Submission of the

ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER

on behalf of the

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

to the

SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

on the

INQUIRY INTO THE NATIVE TITLE [AMENDMENT] BILL 2006

25 January 2007

A INTRODUCTION

1. It is essential at all times when the reform of native title law is contemplated, that the historic importance of the recognition of native title to the building of a more just Australia, be kept squarely in mind. The law of native title provides for the limited recognition and protection of what remains of the traditional property rights of Indigenous Australian peoples that were unjustly ignored and denied for the first 200 years of European settlement. The preamble to the *Native Title Act 1993* (the 'Act') records Parliament's recognition that as a consequence of dispossession Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society. The recognition and protection of native title today is of great significance to the economic and social advancement of Indigenous communities, to the spiritual wellbeing of Indigenous peoples, and to the continued practice and flourishing of their cultures.

2. It is important to also keep in mind that the Act has always represented a pragmatic compromise by the legislators of this country, in which the recognition and enjoyment of native title rights are already subjugated to other rights and interests in relation to land and waters.

3. Further, assisting Indigenous peoples and groups to engage in proceedings and negotiations to have their traditional rights recognised and protected at this point in the nation's history presents many challenges. Achieving formal legal recognition of native title rights and interests is, and is likely to remain, notoriously difficult.

4. It is of very great importance that any further changes that are made to the Act do not further disadvantage Indigenous peoples or weaken their traditional property rights.

B SUMMARY OF RECOMMENDATIONS

Recommendations in relation to Schedule 1 – Amendments to Representative Aboriginal / Torres Strait Islander Bodies

Recommendation 1

Item 7 should not be enacted.

If item 7 is enacted, it should be amended to:

- Require the Minister, no later than a specified time before the expiry of the period of recognition of a representative body, to invite that representative body to apply for a further period of recognition;
- If this amendment is to give the Minister any discretion not to issue an invitation to apply for recognition to the incumbent representative body, the exercise of that discretion should be equivalent to, and require the same procedure as, the discretion to withdraw recognition;
- Provide criteria in the Act (or require the provision of criteria in the regulations) for making decisions about the length of the recognition period that representative bodies will be offered;
- Provide for a more transparent and predictable basis of making decisions to recognise a person or body as a representative body, or to refuse or withdraw such recognition.
- Establish a formal legal link between recognition and funding, such that the Department will be required to provide funds to recognised representative bodies;
- Require funding to be provided for the whole recognition period, and
- Require funding and recognition periods to be the same length.

Recommendation 2

Items 13, 24 and 27 should not be enacted.

If items 13, 24 and 27 are enacted, they should be amended to set out relevant criteria for the exercise of the broad ministerial discretion pursuant to which they are to be made, including:

- compliance with approved statutory plans under s 203D, and
- satisfactory representation and effective consultation with constituents.

Recommendation 3

Item 31 should not be enacted; s 203D should be retained as is.

If item 31 is enacted, representative body planning procedures should be considered a relevant criterion in the making of recognition decisions.

Recommendation 4

Items 18, 19 and 20 should not be enacted.

The criteria of effective consultation and satisfactory representation should be retained.

If item 18 & 19 are enacted, they should be amended to remove the public right to comment on extensions and variations.

Recommendation 5

Items 12, 18, 19, 20, 23, 24 should not be enacted.

There is no reason for implementing recognition decisions by way of legislative rather than written instrument. Implementing these decisions by way of legislative instrument unjustifiably limits representative bodies' rights to judicial review.

Recommendation 6

Item 8 should not be enacted.

Recommendation 7

Item 5 should not be enacted.

No justification for making non-Indigenous corporations is advanced in support of it and it is inconsistent with the notion that representative bodies represent the exclusively Indigenous interests of native title claimants.

Recommendations in relation to Schedule 2 - Claims resolution review

Recommendation 8

Item 48 be amended to clarify the meaning of 'relevant interest'.

Recommendation 9

Items 33 and 51 should not be enacted.

If there is to be a provision allowing the Court to request regional progress reports and work plans, I believe that there should also be provisions to ensure that:

- in the preparation of such a report, the NNTT is to consult with relevant representative bodies, and have regard to its views in relation to the development of the work plan and to its strategic and/or operational plans for the relevant period, and

- that the relevant representative body will receive a copy of the regional report and/or work plan sufficiently in advance of the directions hearing to allow it to make any submission to the Court about the report or plan that it considers necessary.

Recommendation 10

Item 36 be amended so that the other parties to the proceedings be served with and provided with an opportunity to comment on any report to which the Court will have regard.

Recommendation 11

Items 31, 45, and 47 should not be enacted.

If items 31, 45 and 47 are enacted they should be amended to:

- 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.

Recommendations 12

Items 53-55 and 56 to 67 should not be enacted.

If items 53 to 55 provisions are enacted, they should be amended so that:

- reviews require the consent of the applicant;
- statements made at a review should be confidential as well as without prejudice (s136GD(1)) and require the consent of the parties before disclosure can be made;
- review reports should only be provided to the Federal Court and non-participating parties (s136GE(2)) with the consent of the participating parties;

If items 56 to 67 are enacted, they should be amended so that:

- inquires should not be requested prior to a general referral to mediation (omit s138B(3));
- Inquiry hearings should not be public (s154A(3) unless the parties consent;
- inquiry reports and determinations should not be provided to the Federal Court (s.164(2) without the consent of the parties.

