National Native Title Council

25 January 2007

Ms Jackie Morris
Committee Secretary
Senate Legal & Constitutional Affairs Committee
By email: legcon.sen@aph.gov.au

Dear Ms Morris

Inquiry into the Native Title Amendment Bill 2006

Thank you for the opportunity for the National Native Title Council (NNTC) to make the attached submission to the Committee's inquiry into the Native Title Amendment Bill.

This submission is based on the combined and considerable practical experience, with the native title system, of native title representative bodies and service organisations across Australia.

The NNTC shares the Federal Government's policy objective of a more streamlined, effective and efficient system that is capable of more quickly settling native title claims.

However, we reiterate our previously expressed concern that many of the amendments will not contribute to this policy objective. We are also concerned that the effect of some amendments will be adverse to the government's stated intention that "substantive rights are not to be reduced". The provision of insufficient resources to the system, including to NTRBs and NTSs, will also frustrate the objectives of the reforms. These concerns are discussed in our submission.

Yours sincerely

Bonita Mason
A/Executive Officer

NATIONAL NATIVE TITLE COUNCIL

SUBMISSIONS TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE ON THE NATIVE TITLE AMENDMENT BILL 2006

INTRODUCTION

The National Native Title Council ("NNTC") is the national body of native title representative bodies ("NTRBs") and service providers ("NTSs"). It was informally established in August 2005 and incorporated in 2006. Its objects are, amongst others, to provide a national voice for Native Title Representative Bodies and Native Title Service Providers on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people.

Except where provisions specifically refer to either NTRBs or NTSs, any reference to one in our submission will include the other.

Many of the proposals that have been put in the current Bill are said to be based upon making the claims process more expeditious and to promote agreement-making rather than litigation[1]. The fact of the matter is that these changes are not, in the main, necessary or would not be necessary if governments – State, Territory and the Commonwealth – did not take such a litigious attitude to the claims process. Too often their stance is one of bitter opposition to virtually all claims in the Federal Court, and then the promotion and support of appeals against any positive determinations that are handed down.

In other words, achieving resolution of native title claims would best be addressed not by seeking to cull native title claims already in the system, and using sanctions to get native title parties to negotiate (an implied alleged necessity underpinning many of the proposed amendments), but of getting governments to accept the reality of native title and show respect to claimants and their representatives in the native title process.

The NNTC generally agrees that a more efficient and less legalistic approach to the resolution of native title applications is worthy of pursuit. However it is worth noting that the *Native Title Act 1993* was introduced to bring a process of reform to two centuries of dispossession of Indigenous people in this country. It has only been in operation for 13 years and it would be a breach of faith to Indigenous people for Parliament to now apparently tire of the process and seek to bring in a 'quick fix', unjust solutions simply to clear up perceived court back logs. This refers in particular to proposals such as statutory summary dismissals which may leave no ultimate recourse for Indigenous applicants to the courts for judicial assessment and determination of their rights.

There has in fact already been significant progress in the resolution of native title claims in the short time since the Act was passed. At paragraph 4.9 (page 16) of the report of

[1] See, the Second Reading Speech, page 1, third paragraph

the Native Title Claims Resolution Review (the Hiley-Levy Report, 31 March 2006) it is 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.

A number of the NNTC's constituent organisations have made submissions to the Government on aspects of the Bill, such as the functioning of prescribed bodies corporate ("PBCs") and changes to the NTA relating to native title representative bodies ("NTRBs") when the Government's proposals were first made. The NNTC itself made submissions to the Government on the Native Title Claims Resolution Review (the Hiley-Levy report) of 31 March 2006.

These submissions now put a joint position on the Government's proposals as they have emerged in the Bill.

In relation to the Bill's proposals concerning NTRBs, there is a concern that they are directed to quietly moving away from the original concept, namely that these bodies be truly "representative" bodies, i.e. representative of the Indigenous people of the region, and towards mere "representing" bodies – i.e. outsourced service providers such as legal practices. This possibility is provided for in the overall scheme of the proposed amendments, which includes negating the requirement for recognition that an NTRB be shown to be able to represent and consult with native title claimants and other Aboriginal and Torres Strait Islander people in their area, setting in place discretionary fixed terms of recognition, providing summary withdrawal of recognition procedures by the Minister and extending the types of eligible bodies.

