CHAPTER 4

THE CLAIMS RESOLUTION PROCESS

Introduction

4.1 The Claims Resolution Review ('the Review') is an important part of the strategy announced by the Attorney-General in 2005. The terms of reference for the Review included a requirement to:

> …examine the role of the National Native Title Tribunal (NNTT) and the Federal Court of Australia (the Court) and inquire into and advise the Government on measures for the more efficient management of native title claims within the existing framework of the Native Title Act 1993.[1]

4.2 In their report, Mr Graham Hiley QC and Dr Ken Levy observed:

> There is room for improvement in relation to the communication and coordination between the Court and the NNTT in relation to both particular claims and overall approaches to claims management.[2]

4.3 The recommendations of the Review include both legislative and administrative proposals as to how this might be achieved. These are broadly supported by the NNTT, and the President acknowledged that the current scheme 'is in need of improvement'.[3]

4.4 A number of submitters and witnesses held concerns over the initiatives resulting from the Review which have been included in the Bill. These concerns are discussed in this chapter.

Aspects of the Claims Resolution Review included in the Bill

4.5 Schedule 2 of the Bill addresses most of the legislative issues raised by the Review through provisions to clarify the relationship between the NNTT and the Federal Court in the resolution of native title applications and strengthen the powers of the NNTT in relation to mediation.

4.6 From the submissions and the evidence presented at the hearing, several themes emerged as being of concern. These were:

- the appropriate interaction between the mediation functions of the NNTT and the Court;

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1 The Review, p. 11.

2 The Review, p. 3.

3 *Submission 17*, p. 1.

- the perception by some parties that NNTT mediation is unsatisfactory when compared to the processes of the Court;
- the proposed powers of the NNTT to compel the attendance of witnesses and the production of documents;
- the proposed requirements for parties to 'act in good faith' in the course of mediation; and
- the proposal for the NNTT to conduct certain inquiries.

Concurrent mediation by the Federal Court and NNTT

4.7 Proposed paragraph 86B(6)(a) of the Bill removes the possibility of the Court and the NNTT conducting mediation at the same time in relation to the same matter. Similarly, paragraph 86B(6)(b) of the Bill would prevent the Court requiring the parties to attend a conference with a Registrar while NNTT mediation is on foot. The proposed amendments will mean that where the NNTT process has been ineffective, the Court may then conduct mediation.

4.8 The Registrar of the Federal Court expressed reservations about the operation of proposed subsection 86B(6)(b). His submission said:

> …the changes may unnecessarily limit the capacity of the Court to manage applications pending before it. Native title applications are filed in the Court and are, until a determination is made, a proceeding in the Court and therefore subject to its control in the exercise of the judicial power of the Commonwealth. An incident of this power is the power to supervise progress of the proceeding. The Bill proposes to prevent the Court from doing so as it appears to limit the Court's capacity to use the full range of case management options normally available to it, including conferences of experts, to assist in the resolution of issues as between the parties while a matter is in the course of NNTT mediation.[4]

4.9 The Registrar also observed that there is the possibility that the 'proposal to exclude simultaneous mediations in the Court and the NNTT may be limited to mediations attracting the protections of section 53B of the Federal Court Act, which were the subject of the Review recommendations, and that only such mediations (by the Court) should be precluded during the course of NNTT mediation'.[5]

4.10 The committee asked the Attorney-General's Department to comment upon the Registrar's submission. The Department explained that proposed subsection 86B(6) will not interfere with the operation of the Federal Court Rules which allow case management by the Court to continue whilst mediation occurs. The Department continued:

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4 *Submission 8,* p. 6.

5 *Submission 8,* p. 8.

> The provision is instead intended to preclude the Court from referring a matter to mediation…or from making orders for parties to attend conferences before a Court Registrar with a view to satisfying the Registrar that all reasonable steps to achieve a negotiated outcome of the proceeding have been taken'. [6]

4.11 The committee notes this advice from the Department suggests that proposed subsection 86B(6) is not as limiting of the Federal Court's discretion as the Registrar believes.