Recommendation 13

Item 35 should be amended to clarify the meaning of the reference in s 87 to 'each registered native title applicant'.

Recommendation 14

Item 69 should be amended to clarify that s 190(3)(a):

- Applications which are partially determined under s 87A are automatically deemed to be amended to exclude the determined area, and
- Such alteration may be made to the Register without the application of the registration test.

Recommendation 15

Items 36 and 2 should not be enacted because they are discriminatory.

If items 36 and 2 are enacted, they should be amended so that:

- Information provided by the NNTT Registrar under the new s 66C [item 2] should not, of itself, be sufficient for the dismissal of proceedings;

- The Court is not obliged to dismiss the proceedings but retains its discretion to do so.

Recommendation 16

Item 73 should not be enacted.

Item 73 is discriminatory and inconsistent with the ordinary principles governing the judicial discretion to summarily dismiss proceedings.

If a new basis for summary dismissal of native title applications is to be enacted, it should be consistent with the ordinary principles governing the judicial discretion.

In any case, the requirement in item 72 should not, of itself, be sufficient basis upon which to exercise a discretion to dismiss proceedings.

Recommendations in relation to Schedule 3 - Amendments in relation to Prescribed Bodies Corporate

Recommendation 17

Item 2 should not be enacted but should be deferred until the next round of amendments so that all proposed changes to the NTA relevant to PBCs, and amendments to the PBC Regulations, can be considered together.

At that time, amendments clarifying the purpose of Regulation 9(2) should be considered.

SUBMISSIONS IN RELATION TO SCHEDULE 1 – AMENDMENTS TO REPRESENTATIVE ABORIGINAL / TORRES STRAIT ISLANDER BODIES

5. In the preamble to the Act, Parliament recognises that it is important that 'appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation'.

6. The circumstances of native title holding communities today, combined with the complexity of the interaction of native title law with the general law, mean that few native title holders are likely to be successful in having their native title rights recognised and protected without the assistance of effective, and well resourced, representative Aboriginal/Torres Strait Islander bodies ('representative bodies').

7. I strongly support any change to the law, or to the administrative policies and procedures of government, that is likely to improve the effectiveness of representative bodies.

Representative body funding levels will determine the effectiveness of any amendments to the representative body system

8. Before addressing the measures contained in Schedule 1 to the *Native Title Amendment Bill 2006* (the 'Bill'), it is important to once again make the point that representative bodies are not presently adequately funded to perform their extremely difficult and important role in the recognition and protection of native title. This point has been made again and again by a great number and range of people.

9. I do not say that increased funding is the sole factor needed to ensure that representative bodies will be effective. Without adequate funding, however, even the most well run representative bodies will find it extremely difficult to achieve results and it is inevitable that the enjoyment of native title rights and interests will be compromised. I believe that inadequate funding has, and continues to, undermine the capacity of representative bodies to provide effective representative and assistance and as a result has diminished the extent to which Indigenous people have been able to secure recognition of and enjoy their rights.

10. I note that the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account made various recommendations in its March 2006 report 'on the operation of Native Title Representative Bodies' (the 'Representative Body Report') in relation to the level at which representative bodies are funded, including that:

    the Commonwealth immediately review the level of operational funding provided to NTRBs to ensure that they are adequately resourced and reasonably able to meet their performance standards and fulfil their statutory functions.

(Recommendation 8)

11. I am not aware whether such a review has taken place. I am aware, however, that there was no increase in the level at which representative bodies were funded in the 2006-2007 financial year.

12. The proposed amendments in the Bill, particularly Schedule 1, have to be considered in light of the likelihood that representative bodies will continue to be under resourced.

13. To the extent that the proposed amendments enhance, encourage or support representative bodies to make the most of their limited resources, I support them. To the extent that the proposed amendments:

    - reduce the ability of representative bodies plan effectively, or
    - entail additional administrative burdens that are not likely to lead to a direct improvement in effectiveness,

I believe they need to be reconsidered.

The proposed amendments erode representative body security of status and administrative independence

14. The pursuit by a representative body of a native title group's legal rights and interests will inevitably place the representative body, and the group that it is assisting, in opposition to the Commonwealth and State or Territory governments. In every native title application proceeding the relevant State or Territory government will be the major respondent and the Commonwealth will often also play a major respondent party role. Further, from time to time, the fearless pursuit of the recognition and protection of native title will inevitably bring a representative body into conflict with the perceived interests and the policies of Commonwealth, State or Territory governments.

15. This makes it important that representative bodies have, and understand themselves as having, a secure existence that is not dependent on maintaining the positive regard of the Commonwealth.

16. It is important to keep in mind the extent to which the independence of representative bodies from the Commonwealth government, and their immunity from actual or perceived political pressure, has already been significantly diminished by the repeal of the *Aboriginal and Torres Strait Islander Commission Act 1989*. Representative bodies are already dependent on the Commonwealth Minister for recognition, and on the Department for funding.