The NNTC absolutely opposes the idea that non-Indigenous bodies should take up the role of representative bodies. Community participation through self-managed native title representative bodies is a corner stone of the native title system. The trust required to achieve viable outcomes, especially in terms of enduring agreement making, simply cannot be replicated by a firm of solicitors or other entity based far away, both geographically and culturally, from claimants.

Most representative bodies have to date operated effectively and efficiently within the constraints of the resources that have been provided to them. Representative bodies themselves, industry representatives and some State governments have consistently made submissions to various bodies, including to Federal Parliamentary committees and government, that what is needed to make them even more effective is adequate funding. Realistic funding has never been provided to NTRBs to fulfil their functions under the NTA.

The NNTC says that rather than seek ways to facilitate legal practices or other such organisations taking over the current functions of representative bodies, the Government should simply adequately fund the current NTRBs. The proposals are in any event self-defeating. One can well imagine that legal practices will end up being vastly more expensive than the presently operating Indigenous representative bodies.

A consistent theme in our previous submissions has been that the NNTC opposes giving exclusive powers to the National Native Title Tribunal ("NNTT") to mediate claims rather than the Federal Court. This is based on the fact that the NNTT has simply not shown in the past that it has the expertise to effectively mediate. The Federal Court, on the other hand, has been found to mediate effectively, no doubt skilled by its experience in its other wide jurisdiction (not just native title). Federal Court involvement is necessary in the mediation process, it is submitted, to deal with recalcitrant State and other respondents, and to act imaginatively to achieve real outcomes.

Under the Bill the NNTT is also proposed to have wide review and inquiry powers. While these have the potential to simplify native title procedures, again, the NNTT has simply not so far shown that it has the skills to perform such tasks. Any such initiatives will need to be accompanied by a significant upgrading of competence levels within the NNTT.

The proposed amendments in Schedule 3 relating to Prescribed Bodies Corporate ("PBCs") do not, unfortunately, address the major issue facing them, namely funding. The NNTC makes submissions concerning that aspect below.

The following submissions only address aspects of the Bill that are of particular concern to the NNTC. A summary of its submissions on the various proposals is set out in bold type, for ease of reference at the end of each section.

SCHEDULE 1 – AMENDMENTS RELATING TO REPRESENTATIVE ABORIGINAL /TORRES STRAIT ISLANDER BODIES

Periodic Recognition

The effect of the proposed amendments relating to Native Title Representative Bodies ("NTRBs") is that recognition is now no longer enduring, but instead is to be 'periodic', i.e. limited to a period of between one to six years within the discretion of the Minister.

The period is to be initially set by the Minister in a letter of invitation to apply for NTRB status: Item3 s203AA(3) for existing NTRBs during a transition period, Item 7 s203A(3A) thereafter for successful applicants from invited 'eligible bodies', and is then reflected as the period in the instrument of recognition under Item 15 s203AD(2D)(b).

Summary of NNTC Submission

The NNTC strongly opposes periodic recognition of native title representative bodies. The opposition is even more so as the period of recognition is to be within the discretion of the Minister.

Periodic recognition will mean:-

(a) Instability for industry, government and native title claimants as they will be unsure of who they may be dealing with at any given time;
(b) Conflict of interest on the part of NTRBs which may feel the need to compromise their activities to produce 'outcomes' for government (which in policy and practice opposes native title through the courts) in order to obtain re-recognition at the end of its term;
(c) Inability of NTRBs to plan for the long term future in terms of securing premises, infrastructure and committed, experienced staff. Increased costs is another likely consequence.
(d) It has been found in practice that building up expertise and corporate knowledge is critical to effectively carry out the functions of a representative body under the NTA[2] and provide a comprehensive service. This will be lost with periodic recognition.
(e) Diversion of already stretched NTRBs from core business to focus on re-recognition processes, which as found in 1999 when all current representative bodies were required to go through rigorous re-recognition examination, are exacting and time consuming.

The NNTC suggests that there are already sufficient controls through the deregistration processes currently in the Act (proposed to be even more summary under this Bill) together with review provisions, grant conditions and the fact that NTRBs are eventually responsible to native title claimants through the election process, to ensure that NTRBs operate effectively on behalf of their constituents.