4.12 The committee also notes the comments made in the Review concerning communication between the Court and the NNTT. The Review said:

> We are aware that the dual management of claims by both the Court and NNTT can cause frustration and confusion amongst parties. For example, parties may be frustrated because Court orders for the provision of certain material may divert resources and prevent the parties from actively engaging in NNTT mediation. We believe that it is important for the Court and NNTT to coordinate their efforts as far as possible to ensure that parties are able to focus their limited resources on resolving the key issues in a particular matter.[7]

Committee view

4.13 The committee agrees that improved communication and better integration of the management of matters between the Court and the NNTT would resolve many of the difficulties surrounding the resolution of native title matters. The committee considers that the proposal to prevent concurrent mediation by the Court and the NNTT will contribute to this. To this end, the committee supports the amendments in proposed subsection 86B(6).

Effectiveness of NNTT Mediation

4.14 In relation to the proposals in the Bill to strengthen the role of the NNTT in mediation, witnesses raised more general issues about the effectiveness of the NNTT in conducting mediation. The comments of Mr Ron Levy, Principal Legal Officer, Northern Land Council, were characteristic of this view:

> Our experience of the tribunal is that, compared to not only the court but also private mediators we have used, it just simply does not do anywhere near as good a job. That is with the greatest respect to the president and the other members, all of whom I know, respect and like. I believe that they are endeavouring to do the best job they can. But all of our experience is that they do not deliver the goods. In those circumstances, we would have thought that the correct course, rather than vesting exclusive jurisdiction in

6 *Submission 16*, p. 2.

7 The Review, p. 24.

> the tribunal regarding mediation, would be to expose them to the winds of competition.[8]

4.15 Mr Andrew Chalk, Partner, Chalk and Fitzgerald Lawyers and Consultants, told the committee:

> I do not think the NNTT has been effective in its mediation function, as a general rule. The experience in native title is not that different from the experience in any other area of dispute, and that is that without the threat of the Court taking the matter into its hands and reaching a determination it may not be in the interests of any party.
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> …It should be for the Federal Court to program matters through to a point where at least the written evidence is there for the other parties to see. If mediation occurs then we would suggest that there should be a window after that evidence is on where the mediation can then occur—via the NNTT, no problem, but where it is a narrow window so the parties have to put their evidence on and it is managed through the Court. It is not a cheap process, but it is certainly a lot cheaper than spending years and years in mediation.[9]

4.16 Similarly, Mr John Stewart AM, of the National Farmers' Federation, told the committee that 'history shows that the Native Title Tribunal does not have a good track record in resolving mediation issues'.[10]

4.17 The Review observed that 'mediation seems to be at the centre of many of the complaints about the ineffectiveness of the system'. The Review continued:

> Although all mediations were originally conducted by the NNTT (both before the 1998 amendments and since then upon referral under section 86B), there has been a trend in recent times for Federal Court judges to order mediation under the Federal Court Rules, notwithstanding that a matter is still being mediated by the NNTT. It is apparent that some judges are frustrated with the NNTT mediation process and feel that a matter, or part of a matter (such as overlapping claims), can be more readily resolved by a Court-appointed mediator, usually a registrar… [11]

4.18 Mr Philip Vincent, counsel for the NNTC told the committee that the NNTT has a place in mediation, but increasing the quality of the NNTT's mediation skills would contribute to achieving greater efficiency and better outcomes for parties. He continued:

> The Native Title Tribunal can continue happily mediating but, with respect, I suggest that it get its house in order by getting proper skills in mediation and understanding what it is all about …

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8 *Committee Hansard,* 30 January 2007, p. 45

9 *Committee Hansard,* 30 January 2007, p. 3.

10 *Committee Hansard*, 30 January 2007, p. 18.