17. I am concerned that the net effect of the proposed amendments to the regulatory regime applicable to representative bodies is a further erosion of representative body independence. This is brought about by:

- the introduction of limited term recognition, meaning that the continued recognition of each representative body will be in the balance at the end of each period (item 7: new s.203A(3A));

- the failure to provide obligations to invite applications for recognition from representative bodies that have already been recognised;

- the preference for broad Ministerial and Departmental discretions over prescribed standards in relation to decisions concerning recognition (items 13, 18, 19, and 24 and also item 31);

- relaxation of procedural fairness requirements in relation to the withdrawal of recognition and reduction of representative body areas (item 25);

- opening up some decisions about recognition to comment by 'the public' which the Minister is bound to consider (items 18 and 19);

- the removal of significant aspects of the accountability regime from the Act to funding conditions imposed by the Department and an expansion of the Department's discretion in relation to the provision of funds and the imposing of conditions in relation to the provision of funds (items 29 to 35);

- the relaxation of the basis on which an investigator or auditor may be appointed (item, 39), and

- the making of recognition decisions by way of legislative instrument (item 12, 18, 19, 20, 23 & 24).

18. I appreciate that these changes are designed to make the regulatory regime more flexible and convenient. I believe, however, that the net effect of these changes is the erosion of the security of status and administrative independence of representative bodies from the Commonwealth executive.

19. Transparency, objectivity and predictability in decision making are all important aspects of administrative fairness, and are vital for the promotion of the sort of fearless and independent assistance and representation that the recognition and protection of native title requires.

20. In addition to the above, I make the following comments about specific items in Schedule 1.

Limited term recognition periods [item 7, new s.203A(3A)]

Limited term recognition periods undermine representative body administrative independence

21. The proposed introduction of time limited recognition of representative bodies:

    - diminishes the security of status and administrative independence of representative bodies and exposes them and their decisions to actual and perceived political pressures;

    - undermines the ability of representative bodies to make the medium to long term plans that are required for them to be effective.

22. With the possible exception of cases where there is good reason for imposing a probationary period, no justification for periodic recognition is necessary in addition to existing mechanisms, including:

    - periodic funding – with the related capacity to impose accountability measures as conditions of funding; and

    - a discretion to withdraw recognition where a representative body is not performing properly,

    both of which are current features of the regulatory regime governing representative bodies.

23. However, if it is decided to introduce fixed period recognition, I believe serious consideration ought to be given to changing proposed s 203A(3A) to:

    - increase the minimum period of recognition from one to three years (which is also currently the minimum period for which a strategic plan may be made under s.203D);

    - establish a formal legal link between recognition and funding, such that the Department will be *required* to provide funds to recognised representative bodies.

Limited recognition periods give too much discretionary power to the executive

24. As a preliminary issue, I note that before a decision is made about whether to recognise a body as a representative body, there must be an invitation to apply for recognition (s.203A).

25. I am concerned that, at the same time that it is proposed that bodies be recognised as representative bodies for no more than 6 years, there is no related amendment proposed that will require the Minister, with or without exceptions, to invite representative bodies to apply for further periods of recognition.

26. Indeed, if the Bill is enacted, there will be no provision in the Act that requires the Minister to issue any invitations for recognition beyond the transition

period. The Minister could perhaps decide to simply fund bodies under s.203FE (as amended) rather than for him or her to recognise them as representative bodies.

27. This leaves representative bodies in a very precarious state and further erodes representative bodies' independence from the Commonwealth government.

28. If item 7, and related items, are to be enacted and recognition is to be for a limited period only, then there should also be an amendment made to s.203A(1) to require the Minister, no later than a specified time before the expiry of the period of recognition of a representative body, to invite that representative body to apply for a further period of recognition.

29. If the Minister is to have discretion about whether to issue an invitation to apply for recognition, the exercise of the discretion should be exercised according to the same criteria as the discretion to withdraw recognition (see further below).

If limited term recognition is introduced, recognition and funding periods should be the same

30. Under the Act, while recognition is for an indefinite period of time, funding is periodic.[1]

31. If limited term recognition periods are introduced, then in my view there ought to be some formal legal link established between recognition and funding so that the periods are the same.

32. Failing to link recognition and funding will result in two periods subject to independently exercised discretions, each of which will effectively determine whether the body concerned continues to exist. This is likely only to multiply bureaucratic processes as well as uncertainty for representative bodies and their constituents.

33. If Ministerial recognition of representative body status is to be time limited, the Secretary should be required to make funding available for the recognition period.

34. Decisions about recognition and funding should be made at the same time.

Recommendation 1

Item 7 should not be enacted.

If item 7 is enacted, it should be amended to:

- Require the Minister, no later than a specified time before the expiry of the period of recognition of a representative body, to invite that representative body to apply for a further period of recognition;

[1] Subsection 203C(2) of the Act allows the Secretary of the Department to provide funding in respect of a period of up to three years.

- If this amendment is to give the Minister any discretion not to issue an invitation to apply for recognition to the incumbent representative body, the exercise of that discretion should be equivalent to, and require the same procedure as, the discretion to withdraw recognition;

- Provide criteria in the Act (or require the provision of criteria in the regulations) for making decisions about the length of the recognition period that representative bodies will be offered;

- Provide for a more transparent and predictable basis of making decisions to recognise a person or body as a representative body, or to refuse or withdraw such recognition.

- Establish a formal legal link between recognition and funding, such that the Department will be required to provide funds to recognised representative bodies;

- Require funding to be provided for the whole recognition period, and

- Require funding and recognition periods to be the same length.

There should be transparent criteria for making recognition decisions

Length of recognition period

35. The Bill introduces limited recognition periods without providing criteria for the length of the period of recognition. This important matter will therefore be determined solely by the application of a broad and largely unchallengeable Ministerial discretion. The Department's assurance that ' representative bodies that are performing satisfactorily will generally get longer terms while those with financial, administrative or legal problems may get shorter terms until their problems are sorted out'[2], provides no comfort, that can be relied on.

