection 86B(1) and substitute **proposed subsections 86B(1), (2) and (2A)** which require that the Court refer each application made under section 61 to an appropriate person or body for mediation.<sup>22</sup> This is to be done as soon as practicable and may be referred to an appropriate person or body including an officer of the court (**proposed subsection 86B(2A)**). See also **proposed section 94D(2)(b)** (inserted by **item 35**). One of the main intentions of the amendments is to remove the Tribunal mediators and to allow the Court to appoint *any* qualified and appropriate mediator. **Proposed subsection 86(2A)** allows this to include the Registrar, a Deputy Registrar, a District Registrar or a Deputy District Registrar of the Court.

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22. Note that the exception to this is where there is a section 86(B)(3) order.

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Amendments to subsection 86B(5) made by **item 12** will allow the Court to refer, at any time in a proceeding, the whole or part of the proceeding to an appropriate person or body for mediation. The Court may take into account:

- the training, qualifications and experience of the person who is to be, or is likely to be, the person conducting the mediation (**proposed subsection 86B(5A)**). This person could be an officer of the Court (**proposed subsection 86B(5B)**).

In making a referral, **proposed subsection 86B(5C)** will allow the Court to make an order about the way in which the mediation is to be provided; whether the person conducting the mediation may be assisted or any other matter the Court considers relevant.

**Item 13** will allow a mediator to appear before the Court if the Court considers that the mediator might be able to assist the Court in relation to a proceeding. **Proposed subsection 86BA** notes that to avoid doubt, **proposed subsection 94D(4)** applies to the mediator when appearing before the Court. That subsection will outline who must conduct mediation conferences and what sort of assistance the mediator may have. The specifics of the subsection are explained below (**item 35**).

**Items 14-20** are mainly consequential amendments for when the court orders the cessation of mediation being conducted now by mediators rather than by the Tribunal alone.<sup>23</sup> **Item 17** will insert a new ground upon which the Court may order that mediation cease. **Proposed paragraph 86C(1)(c)** will allow the Court to make such an order if it is ‘appropriate to do so for any other reason’.

**Item 21** makes a significant amendment to section 86C of the Act. **Proposed subsection 86C(6)** will allow the Court (after making an order under subsections (1), (3) or (4) which relate to the cessation of the mediation) to make any other orders that the Court considers are reasonably necessary or appropriate to deal with the cessation of the mediation.

This is the key to the flexibility of the new system. As Andrew Chalk notes:

[Moving matters] into and out of mediation at the judge’s discretion will give the Court far greater flexibility without having to first meet any statutory condition. With frank reporting from the mediator, and active and timely case management from the judge, there is no reason that priority matters cannot be resolved in much shorter timeframes than they are at present.<sup>24</sup>

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23. Note the effect of **proposed section 94D(2)(b)** here.

24. Chalk, A. ‘Redefining the Role of the Federal Court in Settling Native Title Matters’, Paper presented to the 3<sup>rd</sup> Annual Negotiating Native Title Forum, Melbourne, 19-20 February 2009, p. 15, used with permission.

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**Items 22-34** make consequential and minor amendments that are necessary to effect the institutional changes. The amendments to subsection 86D(1) and 86D(2) will allow the Court to determine questions of fact or law that are referred to it by a mediator. Amendments to section 86E will allow the Court to request a progress report on mediations that are being conducted by the one or more mediators. These amendments will provide more scrutiny of the case management load.

**Item 35** will insert **proposed section 94D-94S (Division 4)** that outline the rules relating to the conduct of a mediation conference. Many of these are consequential and move provisions that exist under section 136A of the Act to the new Division. They are not new provisions. Moving them to a different part of the Act makes it clear that the provisions apply to all mediators subject to a referral from the Court under section 86B. The provisions cover the following areas:

- who must conduct conferences and what assistance they may have (**proposed subsections 94D(2) and (3)**). Note that this still includes Tribunal members
- statements made in a conference may not be used later in court, unless agreed (**proposed subsection 94D(4)**)
- parties' attendance at conferences (whether required, limited or excluded) (**proposed subsection 94E**)
- mediator's powers to direct a party to produce a document (**proposed subsection 94G**)
- referral powers on questions of fact or law (**proposed subsection 94H**)
- referral powers about dismissing a party to the proceedings (**proposed subsection 94J**)
- privacy and the disclosure of information in a mediation (**proposed subsection 94K and 94L**)
- the production of documents and a mediator giving evidence to a Court (**proposed subsection 94M**)
- the requirement to report to the Federal Court (**proposed subsection 94N**)
- specific reporting requirements (**proposed subsection 94P and 94Q**)
- protection and immunity of mediator (**proposed subsection 94R**)

**Items 36-38 and 41-66** makes minor consequential amendments to terminology as a result of moving the mediation function to the Court. Item 39 repeals Division 4A of Part 6 of the Act.

**Items 67 and 68** will insert two new definitions into section 253. The term 'mediator' will be defined by reference to the person or body who is conducting the mediation following a referral under subsection 86B(1) and the term 'person conducting the mediation' means the person mentioned in subsection 94D(2) who conducts a conference under section 94D

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in relation to the mediation concerned. See **item 35** for details about who must conduct conferences.

#### Part 2 – Application provisions

**Items 69-73** in Part 2 of the Bill will provide that the amendments apply to applications made under section 61<sup>25</sup> regardless of whether that application was made before or after commencement of that section.

The Explanatory Memorandum notes that the intention of this is to clarify that the amendments apply to all future applications and to existing applications still in progress.<sup>26</sup> The purpose of **item 70** is to clarify that ‘a thing done for the purposes of the current provisions relating to the mediation conferences are taken to be done as under the proposed amended provisions relating to the mediation conferences’.<sup>27</sup> **Item 72** deals with reviews to the tribunal on whether there are native title rights and interests. If the review has not been completed before the commencement of the amendments, the referral is taken as having been made under the new **proposed subsection 136GC(2)**.

#### Schedule 2 – Powers of the Court

**Items 1-4** make minor corrections and rewording of headings to facilitate the new mediation role of the Court.

**Item 5** is a significant provision that will insert **proposed subsections 87(4)-87(11)** allowing the Court to make consent orders about matters other than native title. A consent order is technically an agreement that has been reached by the parties during the mediation conference that then become an “order” by the Court. **Proposed subsection 87(4)** allows the Court to give effect to terms of the agreement that involve matters other than native title. **Proposed subsection 87(5)** will allow the Court the same if the order *is* a native title determination. The Explanatory Memorandum also notes that these provisions will also have the scope to use existing powers to control the time parties spent on wider agreements.<sup>28</sup>

**Item 7** allows the Court, under **proposed subsections 87A(5), 87A(6) and 87A(7)** to make orders that cover matters beyond native title where parties reach an agreement about part of an area. The Explanatory Memorandum notes that

these amendments would clearly provide that it is within the Court’s jurisdiction to, whether it is within its power and appropriate to do so, make separate orders dealing

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25. Section 61 sets out a table showing the types of applications that may be made under the Division to the Federal Court and the persons who may make each of those applications.

26. Explanatory Memorandum, p. 30.

27. *ibid.*

28. *ibid.*, p. 33.

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with (1) the determination of native title and (2) the matters covered by the agreement, including matters other than native title.<sup>29</sup>

**Proposed subsection 87A(5)** will allow the Court to make an order on matters other than native title if the Court considers that the order would be within its power and it would be appropriate to do so. In doing so, the Court must take into account any objections made by the other parties to the proceedings. Examples of non-native title matters that may be covered are noted in the Explanatory Memorandum as:

- economic development opportunities
- training
- employment and heritage
- sustainability
- viability
- the benefits for parties and existing principles or agreements that might be relevant to in making orders about matters other than native title.<sup>30</sup>

**Proposed subsection 87A(8)** will allow the Court to take into account any objections made by other parties in deciding whether to make an order under subsection (4) or (5). With the intention of saving time during Court mediation, **proposed subsections 87A(9), (10), (11) and (12)** will allow the Court to accept an agreed statement of facts agreed by some or all of the parties without requiring evidence. **Proposed subsection 87A(10)** will require the Registrar of the Court to notify, within 7 days, other parties to the proceedings that the statement had been filed with the Court.