The proposal for initial application for re-recognition during the transition period by all current NTRBs (which, if they apply results in their automatic continuance) is unnecessary. NTRBs are over-worked and under-funded. As mentioned above, the re-recognition process is extremely time-consuming and this process will divert NTRBs from their core functions.

For native title claimants, native title should provide the much-sought recognition of traditional ownership, and contribute in a meaningful and contemporary way to people's lives. Many NTRBs – by virtue of their community representative nature, their networks and their ability to work successfully with Indigenous people – are able to integrate native title activities, consultation processes, representative forums and agreement outcomes with other land-related aspirations and activities. Natural Resource Management is one example. This coordinated and integrated approach is more likely to build the resources and capacity necessary for successful local and regional economic development.

Separating native title from other matters, and from community networks, will destroy the possibility of these synergies. It is evident that since the demise of ATSIC, government and business agencies, when finding they need to consult

[2] For NTRB functions see current s203B(1) and the remainder of Part 11 of the Act.

with Indigenous people, are calling on NTRBs and NTSs to provide the mechanism.

Further, weakening NTRBs by undermining their long-term security will ensure that the native title system, and its potential for Indigenous development, is also undermined. This will benefit no one.

Expanded range of bodies that can become an NTRB

Under the Bill there will now also be a greater range of bodies that can become NTRBs: Item 5 s201B(1)(ba) enables a company incorporated under the Commonwealth's *Corporations Act 2001* to be an NTRB. Unlike Aboriginal Corporations (eligible bodies under the unamended section) companies will not be required to have any special constitutional requirements to be eligible.

There are also fewer matters that the Minister will need to be satisfied of in recognising an NTRB. Significantly, the importance of Indigenous involvement is proposed to be reduced. Under the current NTA, before appointing an NTRB, the Minister had to be satisfied that the NTRB (a) satisfactorily represented native title claimants, and (b) consulted effectively with Indigenous people in its area (e.g. ss203AD(1), 203AE, s203AF(4) etc of the current Act). Under the Bill The Minister no longer needs to be satisfied of these matters, and simply need be satisfied that the NTRB can perform its functions: e.g. Item 13 s203AD(1).

The same changes, namely a removal of the Minister needing to be satisfied with the NTRB's claimant representation and Indigenous consultation, have also been repeated in relation to the Minister's powers to withdraw NTRB recognition (item 24 s203AH(2)) and in extending, varying or reducing the NTRB's area (items 18, 19 & 20).

The Explanatory Memorandum (page 6, third paragraph) endeavours to 'sweeten the pill' by saying that s203BA(2)(a) & (b) remain, requiring that NTRB work must "maintain ... organisational structures and administrative processes that promote the satisfactory representation [of native title claimants]" and "maintain ... organisational structures and administrative processes that promote effective consultation with [Indigenous people]". However the proposed removal of the Minister's needing to be satisfied about these matters for actual recognition as a representative body constitutes a clear downgrading of the importance of these matters. Also, it remains unclear as to how 'representation' will continue to be interpreted. Will it be interpreted to mean representation within the organisation (i.e. the current interpretation, a requirement that an organisation actually be Indigenous) or will it be interpreted to merely mean that an organisation must show that its structures and administration facilitate satisfactory representation of claimants (say as legal representative) within the native title court and other processes?

<u>Summary of NNTC Submission</u>

The NNTC opposes the eligibility of companies incorporated under the Commonwealth's *Corporations Act 2001* to be an NTRB in the absence of:-

(a) the need (as currently applies for eligibility of Aboriginal corporations) to have specific objects relating to the performance of representative body functions; and
(b) the need (as currently applies) to show that it satisfactorily represents native title claimants and consults with Indigenous people in its area.

The ability of the Minister to determine which eligible body will be successful will, if the Bill is passed, be entirely discretionary. These changes, over time, are likely to significantly change the nature of NTRBs from 'representative' bodies to bodies that merely 'represent' native title claimants (such as legal practices). This is contrary to the spirit of the NTA arrangements and is likely to produce a service that is ultimately outside of the control of Aboriginal and Torres Strait islander people. It is also likely to be more expensive.