36. Statutory criteria should:

    - allow representative bodies to predict what standards or indicators they will have to meet in order to be reasonably assured of recognition for longer periods;

    - promote confidence in the objectivity of the decision making process; and

    - help ensure that recognition is not restricted to short periods without sound reason.

    - allow reference to other relevant matters.

[2] Department of Families, Community Services and Indigenous Affairs, *Reforms to Native Title Representative Bodies*, leaflet published in 2006.

Recognition and withdrawal of recognition [items 13, 24, 27; cf item 20]

37. The Bill repeals some of the present criteria in both recognition [item 13] and withdrawal of recognition [item 24] decisions. These criteria are whether the representative body does or will:

- satisfactorily represent persons who hold or may hold native title in the area [s.203AD(1)(a) and s.203AH(2)(a)(i)]; and

- be able to consult effectively with Aboriginal peoples and Torres Strait Islanders living in the area [s.203AD(1)(b) and (s.203AH(2)(a)(ii)].[3]

If these amendments are passed, the only criterion applying to these recognition decisions will be whether, in the Minister's opinion, the body would be able to satisfactorily perform its statutory functions.[4] When withdrawing recognition on discretionary grounds, the Minister would consider whether the representative body is satisfactorily performing its functions or there was serious and repeated irregularity in its financial affairs [item 24, new s 203AH(2)].

Item 27 retains the relevance of the 'fair operation' of representative body 'structures and procedures' as a criterion for making recognition and withdrawal of recognition decisions [see s 203AI(1)]. However, it removes any reference to effective consultation and satisfactory representation that are currently the primary indicia of fairness [current s 203AI(1)(a) &(b).

I have no argument with the proposition that representative bodies must perform their functions satisfactorily. However:

- there will always be a great deal of room for difference in opinion about what is satisfactory performance; and

- broad Ministerial discretions do not afford the level of transparency, predictability or consistency that is critical to the integrity of the native title system and the operation of representative bodies.

38. Representative bodies should be able to expect that, if they conduct themselves consistently with the criteria for recognition (including, it is submitted below, approved statutory plans):

- their status will not be called into question and

- any challenge to that status may only be brought on predictable grounds.

If periodic recognition was introduced, conduct consistent with the relevant criteria should also lead to an expectation that at the end of that period, it will be recognised for a further period.

[3] Items 13, 24 and 27.
[4] Item 24.

A statutory plan would provide a benchmark for the 'satisfactory' performance of representative body functions.

Recommendation 2

Items 13, 24 and 27 should not be enacted.

If items 13, 24 and 27 are enacted, they should be amended to set out relevant criteria for the exercise of the broad ministerial discretion pursuant to which they are to be made, including:

- compliance with approved statutory plans under s 203D, and
- satisfactory representation and effective consultation with constituents.

Abolition of approved statutory plans removes an important criterion for making recognition decisions [item 31; repeal of s 203D]

39. The prosecution of native title claims, and most other significant native title projects, involves a long term commitment of resources. The operations of representative bodies therefore need to be informed by a long term perspective.

40. Because representative bodies are poorly resourced, they will have to make difficult resource allocation decisions in order to be effective. For example, in order to successfully prosecute some native title claims, a representative body will inevitably have to delay substantive action in relation to others. As a consequence, representative bodies' constituent groups will inevitably see themselves as competing with each other for assistance. To maintain the confidence of their constituency, representative bodies' resource allocation decisions will have to be transparent, fair and objective.

41. Rather than imposing a burden on representative bodies, I consider that the long-term nature of native title litigation and projects, the paucity of representative body resources to progress them, and the necessity for fair allocation of resources, make transparent planning processes essential to the effective operation representative bodies. Statutory plans provide a sound basis on which to base decisions about resource allocation. Such plans are also useful for engagement with the Court and NNTT in relation to, for example, case management.

42. I acknowledge that the repeal of the strategic planning provisions will not of itself prevent representative bodies from planning, and in fact it is my understanding that the present intention of the Department is to continue to insist on planning and reporting as conditions of funding.

43. However, an approved strategic plan is an objective standard against which the satisfactory performance of representative body functions may be assessed. As such, approved strategic plans provide a useful criterion in the making of recognition decisions.

44. No justification for the proposed repeal of s.203D has been advanced. The Representative Body Report did not consider the possibility, although it did report positive comments made on behalf of the OIPC in relation to the role played by strategic plans.[5] I note that the Department has more recently stated that repeal of section 203D will 'reduce paperwork, making planning simpler and more relevant' at the same time maintaining that 'good planning by representative bodies continues to be very important'[6]. In this regard it must be observed that if strategic planning is to be retained as a condition of funding, as I understand it is, it is not easy to see how paperwork will be reduced by the repeal.

45. The requirement that representative bodies make a strategic plan which must be approved by the Minister should be retained. Section 203D should not be repealed. To the extent that it is considered that the existing s.203D requires or encourages strategic plans that are not relevant, it should be amended.

Recommendation 3

Item 31 should not be enacted; s 203D should be retained as is.

If item 31 is enacted, representative body planning procedures should be considered a relevant criterion in the making of recognition decisions.