The notification under **proposed subsection 87A(10)** will facilitate the operation **proposed subsection 87A(11)** which will require that the applicant and the principal government respondent must agree to the statement of facts. The principal government respondent could be the Commonwealth, a State, a Territory, the Commonwealth Minister, a State Minister or a Territory Minister depending on the case, including the type of interests or the area of the claim.<sup>31</sup>

### **Schedule 3 – Rules of evidence**

**Item 1** in Schedule 3 inserts a new **proposed section 214** into the Act. This section will allow the Commonwealth *Evidence Act 1995* to apply to native title proceedings that commenced prior to 1 January 2009. In particular, changes made under the *Evidence Amendment Act 2008* to evidence given by Aboriginal and Torres Strait Islander people

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29. Explanatory Memorandum, p. 35.

30. Explanatory Memorandum, p. 36.

31. *ibid.*

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will make it easier for a court to hear evidence of Aboriginal and Torres Strait Islander traditional laws and customs, where appropriate.

**Proposed section 214** is very broad and will allow the provisions of the *Evidence Amendment Act 2008* to apply to a native title proceeding that commenced prior to 1 January 2009 if:

- the parties consent, or
- the Court exercises its discretion to decide that it is in the interests of justice that the amendments apply.

#### **Schedule 4 – Assistance in relation to inquiries etc.**

**Item 2** of Schedule 4 is inserting a new section that will cover all types of mediation (whether by Court or the Tribunal). The drafting and the effect of this item is not new. It is replicated on the existing section 183 of the Act which provides for financial assistance in native title matters from the Attorney-General. The amendments have the effect that financial assistance may be available to any inquiry, mediation or proceeding, whether it is before the Court or the Tribunal. It is unlikely that this will actually lead to an increase in requests for, or grants of, financial assistance because the guidelines for assistance that are created under **proposed paragraph 213A(5)** will take into account the substantive changes to the Act.

Similarly, **proposed new subsections 213A(3), 213A(4), 213A(5) and 213A(8)** will have effect (or validity) if the initial application or authorisation was made under current **subsections 183(2A), 183(3), 183(4) and 183(7)** prior to the new subsections commencing. Explicitly, previous applications and authorisations will continue under the new provisions.

#### **Schedule 5 – Amendments relating to representative bodies**

##### **Part 1 – Removal of transitional arrangements**

**Items 1-4** repeal the definitions of terms relating to previous transitional arrangements. These are no longer required. Consequently, **item 5** removes references to provisions that will be repealed. **Items 6-8** also repeal subsections that have been spent.

**Item 9** will insert a new provision to require the Commonwealth Minister to determine applications for recognition as a representative body under section 203AB as soon as practicable after ‘whichever of the following periods ends last’:

1. the initial time for making an application has passed, or
2. any extended time given under subsection 203AB(2) for making an application has passed, or

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3. the Commonwealth Minister has asked for more information under subsection (1), which extends the time for finalising an application by not less than 21 days.

**Items 10 and 11** also repeal subsections that are no longer effective. Additionally, **item 11** substitutes a **new subsection 203AD(2)** that specifies the period of recognition of the body as a representative body. The provision notes that the recognition of the body as a representative body takes effect on the day specified in the instrument of recognition and ceases to have effect at the end of the day specified in that instrument unless the body's recognition is earlier withdrawn under section 203AH.

**Item 12** is a savings provision. The Explanatory Memorandum notes that the provisions would 'operate to the effect that a representative body that was recognised at the time of these amendments coming into effect would continue to be recognised as if the amendments had not been made.'<sup>32</sup>

## **Part 2 – Recognition of representative bodies**

These provisions allow for a simplified process for the re-recognition of current representative bodies. It is intended that this will be more efficient by making the variation process more streamlined. Provisions are made for extensions of time for representative bodies to make submissions if required.