Summary de-recognition processes
NTRB de-recognition will also become easier under the Bill because the proposed amendments remove the current NTA provision that the Minister can't withdraw recognition unless satisfied that the NTRB is unlikely to remedy the relevant deficiencies (current s203AH(2)(b)). Instead, the Minister will be able to simply withdraw recognition if satisfied that the NTRB isn't "satisfactorily performing its functions" or there are serious or repeated financial irregularities: Item 24 s203AH(2).

The notice period (before withdrawing NTRB recognition or reducing an NTRB's area) is likewise reduced from 90 days to 60 days: Item 21 s203AG(3) & Item 25 s203AH(3).

<u>Summary of NNTC Submission</u>
These changes are draconian and unnecessary. They will have a destabilising effect on NTRBs. The removal of the provision for the Minister to be satisfied, prior to de-recognition, that relevant deficiencies are unlikely to be remedied introduces a summary or 'sudden death' aspect to de-recognition. This is contrary to contemporary standards where people's rights and livelihoods are in issue. In the context of Aboriginal organisations, where governance is a matter of continuing mentoring and growth, deficiencies in efficient operations can be remedied through guidance and assistance or, in relation to some matters, through a change of committee.

The reduction of the response period for a notice of intention to withdraw recognition from 90 days to 60 days is unrealistic given the gravity of the matter, and the burden on NTRBs to fulfil their other functions. It is simply more pressure to be imposed on organisations that are under-funded and over-worked.

Amendment of the geographical area of responsibility of an NTRB

The amendments propose that an NTRB can be required to administer a larger area (even against its wishes – Item 18 s203AE(3)) where the Minister decides that it can perform the functions of an adjoining area that doesn't have an NTRB (Item 18 s203AE), or where the adjoining area has an NTRB but the Minister thinks there needs to be some boundary adjustment (Item 19 s203AF).

Summary of NNTC Submission

The current boundaries of NTRBs have been the result of considerable consultation and negotiation between government, NTRBs and their constituents. Boundaries are not mere matters of administrative convenience, but also represent cultural groupings and are reflected in NTRB membership and other constitutional aspects. It is clear that what might be administratively attractive to a government could cause significant difficulties for an NTRB and its constituents. For example, where an effective NTRB is required to expand into an area which does not have a current representative body, or where an NTRB is required to take over an area which was previously within another NTRB area, against the wishes of one or more traditional owner groups, it is likely to cause conflict and administrative dislocation. The better process would be to simply issue an invitation for an eligible body to take up the area. This would ensure that only bodies that felt comfortable to represent the people of the area would end up doing so.

The reduction from 90 days response period of 60 days to Ministerial decisions to alter NTRB areas (see Item 18 s.203AE(5) and (6) for expansion of area; Item 21 s.203AG(3) for reduction of area) is, again, unrealistic. Considerable consultation would be required by an NTRB with its constituents and other representative bodies in order to properly respond to such a notice. There seems no reason for imposing these reduced times.

Native Title Service Providers ("NTSPs") – move towards work on a 'cost recovery basis'

The Amending Bill has a series of provisions in relation to NTSPs (i.e. bodies funded to do NTRB functions where there is no NTRB). In various ways these bodies are to be given more responsibility to perform the functions of NTRBs (e.g. Item 45 ss203FEA and 203FEB). However under the proposals there is potential for these bodies to be pushed to work on a 'cost recovery basis' rather than in the knowledge that, as with other native title claimants (and for that matter, most parties – see current NTA s183), their clients will be funded by the Commonwealth. Under the Bill, they will now be funded only if the Secretary of the Department is of the opinion that the work to be done wouldn't be done efficiently and expeditiously without the funding: Item 43 s203FE(1A).

Summary of NNTC Submission

It is unfair and discriminatory that Aboriginal claimants in an area where there is an NTSP rather than an NTRB do not have a right under the NTA to like funding for native title activities.

SCHEDULE 2 – CLAIMS RESOLUTION REVIEW

Exclusive mediation role to the National Native Title Tribunal ("NNTT")
The Bill includes as a major strategy more emphasis on the role of the NNTT in mediation at the expense of the Federal Court. The strategy includes forbidding the Federal Court from mediating any aspect of a claim, or in the normal course enquiring as to progress of mediation via a court Registrar, if the claim is before the NNTT for mediation (see Item 19, s86B(6)).