Extending, reducing and varying recognition areas [items 18, 19 and 20 proposed new ss.203AE & 203AF and amended s203AG]

46. I am concerned that the proposed changes to the way in which decisions to extend, vary or reduce a representative body area are made.

47. Presently, such decisions cannot be made without -

    a. in case of extension:

        - the representative body's agreement [s203AE(f)], and
        - Ministerial satisfaction that the body will 'satisfactorily represent persons who hold or may hold native title' [s203AE(c)], and
        - Ministerial satisfaction that the body 'will be able to consult effectively with ATSI peoples living in the area' [s203AE(d)], and
        - Ministerial satisfaction that the body will satisfactorily perform its functions [s203AE(f)];

[5] See Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the Operation of Native Title Representative Bodies*, March 2006, pp 57 to 60.

[6] Department of Families, Community Services and Indigenous Affairs, *Reforms to Native Title Representative Bodies*, leaflet published in 2006.

b. in the case of variation:

- joint application for variation being made by the representative bodies[s203AF(1)], and
- a consultation requirement [s203AF(2) & (3)], and
- Ministerial satisfaction that the body will satisfactorily represent native title holders and claimants [s203AF(4)(a)] and effectively consult with Aboriginal and Torres Strait Islander peoples [s203AF(4)(b)], and
- Ministerial satisfaction that the body will satisfactorily perform its functions [s203AF(4)(c)].

c. In the case of reduction:

- Ministerial satisfaction that the body is not satisfactorily representing native title holders and claimants or effectively consulting with Aboriginal and Torres Strait Islander peoples [s203AG(1)(a) & (b) but will do so in relation to the remainder of the area [s 203AG(2)(a) &(b)];
- Ministerial satisfaction that the body will satisfactorily perform its functions [s203AG(2)(c)].

48. It is proposed to remove all of these criteria save the sole criterion that the Minister is satisfied that, after the extension or variation, the representative body or bodies will satisfactorily perform statutory representative body functions in relation to the extended, varied or reduced areas.

49. In this regard, I note that representative bodies' functions do not include general representation and consultation requirements and do not suggest any standard for representation and consultation.[7]

50. Under the proposed changes, the Minister would, in relation to extension and variation decisions, be required to give 60 days notice of his or her intentions to 'the public' inviting submissions about the matter, and to consider any submissions made by the public [s203AE(a)], before making a decision.

51. I am concerned that 'the public' are thought of as having:

- any relevant interest in which particular body will be responsible for providing legal representation to native title holders in an area, or
- any relevant opinion about the likelihood of satisfactory performance of statutory functions by any particular body.

[7] Some general statutory functions include a consultation element, eg s203BC(2)(a). Section 203BJ(e) is a general power to consult. However, these functions do not require 'effective consultation' or 'satisfactory representation'.

52. The inclusion in the Bill of a proposed requirement that there be notice of these matters to the public and consideration of the public's submissions, underscores my concerns that leaving recognition decisions to be decided solely on the basis of a broadly defined criterion susceptible to differing interpretations, exposes representative bodies to an actual or at least perceived danger that decision making will be influenced by political considerations.

Recommendation 4

Items 18, 19 and 20 should not be enacted.

The criteria of effective consultation and satisfactory representation should be retained.

If item 18 & 19 are enacted, they should be amended to remove the public right to comment on extensions and variations.

Recognition decisions should be reviewable administrative decisions [items 12, 18, 19, 20, 23 and 24 ss 203AD(1); 203AE(2); 203AF(2); 203AG(1); 203AH(1); 203AH(2)]

Recognition decisions are currently reviewable under the AD(JR) Act. The Bill requires the Minister to make these decisions by way of legislative instrument [items 12, 18, 19, 20, 23, 24].

As legislative acts rather than administrative decisions, recognition decisions would no longer be reviewable under the AD(JR) Act. Rather, application for review of any acts alleged to have been done (eg without adequate notification) would have to be brought by way of prerogative writ.

Access to judicial review is an important element of transparent decision making. This is particularly so where, as proposed by the Bill, the decisions leading to the making of the legislative instrument are based on extremely broad considerations.

Prerogative writs are more complex, more expensive to litigate, are available on narrower grounds and provide more limited remedy than applications brought under the AD(JR) Act.

This amendment limits representative bodies' procedural rights without justification. No advantage attaches to legislative instruments over the current written instrument upon which the Act relies for the making of recognition decisions. Instead, the proposed amendment would politicise recognition decisions, making them vulnerable to inappropriate public comment and potential political disruption in what should be a principled and predictable administrative process.

Recommendation 5

Items 12, 18, 19, 20, 23, 24 should not be enacted.

There is no reason for implementing recognition decisions by way of legislative rather than written instrument. Implementing these decisions by way of legislative instrument unjustifiably limits representative bodies' rights to judicial review.

Re-recognition for representative bodies in the 'transition period' is unnecessary [item 8 (new section 203AA)]

See also items 9, 10, 14

53. I cannot see that any useful purpose will be served by requiring the existing recognised representative bodies to respond to an initial invitation to apply for recognition (for a period of between one and six years) in the transition period. This is because:

    - they will be the only bodies making the applications (proposed ss.203AA(5) and 203AB(3)), and

    - the Minister will in any case be required to recognise all such bodies as do apply, regardless of the quality of the application (proposed s.203AD(1A)).

54. As the Bill is drafted, the only significant decision that will be made in the transition period about recognition will be the length of time that the representative bodies are to be offered recognition.