11 The Review, p. 20.

> …Any bona fide, good-faith lawyer would say, 'Well, we can't get anywhere with the NNTT, and it may be because it doesn't have the skills; it doesn't have the gravitas. The Court is willing, and it has shown itself to be rather more expeditious…[12]

4.19 In their submission the MCA recommended that the internal capacity of the NNTT to conduct mediation be increased (within the existing resources) to ensure the competence of the NNTT for its increased role in mediation.[13]

4.20 Part of the NNTT's perceived limitations in mediation were attributed to the training of mediators within the NNTT. The President of the NNTT, Mr Graeme Neate, explained to the committee that, most, if not all, NNTT members have completed basic courses such as LEADR,[14] and a number of them have continued to update those skills. The NNTT also developed its own week-long mediation training course with external consultants.[15] Further, Mr Neate told the committee that the members had a range of skills:

> Either they were a legally qualified person with a certain length of experience or they had, in the opinion of the Governor-General, special knowledge in relation to Aboriginal and Torres Strait Islander societies, land management dispute resolution or any other class of matters considered by the Governor-General to have substantial relevance to the duty of members. The duties of members ranged beyond mediation, including arbitration matters and so on.[16]

4.21 In its submission, the NNTT cited the Report on the effectiveness of the NNTT by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account,[17] to refute criticism of the mediation capabilities of the NNTT.[18] That report observed that the NNTT manages to balance competing interests and although there is a perceptible level of frustration with the process, this was rarely attributable to the manner in which the NNTT performs its functions.[19]

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12 *Committee Hansard,* 30 January 2007, p. 14.

13 *Submission 4,* p. 4.

14 LEADR is an Australasian organisation which promotes Alternative Dispute Resolution or ADR. LEADR also provides training in ADR.

15 *Committee Hansard*, 30 January 2007, p. 57.

16 *Committee Hansard,* 30 January 2007, p. 57.

17 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Effectiveness of the National Native Title Tribunal,* December 2003.

18 *Submission 17,* p. 3.

19 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Effectiveness of the National Native Title Tribunal,* December 2003, paragraphs 6.18 and 3.42.

4.22 The NNTT submission also notes that the NNTT engages in creative approaches to mediation which may not necessarily meet the requirements of those who would like to see the role of the NNTT as 'cracking heads together.'[20]

4.23 For some witnesses it was the appropriateness of the training undertaken, rather than the quantity of it that was of concern. Mr McAvoy, counsel to Queensland South Native Title Services, told the committee that:

> …any mediator who comes through the normal mediation training processes or who undertakes a [LEADR] course or some other form of mediation or arbitration course, who has the appropriate qualifications, and who has been involved in mediation in the Courts and commercial arbitration, is going to have problems coming from that background and going into the environment of very political Aboriginal community negotiations because there are levels of nuance and sophistication in these negotiation processes that they are simply not going to be equipped to deal with. ... I am sure that all members of the NNTT would be assisted from ongoing training.[21]

4.24 In response to this criticism, the President of the NNTT explained that a nuanced approach to training is already occurring in the NNTT. He said:

> …a whole range of other cultural and other factors means that we have to concentrate on those things which are specific to the form of practice that we are engaged in. We have taken active steps in recent years to have tailored training for that purpose.[22]

4.25 Overall, the view persists that in some way Court administered mediation is more efficient than NNTT administered mediation. The President of the NNTT suggested that 'the issues that have been raised by a number of witnesses seem to go beyond mere training and mediation to what seems to be a core issue and that is how much clout the NNTT can bring to the mediation process'.[23] The President quoted the Review at paragraph 4.33:

> Some parties see NNTT mediation as being a 'soft' process and consider that timely and effective outcomes are more likely to be achieved through Federal Court mediation. However, there appears to be no reason to assume that another body with the same constraints as those which presently exist in relation to NNTT mediation could have been more effective than the NNTT. [24]

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20 *Submission 17*, p. 6.