As mentioned above in the Introduction, the NNTT has so far simply not been effective in its mediation role. This is borne out by the statistics provided in the Hiley-Levy Native Title Claims Review report. At paragraph 4.11 (page 16) the report notes that as at 17 January 2006, of 356 claims currently with the NNTT for mediation, 272 (approximately 76 per cent) had been with the NNTT for more than three years and 170 (just under 48 per cent) for more than five years. It is no doubt that concerns about competence led Messrs Hiley and Levy's to report (at paragraph 2.8 (page 13)) that they had not been able to reach agreement on options for institutional reform.

The ineffectiveness of the NNTT in mediation has been of great frustration to NTRBs and native title claimants. The ineffectiveness is not, we suggest, due so much to a matter of powers ("teeth") of the NNTT (which is sought to be addressed by sections of the Bill), but to lack of competency. In this regard there do not seem to be sufficient skills within the Tribunal membership in basic mediation techniques. It is for this reason that many NTRBs have opted to seek court-based mediation rather than relying on NNTT mediation processes. Reports of results in the Federal Court, perhaps due to the experience of the court personnel, have been far more encouraging than in the Tribunal, and NNTC members would be concerned if this avenue was blocked or restricted in any way.

Summary of NNTC Submission
The Federal Court appears to be able to deliver far better results in mediation of native title cases than the NNTT, possibly due to its prestige and experience in other jurisdictions, and the NNTC considers it a serious policy error to exclusively vest such functions in the Tribunal, which does not have the necessary skills, at the expense of the court.

Compulsive powers given to the NNTT
Various compulsive powers are proposed for the NNTT in the Bill to accompany their role in mediation, although compulsive powers would seem generally inimical to the mediation process.

These powers include powers in the NNTT to:-

(a) require attendance of parties at a mediation session (Item 45 s.136B(1A));
(b) require parties to mediate in good faith (Item 46 s.136B(4); and
(c) require production of documents (it seems even legally privileged documents, although the Explanatory Memorandum at para 2.102 claims the contrary) (Item47 s.136CA).

The NNTT's above powers are sought to be supported by a variety of supplementary powers. These include powers to:-

(a) report breaches to the court (including disclosing of otherwise privileged material – having the potential to ultimately compromise the court's independent arbitral powers) (see Item 51 s136G(3B); Item 52 s136GA(4));
(b) report to other entities for breach of the good faith provision, including State/Federal Ministers, Secretaries of funding departments and to State or Territory legal professional bodies (Item52 s136GA); and
(c) have the Federal Court make orders to compel compliance with NNTT directions (only – as a cipher, i.e. "in similar terms to the directions that are the subject of the report") (Item 31 s86D(3)).

Summary of NNTC Submission

The powers ("teeth") proposed to be accorded to the NNTT to augment their mediation function are incompatible with that function, and are harsh and oppressive.

The powers to compel the production of legally privileged documents, to put to the court statements and materials which were initially held out to be confidential and to report to legal disciplinary committees what a tribunal member or contracted mediation consultants considers 'lack of good faith' are extreme and oppressive.

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.

In relation to the proposal for the NNTT to report so-called "lack of good faith" to legal disciplinary bodies, as lawyers would be acting *in terrorem,* they would not be able to participate, on an ethical basis, in the mediation process. Native title claimants would therefore be required to appear unassisted in such matters before the Tribunal.

It is noted that on the other hand, State and Commonwealth representatives are, under the proposed amendments, only to be reported to their respective Minister (their client) for acting in bad faith, with a potentially adverse mention in the NNTT annual report (Item52 s136GB).

The difference approach indicates the unfounded assumption within the Bill that the native title parties and their representatives are the ones who are obstructing mediation towards negotiated outcomes. The NNTC can quite clearly state that overwhelmingly it is government parties who frustrate the settling of native title claims, not Indigenous parties. This is evidenced by the number of cases that have been fought by governments through the courts and then appealed by them to the highest levels.

Instead of using the oppressive measures proposed in the Bill, Parliament could consider the ability to develop guidelines for behaviour in mediation as suggested in the Hiley-Levy report (see Explanatory Memorandum paragraph 2.99 page 49).