55. This decision will be made by the Minister in the exercise of his sole discretion, on an undetermined basis, prior to inviting the applications for recognition and apparently without seeking any submission or comment from the representative bodies.

56. I refer to my earlier submissions that if recognition of representative bodies must be time restricted, then in the interests of transparency and consistency, the bases for making decisions about the duration of the recognition period should be prescribed. This applies as much to recognition in the transition period as at any other time.

57. This means that requiring the existing representative bodies to apply for recognition in the transitional period will be a waste of their scarce resources and for that reason I am opposed to it. It may be, however, that the Minister does not intend to require any more than a letter confirming acceptance of the invitation by way of an application for recognition in the transition period. In that case my objection will have little force.

58. Another way of introducing time limited recognition would be to do so in a staged manner, at the end of current approved strategic plans. A transitional process could be adopted over a longer period by reference to the terms of currently approved strategic plans.

Recommendation 6

Item 8 should not be enacted.

Non-Indigenous corporations should not be 'eligible bodies' [item 5]

59. It is my view that it is important that representative bodies be representative of native title holders in their area not only in the sense that they provide legal representation, but also in their internal governance. This is particularly important where the funding situation is such that decisions made about which claims and other projects are to be given priority will have a great bearing on access to justice for some traditional owner groups.

60. The Parliamentary Joint Committee (the Committee) has noted that restriction of NTRBs to Indigenous corporations results in problems with governance, including inadequate separation of powers and conflicts of interest, at the expense of effective service-delivery. Such problems, it contends, do not arise for non-Indigenous corporations.[8] Indeed, the Committee asserts that non-Indigenous corporations are able to 'recruit expert directors and to minimise governance problems such as conflicts of interest and inadequate separation of powers'.[9]

61. However, the CATSI Act addresses many of the internal governance issues identified by the Committee as problems for Indigenous corporations.[10]

62. The advantage of Indigenous corporations is their ability to represent native title holders by virtue of 'special measure' membership provisions. Where non-Indigenous NTRBs provide services, possible credibility problems arise leading to 'real conflict between directors, members and the NTRBs clients'.[11] Further, the provision of control of Indigenous corporations 'provides a model of Indigenous participation in decision-making which also allows for the exercise of the right to effective participation and the right to self-determination.'[12]

63. While the CATSI Act makes control by constituents a matter for the members, rather than a statutory requirement of incorporation, it does:

- enable membership to be open only to Indigenous peoples as a 'special measure' under the *Racial Discrimination Act 1975* (Cth);
- impose an Indigenous quota on membership of Indigenous corporations.

64. This does not, of course, mean that every Aboriginal corporation will be representative in the sense that I am concerned. However, limiting the class of bodies that may be 'eligible bodies' to Indigenous corporations does

[8] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the operation of Native Title Representative Bodies* March 2006 pp 19 para 2.51.
[9] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the operation of Native Title Representative Bodies* March 2006, p 21 para 2.61.
[10] See for example s 683 of the CATSI Act, which defines directors, officers and employees in such a way as to extend certain of the directors' duties prescribed in Part 6.4 of that Act to them.
[11] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the operation of Native Title Representative Bodies* March 2006 p 22, para 2.66.
[12] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the operation of Native Title Representative Bodies* March 2006 p 22, para 2.65. At para, 2.66 OIPC acknowledge the credibility deficit and the 'issues of accountability and Indigenous participation in decision making to be taken into account'.

immediately rule out bodies whose corporate structure would not allow them to be representative of native title holders by, for example, limiting membership to Indigenous people.

65. Further, since non-Indigenous corporations may already perform the functions of representative bodies under s 203FE of the Act, it is unnecessary. It is appropriate that non-Indigenous bodies be distinguished from representative bodies, particularly where, under the proposed amendments, the representative and consultative criteria are to be removed from the criteria for recognition. In these circumstances, membership provisions are the one remaining criterion by which representative body constituents may be assured that a body is 'representative'.

66. The NNTT has observed that effective service delivery should be the object of reform, rather than particular models of governance. To this observation should be added the recommendation that service delivery, to the extent that it includes the performance of statutory functions relevant to decision making in relation to land, should be informed by relevant human rights, such as the right to self-determination and the right to control decision making affecting Indigenous land and institutions.

Recommendation 7

Item 5 should not be enacted.

No justification for making non-Indigenous corporations is advanced in support of it and it is inconsistent with the notion that representative bodies represent the exclusively Indigenous interests of native title claimants.

SUBMISSIONS IN RELATION TO SCHEDULE 2 – CLAIMS RESOLUTION REVIEW

67. I have recently made public comment expressing concern about the length of time taken for the resolution of native title determination applications, including concern that this means that older members of claim groups are not living to see their native title recognised. Any proposed legal or administrative reform that has a real chance of shortening the length of time that it takes for native title determination applications to be determined deserves serious consideration. At the same time, however, it is essential that any such reforms do not shorten claim backlogs at the expense of justice and equality for the native title claimants.

68. I welcome and support many of the reforms in Schedule 2 of the Bill, but I am concerned that others are:

- unfair to native title claimants and/or
- will increase the amount of time and money required for the resolution of native title proceedings.