21 *Committee Hansard,* 30 January 2007, p. 32.

22 *Committee Hansard,* 30 January 2007, p. 53.

23 *Committee Hansard,* 30 January 2007, p. 54.

24 *Committee Hansard,* 30 January 2007, p. 54; the Review, p. 21.

Committee view

4.26 The committee notes the concern about the capacity of the NNTT to undertake mediation. There is a lack of confidence in the process on the part of some parties, both in terms of the time taken and the efficiency of the process. The concerns centre on the effectiveness of NNTT mediation when compared with Federal Court administered mediation, and the qualifications of the mediators in the NNTT.

4.27 Much of the criticism of the NNTT has come from legal practitioners who may have expectations of the NNTT based on their experience of the Federal Court. As the President of the NNTT pointed out, the NNTT is a different environment from the Court, and the criticism does not take into account the nature of the NNTT's statutory responsibilities. The President also notes that there is no national accreditation scheme for mediators, and there is no generally available training in mediating native title applications unlike general mediation skills.[25] The committee welcomes the advice from the NNTT that it is currently developing a scheme for professional development and appraisal of members.[26]

4.28 The committee understands the perspective of practitioners who are aiming to have matters resolved quickly, and therefore with less cost, and who find the Court environment better placed to achieve this when compared to the NNTT. However, the NNTT is not a court, and must deal with matters according to its statutory remit.

4.29 Nevertheless, the committee considers there should be a more focussed approach by the NNTT to mediation, especially given that the amendments in the Bill propose to strengthen the powers of the NNTT in relation to mediation. This could be achieved by enlarging the mediation training provided to members. In the committee's view, the two weeks' training referred to at the hearing,[27] even for people who bring extensive dispute resolution experience to the NNTT, seems inadequate in a specialised area of dispute resolution.

Additional NNTT mediation powers

4.30 The Review also recommended (recommendation 2) that the NNTT be provided with statutory powers to compel parties to attend mediation conferences and to produce certain documents for a mediation within a nominated period or by a nominated date. Items 45 and 47 of Schedule 2 implement this recommendation. Failure to comply allows the presiding NNTT member to report the failure to the Court, which may result in sanctions by the Court.

4.31 The committee notes that these powers (often called coercive powers) are usually given to Royal Commissions and similar bodies. In his submission, the

25 *Submission 17*, p. 6.

26 *Submission 17*, p. 6.

27 *Committee Hansard,* 30 January 2007, p. 57.

Registrar of the Federal Court raised four issues about these powers of compulsion, and expressed concerns about the constitutionality of the proposed amendments. In summary, the four issues were:

- The powers are likely to be exercised by people whose primary function is mediation. They may be less equipped to formulate orders which are readily enforceable.
- The governmental functions of state and territory governments are likely to be affected. A government's participation is informed by its own policies and practices, and directions by the NNTT could raise legal or possibly constitutional issues, by compromising its ability to act in accordance with its policies; this, in turn could lead to second order litigation and further delays.
- Administrative directions by the NNTT (which are formulated by persons not necessarily qualified to do so) will require an effective enforcement regime which will ultimately rely on the Court. This is likely to add to delays and costs.
- The proposal raises constitutional issues. The power to give directions in the NNTT is an administrative order, not a judicial one, and could be subject to judicial review under either section 39B of the *Judiciary Act 1903* or the *Administrative Decisions (Judicial Review Act) 1977*. [28]

4.32 The NNTC submitted that these powers are incompatible with a mediation function. The NNTC added:

> The power in the NNTT to compel production of legally privileged material, in compulsive process will hinder the ability of parties to properly and confidently prepare their cases and to advise their clients and is a basic breach of rights.[29]

4.33 The Carpentaria Land Council was also opposed to the proposal for similar reasons. In recommending the proposal be abandoned, their submission said:

> The power to compel the production of documents is appropriate to a forum that is concerned with ascertaining and making findings in relation to facts in issue. The NNTT is not and should not be so concerned. The proposal to empower the NNTT to compel the production of documents for the purpose of a mediation conference is misconceived and inappropriate.[30]

4.34 The submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner also considered that conferring coercive powers on the NNTT is incompatible with the mediation function. The Commissioner suggested that if the amendments were to be enacted, that they should:

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28 *Submission 8*, pp 6-7. See also Mr Ron Levy, Northern Land Council, *Committee Hansard*, 30 January 2007, p. 45; *Submission 14*, p. 4.