NNTT's Review power

As part of the proposed new powers of the NNTT, it is to have power to conduct reviews on whether a native title claim group holds native title over its claim area (see Item 53 Part 6 Division 4AA – Review on whether there are native title rights and interests).

It is explained (Explanatory Memorandum para 2.129 page 53) that the object is to enhance the mediation process and facilitate agreement between parties. Whilst this may be a useful power, there appears confusion in the Bill as to the intended purpose and the status of the material in and resulting from the reviews.

Proposed Item 53 s136GC(7) provides that evidence of review matters cannot be tendered in later court proceedings without the consent of the participating parties. In that regard the Explanatory Memorandum states (para 2.137 page 55): "This imposes the same 'without prejudice' protection to words spoken and acts done during the course of the mediation ..."

However proposed Item 53 s136GE provides that the person conducting the review (who may be a consultant) is to prepare a report on the review and (by subsection (2)) "may provide a copy of the report to the Federal Court and other parties in the proceedings". The Explanatory Memorandum (paragraph 2.147 page 56) refers to the fact that the court can then "adopt the findings of the review".

This completely abrogates the stated purpose of the review process (mediation) and the alleged "without prejudice" status of the procedure. It seeks under the guise of a mediation tool to affect the decision of the court. It will be impossible for a court, upon receipt of a review report, to be unaffected by what is in it, even if it doesn't want to "adopt" its outcome. The review report will no doubt contain reference to what was said and done in the course of the review, and the reviewer's views on the very matter that the court may ultimately be asked to decide, i.e. the existence or otherwise of native title. And later, because of proposed Item 53 s136GC(7), parties will not be able to refer or question the material forming the basis of the review report which the court may have adopted!

It is further surprising that a consultant can decide to send his report off to the Federal Court, without the question first being considered by the President of the Tribunal (s136GE).

Summary of NNTC Submission

The stated purpose of the NNTT's review power to enhance mediation is abrogated by the ability of the reviewer to send his/her report to the Federal Court and other parties with a view to adoption of the result.

This has the potential to embarrass the court, as the review report will state opinions on the matter before the court. It also abrogates the undertaking that the process is 'without prejudice'. This has the potential to be unfair and unjust to all parties.

The real purpose of the NNTT's review power (report to court – as with the proposed Native Title Inquiry power) should be clearly stated or, if it is intended that the review truly be a mediation tool, the NNTT should only be able to send the report of the review to the court and /or other parties with the consent of the review parties.

NNTT's Inquiry Power

The NNTT currently has powers to inquire into matters referred to it by the Minister and into general matters (see NTA ss137 and 139). These are proposed to be augmented by the Bill to enable the NNTT, where there is the consent of applicants, to institute an inquiry into the existence of native title in particular claims (Item 57 Part 6 Division 5 Subdivision AA).

Following the Inquiry, the NNTT is to send its report, including any "determination" (Item67 s164(2)) to the Federal Court. Under amendments proposed in Item 7 s. 86(2) the court is required to consider whether to admit the transcript of the Inquiry's proceedings into evidence and may adopt or draw conclusions from the NNTT's determination in the matter.

However the ability of the NNTT to contribute positively within the inquiry process is dependent on its members' skill level. The NNTC has already expressed its views on that issue above in relation to mediation. It is not considered that the NNTT's skills are any better in relation to the holding of inquiries. These would need to be significantly augmented if the proposed inquiry power is to be useful to the community.

Summary of NNTC Submission

While the Inquiry power into native title claims proposed to be given to the NNTT may be useful in providing a less legalistic forum for resolution of these matters, the NNTC has a concern that the NNTT does not presently have the skills to exercise

the function effectively. Significant changes to personnel and administration will be required within the NNTT if the power is to be maximised.

Summary strike out of native title claims

The Bill proposes that two types of native title claims will be dismissed under its provisions. This proposal is in addition to the power that the Federal Court already has under its ordinary rules to dismiss native title claims for want of prosecution or on a "strike out" if they are manifestly unsound.

The proposed new grounds for summary dismissal of claims are:-

(a) Claims brought in response to a "future act" (Item 36 s94C)

The scheme of proposed s94C is not at all clear, although it appears to require the provision of expedited evidence to the court where native title claims have been lodged in response to "future acts". In the absence of the production of such evidence, the claims are to be dismissed, unless "compelling" reasons can be shown.