Changes to provisions about parties

69. In my view, proceedings relating to native title determination applications have been unnecessarily overburdened by minor respondent parties, often funded by the Commonwealth pursuant to section 183 of the Act. The Act already provides for the protection of other valid interests. Further, the protection of other interests is always the primary concern of the State and Commonwealth governments acting as the major respondent parties in the proceedings. A multiplicity of minor respondent parties unnecessarily slows down the resolution, and significantly increases the costs, of native title proceedings.

70. I am therefore pleased to see that changes are being proposed to the provisions relating to the rights of persons to become and remain as respondent parties to the proceedings.

Reducing the range of persons who may be a party as of right [items 3 – 5]

71. I support the change proposed to s.84(3)(a) (items 3 & 4), limiting the range of persons who have a right to become a party to those whose 'interest, in relation to land or waters' may be affected by a determination.

72. The related proposed change to s.84(5) (item 5) more than adequately provides for the addition of other parties where this is in the interests of justice.

Referral of question about whether a party should be dismissed [item 48]

73. I also support the intent of the proposed new s.136DA (item 48).

74. I am concerned, however, whether the test of 'does not have a relevant interest in the proceedings', is sufficiently clearly articulated to be readily applied by the presiding member of the NNTT.

75. Does a 'relevant interest' in this context mean any more than the sort of interests held to be sufficient for the purposes of the current s.84(3)(a)(iii) (see for example *Byron Environment Centre Incorporated v Arakwal People* (1997) 78 FCR 1)? I believe that it should, and that the test should be reworked to refer to whether or not the person's interests are likely to be significantly affected by a determination if they cease to be a party.[13]

Recommendation 8

Item 48 be amended to clarify the meaning of 'relevant interest'.

Provisions concerning the relationship between the NNTT and the Federal Court in relation to mediation

No mediation by the Federal Court while mediation being conducted by the NNTT [item 18 – 20]

76. I support the proposed new s.86B(6) which will have the effect that when proceedings have been referred to the NNTT for mediation:

- no mediation is to be conducted by officers of the Federal Court (s 86B(6)(a)), and
- No 'show cause' hearings under the proposed s 190D [items 36, 2 and 73] (s 86B(6)(b)).

I do not believe that the efficient resolution of native title proceedings is well served by parties' access to multiple fora for the same or similar purposes.

Under proposed s 86B(4)(ea) (item 18), any submission made by the NNTT pursuant to its right of appearance under ss 86BA(1) [item 20] may be taken into account by the Court in making mediation orders.

NNTT right of appearance [item 20]

77. I understand that it is presently common practice at directions hearings in relation to native title proceedings, that a representative of the NNTT (usually the relevant case officer), appears to speak to any mediation report that has been provided to the Court in relation to the application concerned. The proposed new s.86BA, which gives the NNTT a right of appearance, simply provides a formal basis for this practice and is supported.

[13] I note that proposed s 136EDA(1) should refer to ss 3 7 4 not ss 2& 3.

NNTT regional progress reports and work plans [items 33 and 51 and related item 36]

78. I support the intent of the proposed new s.86E(2) [item 33] and s.136G(3A) [item 51], which allow the Court to request or the NNTT to provide at its own initiative, regional mediation reports and/or regional work plans to the Court to 'assist the Court in progressing proceedings'. Proposed s 94B [item 36] would require the Court to take these reports into account when making orders relating to the application.

79. It is in the interests of the efficient management of native title proceedings that the Court, which has responsibility for the management of the proceedings, has the benefit of information about the NNTT's activities and priorities on a regional level.

80. I am concerned, however, about the potential for regional work plans to be made, and priorities to be set, without proper regard to the objectives and priorities of the relevant representative body or bodies. It is widely recognised that representative bodies are under-resourced. It is therefore essential that they be in control of how their resources are allocated. To the extent that NNTT reports could affect representative bodies' priorities, they should be considered in the context of the conditions in which representative bodies operate.

81. My concern is aggravated by the proposed abolition of statutory strategic plans.

82. Representative bodies are presently required by the Act to have an approved strategic plan that sets out their objectives and strategies for achieving them (s.203D).[14] Representative bodies' funding conditions also require them to have and report on the implementation of an operational plan.

83. A regional work plan proposed by the NNTT that does not have regard to a representative body's objectives and priorities, may:

- cut across the representative body's strategic and operational plans and/or funding conditions, or

- where NNTT reports and representative body strategic and operational plans are not consistent, there is a danger that Court orders based on the former will be frustrated or disobeyed, to the embarrassment of the Court and potential prejudice of the applicant.

Recommendation 9

Items 33 and 51 should not be enacted.

If there is to be a provision allowing the Court to request regional progress reports and work plans, I believe that there should also be provisions to ensure that:

[14] Item 31 of Schedule 2 would repeal this requirement. It would then be replaced by funding conditions.

- in the preparation of such a report, the NNTT is to consult with relevant representative bodies, and have regard to its views in relation to the development of the work plan and to its strategic and/or operational plans for the relevant period, and

- that the relevant representative body will receive a copy of the regional report and/or work plan sufficiently in advance of the directions hearing to allow it to make any submission to the Court about the report or plan that it considers necessary.

Court to have regard to NNTT reports [item 36]

84. I have no objection to the intention of the proposed new s.94B requiring the Court to have regard to reports provided by the NNTT under s.136G(1), (2), (3) or the proposed (2A) and (3A) when making orders in relation to applications under mediation. I would be surprised if the Court did not presently have regard to the NNTT's reports.