29 *Submission 9,* p. 9.

30 *Submission 13,* p. 7.

- include rights to object to the orders on the grounds of confidentiality, privilege and prejudice; and
- be the subject of guidelines as to their exercise.[31]

4.35 The Attorney-General's Department was asked to comment upon the possibility that the proposal to grant coercive powers of the NNTT may be unconstitutional. The Department accepted the Federal Court Registrar's view that 'ultimately, under our constitutional arrangements, it is simply not possible to set up a system under which an administrator may give binding statutory directions which do not attract a need for judicial enforcement and which are exempt from judicial review'.[32]

4.36 However, the Department argued that:

> Instead, proposed subsection 86D(3) provides a mechanism for the Court to enforce a direction given by the member presiding over a mediation conference. …In the event of breach of the Court order it is this order that would be enforced. It would not be the situation of a judicial body enforcing an order made by an administrative body.[33]

4.37 The Department noted that:

> …under the existing provisions of the Native Title Act Tribunal members are able to make certain directions regarding the conduct of mediation conferences, including directions to exclude or limit parties to the native title determination application from attending conferences (see section 136B) and directions governing the disclosure of information given at conferences (see section 136F). We are not aware of any constitutional concerns having been raised in relation to these provisions, which were enacted in 1998, nor of any collateral litigation in respect of these provisions.[34]

4.38 The Department considered that because any direction would ultimately be enforced by the Court, this would address the concerns about the incompatibility of the direction provisions with the mediation role of the NNTT.[35]

4.39 In its supplementary submission, the Department indicated that the Court's concern about the competence of NNTT members to make directions is unfounded. The Department noted examples in other legislation of non-judicial members making directions and these may or may not be upheld if challenged. The NNTT, according to the Department, may draw on drafting assistance from internal legal staff. Further, the

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31 *Submission 10*, p. 27.

32 *Submission 16,* p. 1.

33 *Submission 16*, p. 1.

34 *Submission 16*, p. 2.

35 *Submission 16,* p. 2.

amendments envisage a closer working relationship between the Court and the NNTT in the management of native title legislation, and by inference, in working out what is and is not acceptable in the drafting of directions.[36]

4.40 Further, the Department advised that any problem with NNTT directions experienced by the state and territory governments in the exercise of their governmental functions may be put to the Court, 'if the matter subsequently comes before the Court to consider itself making an order'.[37]

Committee view

4.41 The committee accepts the evidence of the Attorney-General's Department that no constitutional issue arises in respect of the grant of coercive powers to the NNTT. However, the committee is concerned by the potential for delays to proceedings while the directions of the NNTT are enforced through the Court, and the possibility of privileged material being the subject of a direction by the NNTT.

4.42 The committee recommends that the provisions should be modified in three ways:

- first, by amending proposed subsection 136B(1A) and proposed section 136CA to include rights for parties to object to directions on the grounds of confidentiality, privilege and prejudice;
- second, by the development of guidelines as to the exercise of these coercive powers; and
- third, that the Court and the NNTT develop a protocol which will allow non-compliance with the directions of the NNTT as to documents and appearance of parties to be dealt with as a matter of priority by the Court.