"Future acts" are defined in s233 of the NTA as acts which in particular circumstances affect or invalidly purport to extinguish native title. The protection of native title in the context of future acts pending the outcome of determination proceedings is a specific object of the NTA and is provided for under the Act by, for example, the right to negotiate provisions contained in Part 2 Division 3.

There is, therefore, nothing improper in claimants filing native title determination applications following future act notices. Indeed it is provided for and contemplated by the Act through, for example, the future act notice provisions (see s29 NTA).

There is therefore no reason why native title determination applications lodged with the motive of protecting native title where a future act is notified should be regarded as improper or an abuse of process. They are in keeping with the very objects and processes of the Act. To seek to single them out for summary strike out is without any legal or moral merit, and must be regarded as an unfair attempt to deprive native title claimants from their right to pursue the proper court processes available to attain their rights.

Further, such summary dismissal processes are unnecessary. The court already has the ability to dismiss <u>any</u> native title claim for want of prosecution as an abuse of process under its ordinary powers and the proposals will simply bog down the court and all parties rather than alleviate any alleged back log.

(b) Claims that fail the Tribunal's registration test

The Bill proposes (Item 73 s.190D(6)) to empower the court to dismiss native title claims that do not pass the merits aspect of the NNTT-administered "registration

test". It can also dismiss claims, if the NNTT states that it was not able to consider their merit because of procedural deficiencies.

The registration test of claims is carried out within the NNTT to allow claimants in native title claims that have some prima facie merit to have negotiating rights pending determination of the question of native title being resolved in the Federal Court (see for eg NTA ss 25, 30 and 30A). Currently, the Federal Court can hear and determine unregistered applications in the same way as registered ones – i.e. on their merits and subject to the court's own regulatory mechanisms.

The NNTT registration test is not, and never has been, determinative, but merely procedural in nature. Indeed, it can be argued that the merits aspects of the registration test do not even ask the correct and relevant questions that a court would need to consider in determining whether native title exists (see for example s.190B (7)) – a point conceded inferentially by the Hiley-Levy Report at Fn 39 (page 38).

The amendments also introduce the strike out proposal, as part of the scheme, to have the NNTT "retest" all currently unregistered claims (Items 89 and 90 – Application and transitional provisions).

These proposals have the potential to clog up all systems rather than alleviate any alleged overload. The NNTT will have to re-test all unregistered applications. NTRBs will have to re-prepare information supporting such applications (under Items 89 and 90 they have that ability). And the Federal Court will have to deal with appeals against registration test decisions (already provided for under s190BD of the Act), as the result of the proposed amendments is that the registration test will be so much more important for all parties.

Further, the proposed procedures are not in fact necessary. The Federal Court already has the ability to strike out manifestly deficient claims under the NTA (s 84C) and s31A of the *Federal Court of Australia Act* 1976.

Summary of NNTC submission

The NNTC opposes both of these summary dismissal powers. They are unnecessary, partisan and oppressive. They use the wrong test for determining whether a native title claim should be summarily terminated. Also, they are likely to burden the system rather than free it up. In the case of proposed future act response claims, the court will be required to invite and consider connection evidence on all such claims that have been lodged. In the case of unregistered claims, all major parties and forums will be involved in the re-registration testing of all currently unregistered claims, the hearing of appeals against the result and then hearing submissions on proposals concerning the summary strike outs.

The proposals are unnecessary; the court is presently vested with adequate strike-out powers for want of prosecution or in respect of manifestly deficient claims.

SCHEDULE 3 – PRESCRIBED BODIES CORPORATE

The proposals in the Bill relating to Prescribed Bodies Corporate ("PBCs") introduce certain technical amendments in respect of which the NNTC sees no need to make submissions.

However, the NNTC is concerned to note that the question of the on-going funding of PBCs has still not been addressed in any serious way, although it is apparently recognised by the Government as a significant issue (see for example Explanatory Memorandum page 73 second paragraph).