**Item 17** will allow the Commonwealth Minister to issue an invitation to an eligible body whether or not there is already a recognised representative body for the area covered in the invitation.

**Item 18** outlines what the invitations must contain and, under **proposed subsection 203A(7)**, the invitations may be general (that is, not to each eligible body).

**Item 19** inserts two new provisions, **proposed section 203AA** and **section 203AAA**. **Proposed section 203AA** will allow the Commonwealth Minister to revoke an invitation if he or she considers it appropriate to do so and the time period for making an application has not expired. If the application has not been determined and the invitation is revoked, then the application is taken never to have been made (**proposed subsection 203AA(2)**).

If an eligible body decides not to apply for recognition, the eligible body must, under **proposed section 203AAA**, notify the Commonwealth Minister of that decision before the end of the period specified in the invitation under subsection 203A(3).

The remaining items in this Part (**items 20-38**) address variation rules of the notification process for representative bodies. These provisions are not problematic or controversial.

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32 Explanatory Memorandum, p. 44.

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**Item 39** is a savings provision relating to sections 203AAE, 203AF and 203AG of the NTA. On commencement, if any matters (relating to extension, variation or reduction of an area) are outstanding, the provisions that were in force prior to the commencement of the amendments made by the Bill will apply to those decisions.

### Schedule 6 – Other amendments

The Explanatory Memorandum states that the intention of Schedule 6, among other things, is to:

- clarify that the Court is required to make a determination about whether a native title determination is to be held on trust or by a Prescribed Body Corporate (PBC) at the same time as, or as soon as practicable after, making a determination that native title exists in an area (**item 2, items 10-12**)
- simplify the provisions about cancelling bank guarantees held as payments under a Right to Negotiate (RTN) process. This would avoid unnecessary banking costs to future act proponents (**item 13**)
- amend the provisions that govern trust arrangements under alternative State and Territory regimes (**items 3-9, 18, 19**)
- clarify the penalty provisions (**items 15-17**).<sup>33</sup>

**Item 1** replaces existing paragraphs 28(2)(a) and (b) with provisions that expand the scope of determinations to include cases where an amount is secured by either a bank guarantee or is held on trust by the Registrar. This item corrects an error from the *Native Title (Technical Amendments) Act 2007*.

**Items 2-5** insert provisions that allow for the option for States to secure an amount by trust or bank guarantee. The *Native Title (Technical Amendments) Act 2007* intended to have a trust regime option and it was ‘mistakenly removed’.<sup>34</sup>

**Items 6-8** intend to avoid unnecessary banking costs to future act proponents. These items make minor amendments to **proposed subsection 52(2)(a), (b) and (c) in column 3 of table 5**.

**Item 9** will insert **proposed section 52A** which again was mistakenly removed in the *Native Title (Technical Amendments) 2007*. This section will set out a trust regime for payments held under the Right to Negotiate process where an alternative State or Territory regime has a trust regime.

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33 Explanatory Memorandum, p. 57.

34 Explanatory Memorandum, p. 58.

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**Items 10-12** require, under **proposed section 55**, the Court to make a determination in sections 56 and 57 about whether native title is to be held on trust and by whom. The Explanatory Memorandum notes that the Court often makes a determination that native title exists but it does not come into effect until a PBC is registered. These amendments will require it to be ‘as soon as practicable after’ the determination.

## Part 2 – Application etc. Provisions

**Item 18** notes that the amendment made by **item 5** applies in relation to the making of a determination under paragraph 43(1)(b) of the Act after the commencement of this item; and the revocation after the commencement of this item of such a determination whether made before or after that commencement.

**Item 19** indicates the validation of pre-commencement determinations. The determination is taken always to have been as valid, as it would have been if paragraph 43(2)(j) had been in force at the time the determination was made.

## Concluding comments

The primary purpose of this Bill is to give a central role in native title mediation to the Federal Court of Australia. This policy decision has been debated in the past but is unlikely to attract particularly strong opposition in the current Parliament. This is because the evidence shows that the existing system is not working efficiently and the move to the Federal Court is based on a recommendation from a 2005 independent review of native title mediation.

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