Obligation to mediate in good faith

4.43 Recommendation 4 of the Review proposed that consideration be given to imposing an obligation on parties to act in good faith in relation to native title mediations and to developing a code of conduct for parties involved in native title mediations.[38] This recommendation is given effect by proposed subsection 136B(4) and proposed sections 136GA and 136GB. The combined effect of these provisions is that all parties and their representatives are required to act in good faith in relation to mediation before the NNTT.

4.44 The Explanatory Memorandum explains that failure to negotiate in good faith can result in the matter being reported to Commonwealth, state or territory ministers,

36 *Submission 16,* p. 2.

37 *Submission 16,* p. 2.

38 The Review, pp 6 and 23.

the Secretary of Commonwealth departments who fund participants in native title proceedings, legal professional bodies, and the Court, as appropriate.[39]

4.45 The Attorney-General's Department stated that it had received, from the NNTT, a number of examples of behaviour which warranted the inclusion of a 'good faith' provision. These included:

- abusive and threatening behaviour;
- personal violence during a mediation conference;
- persistent non-compliance with agreed actions, leading to stalling of the process;
- persistent last minute non-attendance at meetings;
- publicly releasing confidential material in contravention of agreement reached about nondisclosure in relation to the mediation process; and
- adopting a negotiation position contrary to the instructions of clients.[40]

4.46 The proposal for an obligation to act in good faith was supported by the Aboriginal and Torres Strait Islander Social Justice Commissioner, who noted:

> These amendments are in my view an appropriate measure aimed at addressing any perception there may be that mediation by the NNTT need not be taken seriously.[41]

4.47 However the Commissioner raised concerns as to the enforceability of such an obligation:

> A presiding member of the NNTT will not find it easy to identify a party's behaviour as a breach of the requirement to act in good faith and to report accordingly. He or she may find it easier to report on behaviour that is, in his or her opinion, unnecessarily hindering or delaying the progress of mediation.[42]

4.48 Mr McAvoy, counsel for Queensland South Native Title Services, supported the proposal but considered that any attempt to define the term 'in good faith', would 'bog the whole process down in an administrative nightmare'.[43]

4.49 The proposal was opposed by the NNTC.[44] In evidence, Mr Philip Vincent, counsel for the NNTC, responded to a question about what constitutes bad faith:

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39 p. 32.

40 *Submission 16,* p. 5.

41 *Submission 10*, p. 27.

42 *Submission 10*, p. 27; see also *Submission 13,* p. 8.

43 *Committee Hansard*, 30 January 2007, p. 30.

44 *Submission 9,* p. 9.

> This is one of the problems; it could be in the mind of the beholder. At the moment, the few guidelines on good faith that have emerged in the Native Title Tribunal relate to being there and answering letters. That is really not enough if you are going to get people to negotiate meaningfully. It is a matter not of directing that they have good faith but of enthusing them into the negotiation process on the basis that their rights are going to be fairly accommodated and the outcome is something which they can respect and honour … I personally believe that it … is a state of mind. … You can only act on a person's state of mind by encouragement, enthusiasm and getting them to change it through personal persuasion.[45]

4.50 Mr Ron Levy, Principal Legal Officer of the Northern Land Council saw the good faith provision as:

> …just a recipe for litigation, especially when it is almost impossible to prove people have not acted in good faith. All the case law is that it is impossible. …Many of the NNTT members are not lawyers, and I think they will make mistakes—mostly honest mistakes. I think this will all lead to litigation and uncertainty and people wasting their time. What we really want is people to reach agreement or to have the matter prosecuted to a conclusion.[46]

4.51 The definition of 'in good faith' was also discussed with representatives of the MCA who supported the amendment while noting that it is 'important for there to be very clear expectations, protocols, guidelines, right at the outset.'[47]

4.52 The NNTT's submission supported the proposal. The submission notes that an obligation to act in good faith will provide 'an incentive to improve behaviour and to focus the attention of the parties and their representatives on the seriousness of the mediation process and the need to approach mediation in a professional manner and with a spirit of good will'.[48]

4.53 However, the NNTT acknowledged that the imposition on parties of an obligation to act in good faith is not a complete solution:

> …there are instances where some parties will refuse to mediate on the basis that there are points of law requiring clarification or that the claim itself is fundamentally flawed. It is not a failure to act in good faith to refuse to mediate if there is a legitimate basis for doing so. However, the party refusing to mediate should explain their position.[49]

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45 *Committee Hansard,* 30 January 2007, p. 15.