While requiring native title to be managed by PBCs, the Commonwealth native title regime does not currently provide any direct funding for them. Nor does it provide native title holders with any assistance in establishing PBCs, or determining the appropriate structure. NTRBs and NTSs are the best-placed organisations to provide PBCs with ongoing assistance once a native title determination has been made, however there is no funding assistance to enable these native title bodies to carry out this role. This has operated as an effective prohibition to such assistance being provided. As a result of this, PBCs have no secure funding source.

In some States many of the outcomes negotiated under the *Native Title Act 1993* do not involve a determination of native title, but rather a raft of other benefits, obligations and responsibilities which are managed by Aboriginal Corporations on behalf of traditional owner groups, rather than by PBCs. Improved funding for these other Corporations and for assistance to these Corporations by NTRBs must also necessarily be incorporated into any changes or improved funding within the PBC scheme, otherwise Indigenous People in many parts of Australia will be unable to capitalise on the outcomes negotiated through the native title claims process.

Whether a successful determination of native title leads to economic benefits for the native title holders is not by any means guaranteed. Native title is not *per se* an income-generating asset, although it can ultimately provide traditional owners with economic benefits depending on the economic uses to which the land and waters are put. The expertise required to generate economic benefit from a native title determination is specialised, and is generally not readily available to native title claimants. The result is that PBCs find themselves, for the most part, without income or readily available assets, and without the necessary skills to be able to generate them.

Once a determination of native title has been made, all official correspondence and dealings with the native title holding group must go through the PBC. This potentially imposes a significant amount of work for the officers of the PBC, and requires a detailed understanding of the future act regime and the rights of native title holders within it. Given the complexity of the system, it is unlikely that many native title holders –

particularly those in remote communities with little formal education – will possess such an understanding.

The native title and other legislative regimes also impose significant administrative and accounting requirements on PBCs. For example, records must be kept of members, financial statements provided to ORAC annually, and minutes kept of every decision of the corporation.

Dysfunctional or under-resourced PBCs jeopardise the capacity of native title holders to exercise their rights and make informed decisions about their country. This can lead to extinguishment by stealth and/or to instability and uncertainty, not only for native title holders, but also for government and third parties.

The question of who should provide funding to PBCs has resulted in something of a stalemate between State and Federal Governments. It is the NNTC's submission that the Commonwealth, as the architect of the *Native Title Act* 1993 and system, bears the primary responsibility for ensuring that PBCs are able to fulfil their statutory requirements. Proper legislative provisions under the NTA for the funding of PBCs are long overdue.

Summary of NNTC Submission

The NNTC makes no submissions on the proposed amendments in the Bill relating to PBCs, but points to the serious and longstanding omission to make proper legislative provision for the on-going funding of PBCs, which are an essential element in the native title scheme.

SCHEDULE 4 – FUNDING UNDER SECTION 183 OF THE NATIVE TITLE ACT 1993

Under current NTA s183 the Attorney-General has the power to provide funding by the Commonwealth to non-Indigenous respondent parties to native title matters "either unconditionally or subject to such conditions as the Attorney-General determines".

The amendments in the Bill (Items 1 and 2) intend to extend the matters for which such funds can be provided.

Summary of NNTC Submission

While the NNTC does not oppose the proposed amendments, it draws the attention of the Committee to the comparison between the onerous requirements applied to Indigenous people for funding native title matters through NTRBs (with even more onerous requirements intended to imposed by the proposed amendments referred to in Schedule 1 of the Bill) and those to which non-Indigenous parties are subjected, as mentioned above.

ADDITIONAL COMMENTS

The NNTC is disappointed at the level of engagement that has taken place between Government and Indigenous people and their representative organisations in the consideration of proposals for amendment to the native title system.

While we have been offered the opportunity to comment on discussion and consultation papers, and appreciate this opportunity, we have not been a part of the process of considering and recommending useful change, in spite of our requests that this be so.

The NNTC has written to the Attorney-General and the Minister for Indigenous Affairs asking the Government to commit to a joint process between NTRBs/NTSs and the Federal Government. We also requested that we be represented on the native title claims review steering committee. None of these requests was agreed to.

NTRBs & NTSs are as interested as the Government in making the native title system faster, fairer and less costly. We believe that the best outcomes from the review process would have been achieved by the full participation of NTRBs and NTSs.

The native title reform process therefore continues a failed practice of government deciding what is best and/or expedient for Indigenous people and then imposing those decisions.