46 *Committee Hansard,* 30 January 2007, p. 46.

47 *Committee Hansard,* 30 January 2007, p. 39.

48 *Submission 17,* p. 22.

49 *Submission 17*, p. 22.

4.54 The NNTT also pointed out that these amendments are not without precedent: the Native Title Act currently contains good faith provisions: for example in relation to previous non exclusive possession acts (subparagraph 23F(3)(c)(ii)). Further, there are requirements to mediate in good faith in other Australian legislation.[50]

4.55 A representative of the Attorney-General's Department indicated that it is developing a code of conduct to support the good faith provision; the code once developed will then be distributed for comment. The code will not be prescriptive, nor will it have the status of a regulation.[51]

Committee view

4.56 The committee welcomes the Attorney-General's Department's advice that the 'good faith' provisions are intended to be supported by a code of conduct. The consultation on the content of the code with interested parties may go some way to alleviating the concerns about what constitutes acting 'in good faith'.

4.57 The committee considers that the code should be developed without delay, to ensure that parties before the NNTT are very clear about their obligations in mediation. The committee does not consider that there is anything to be gained by defining 'in good faith' further in the legislation, and agrees with the witnesses who saw any attempt at doing so as having the potential to slow the native title process unnecessarily.

Review function of the NNTT

4.58 The Bill inserts a new Division 4AA into the Native Title Act which allows the NNTT to conduct a review of documents to establish whether a native title claim group holds native title rights and interests. The Division also allows the NNTT to inquire into an issue or matter relevant to the determination of native title.

4.59 A review may only occur in the course of mediation by the NNTT and participation will be voluntary. The coercive powers of the NNTT will not apply.

4.60 The NNTC opposed this proposal on the grounds that it abrogates the 'without prejudice' nature of mediation proceedings.[52] Mr Philip Vincent, counsel to the NNTC, told the committee:

> With the review process, it is said that it is subject to the normal confidentiality provisions, but the fact is that the reviewer has the power simply to send off the report to the Court. So I cannot see how he can send

50 *Submission 17*, pp 22-24. One example given by the NNTT was the good faith obligation contained in subsections 34A(5) and 34B(4) of the *Administrative Appeals Act 1975* (Cth) in relation to alternative dispute resolution ordered under that Act: *Submission 17*, p. 24.

51 *Committee Hansard*, 30 January 2007, p. 59.

52 *Submission 9*, p. 10.

> off a report to the Court about the result of a voluntary review, which presumably is a finding as to whether there is likely to be native title or not or whether a party has rights and interests in the land, and which should be taken into account. It is said to be for the purpose of mediation, to help the parties to see the strengths and weaknesses of their own position. If the NNTT has the power simply to send that off to the Court, it will immediately compromise the position of the judge. It would be as if the evidence were then before him.[53]

4.61 The Aboriginal and Torres Strait Islander Social Justice Commissioner also opposed the insertion of Division 4AA. In principle, his objections centred around the fact that reports may be presented to the Federal Court and non-participating parties, without the consent of the participating parties. In addition, the Commissioner noted:

> The proposed review and inquiry provisions…threaten to create even greater confusion by enlarging the role of the NNTT to include quasi-judicial investigations into the factual and legal issues at the heart of a native title claim, the determination of which is, appropriately, currently the sole domain of the Federal Court.[54]

4.62 Mr Ron Levy of the Northern Land Council observed that:

> The proposal that the NNTT duplicate the Court's function by conducting parallel inquiries as to the existence of native title is inherently inefficient – it will divert resources, engender legal challenge and not assist or enhance the Court's judicial function.[55]

4.63 The Attorney-General's Department told the committee that these reviews and inquiries, 'are only two more tools and it is certainly not envisaged that they would be deployed as a matter of course in claims'.[56]

Committee view

4.64 The committee notes that the Attorney-General's Department does not envisage that these measures will be used as a matter of course. However, the fact remains that these measures will be available and they appear to duplicate the Court's function. Further, it is not clear to what extent the availability of these reviews will contribute towards the expeditious resolution of native title matters.

4.65 The committee recommends that the Attorney-General's Department should monitor the use and operation of the review provisions in proposed Division 4AA and report to the Parliament on the effectiveness of the provisions after two years of operation.

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53 *Committee Hansard,* 30 January 2007, p. 16; see also *Submission 9*, p. 10.

54 *Submission 10*, p. 30.

55 *Submission 14*, p. 3.

56 *Committee Hansard* , 30 January 2007, p. 51.

Other amendments

4.66 In a submission to the inquiry, Telstra took exception to the proposed amendments to subsection 84(5) and section 87A of the Native Title Act.

4.67 The proposed change to subsection 84(5) requires the Court to be satisfied that the joinder of a respondent at the end of the notification period under section 66 is in the 'interests of justice'.[57]

4.68 Telstra considers the amendment unnecessary on the basis that the Court already has a discretion to refuse joinder and exercises it.[58] Telstra also indicates that the proposal introduces an element of uncertainty because of the lack of definition of the interests of justice, and submits that there be no change or, alternatively, that the minimum requirements for joinder within the notification period be that a person has 'an interest in land or waters that may be affected by the determination.'[59]

4.69 The significance of the amendment compared to the current practice is explained in the Bills Digest:

> 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. [60]

4.70 The proposed amendment to section 87A would allow part of a native title claim proceeding to be settled by a consent determination. The proposed section limits the requirements for consent to only those respondent parties who hold a publicly registered proprietary interest in relation to land or waters in any part of the determination area.

4.71 The submission from Telstra points out that those with unregistered interests or non-proprietary interests are not required to be involved in such agreements.[61] Telstra's concern arises from the fact that many of its facilities may be installed in areas in which its interests are not included in any public register.

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57 *Submission 15*, p. 2.

58 *Submission 15*, p. 4.

59 *Submission 15*, p. 5.

60 Parliamentary Library, "Native Title Amendment Bill 2006", *Bills Digest No. 77 2006-07*, 6 February 2007, p. 12.

61 *Submission 15*, p. 6.

4.72 The Bills Digest notes that this amendment addresses the need to 'encourage more efficient resolution of native title matters'.[62]

Committee view

4.73 The committee acknowledges that Telstra has a significant interest in matters affecting native title. Telstra is the beneficiary of unregistered interests which contribute to the efficiency of communications across Australia, and any significant impediment to its ability to do so should be examined, and where necessary, rectified.

4.74 It appears to the committee that there is a small risk that the requirements that joinder be 'in the interests of justice' will create some uncertainty. However, the committee considers that the provision strikes an appropriate balance between streamlining the claims process and ensuring that those who have a substantive interest have the opportunity to join the proceedings.

4.75 The committee notes that proposed section 87A is intended to encourage the efficient resolution of native title matters. However, the committee is concerned as to the nature of the unregistered interests and non-proprietary interests which may be affected by the provision. It can be argued that the entitlement of any such party would be very limited, but at the same time it is important that a communications body is at least notified of any proposal affecting its interests ─ registered or unregistered.

4.76 The amendments to section 87A suggested by Telstra should be examined by the Attorney-General's Department and, if appropriate, considered for inclusion in the further amendments to the Native Title Act proposed for later this year.

62 Parliamentary Library, "Native Title Amendment Bill 2006", *Bills Digest No. 77 2006-07*, 6 February 2007, p. 13.