85. It is important, however, that the applicant, representative body, and other parties to the proceedings, be served with and be given an opportunity to comment on any report to which the Court will have regard.

86. I am aware that it has not always been the practice of all members of the NNTT to do this. The Act should be further amended to ensure that all reports provided by the NNTT to the Court must also be provided to the applicant, the representative body and any other party that might be affected.

Note: the balance of item 36 is dealt with at paragraphs 127-132.

Recommendation 10

Item 36 be amended so that the other parties to the proceedings be served with and provided with an opportunity to comment on any report to which the Court will have regard.

Provisions in relation to the conduct of mediation

Compulsive powers have no place in voluntary mediation processes [item 31 & 51, 45 & 47]

87. Proposed new s.86D(3) [item 31] gives the Court the power to make orders consistent with directions made by the NNTT under proposed sections 136B(1A) and 136CA. Under these provisions, the NNTT may direct a party to:

    - attend a conference [item 45 s 136B(1A)], or

    - produce documents [item 47, s 136CA)]

    for the purposes of mediation [see s 86A(1) & (2)].

88. A related amendment is proposed s 136G(3B) [item 51], pursuant to which the presiding member may report in writing any non-compliance with his or her directions to the Court.

89. While I appreciate that the intent of the amendments are to make the process more efficient, I am concerned that the conferral of these powers on the NNTT are contrary to the role that mediation plays in the resolution of native title proceedings. I understand that the intention of the proposal is to counter a possible perception that NNTT mediation is a 'soft' process. I consider that more thought should be given to what changes to the Act would best ensure that engagement in NNTT mediation is taken seriously.

90. I am particularly concerned by the proposed conferral of power on the NNTT to direct a party to produce documents. Power to direct the production of documents is appropriate to a forum that has a role in determining facts. The purpose of mediation, however, is not to determine facts or legal issues, but to encourage parties to reach agreement on relevant matters.

91. In mediation it is important that each party retains control over the material it wishes to provide to the other parties.

92. More often than not it will be the applicant, that bears the burden of proof in relation to most of the issues concerned in a native title application, that will be required to produce documents. While it may be appropriate for the NNTT to make sure that an applicant understands that the respondents will not give serious consideration to consenting to a determination if they are not provided with reasonable supporting material demonstrating that the applicant has an arguable case, the applicant must not be forced to produce material against its wishes. The forced production of evidentiary material in mediation could disadvantage and even be prejudicial to an applicant in the event that the matter proceeds to trial. The applicant must be free to pursue whatever mediation strategy he or she considers is in his or her best interests.

93. Further, the power to give directions to produce documents is also likely to result in mediation becoming unnecessarily formal and even adversarial in character. The direction-making power may prove to be counter-productive to providing a forum in which parties can explore the settlement of native title claims without being distracted by legalistic argument.

94. If the concern that the proposal seeks to address is to ensure that mediation is taken seriously, and that parties participating in mediation do so with the efficiency and diligence that is expected in Court proceedings, thought might be given to introducing alternative reforms. These might include the development of guidelines for the preparation of NNTT reports, ensuring that the Court is made aware of the extent to which parties are adhering to agreed mediation programs and their obligations under them. It ought to be possible for the Court to be provided with such reports without compromising the privacy of mediation conferences.

Recommendation 11

Items 31, 45, and 47 should not be enacted.

If items 31, 45 and 47 are enacted they should be amended to:

- 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.

Obligation to mediate in good faith [items 46 & 52]

95. I support the proposed new s.136B(4) [item 46] which places all parties and their representatives under a general obligation to act in good faith.

96. New section 136GA [item 52] creates a regime whereby NNTT members presiding over mediation may report any party not acting in good faith to the government, to legal professional bodies and to the Court. The member may also publicise the reasons why the member considers that the party has not acted in good faith in the NNTT annual report.

97. 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.

98. However, I would suggest that this obligation will not be easy to enforce.[15] 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. This is perhaps another reason to give consideration to the development of guidelines for the preparation of NNTT mediation reports.

NNTT reviews and inquiries [items 53, 55 & 56 (Reviews), and items 57-68 (Inquiries)]

99. I oppose the introduction of proposed new Division 4AA s [item 53] and 4B [item 54 - 68] of Part 6, which would empower the NNTT to:

    - Review the existence of native title rights and interests, and
    - Inquire into an issue or matter relevant to the determination of native title under s 225.

100. While inquiries require the consent of the applicant before they can proceed [see proposed s 138B(2)(b)], reviews can proceed without the consent of the applicant [although the presiding member must consult with the parties before recommending a review s 136GC(3)]. Both reviews and inquiries must be

[15] Refer to analogous caselaw re, eg, right to negotiate, expedited procedure.

conducted on the recommendation and referral (reviews) or direction of the president of the NNTT [inquiries s 138B(1)] but the parties, or the Chief Justice of the Federal Court, may also request that the President make a direction to hold an inquiry [s 138B(1)] and an inquiry may be requested before the proceedings are referred to mediation [s138B(3)].

101. My concerns with these proposals are as follows.

NNTT reviews and inquiries have the disadvantages of trial without the advantages

102. Reviews and inquiries by the NNTT will have all of the disadvantages of a trial but none of the advantages.

103. If an applicant does not wish a review or inquiry by the NNTT to be seriously damaging to his or her prospects of obtaining a determination, he or she will have to prepare for, and act in, a review or inquiry with a similar degree of care to that required for trial. If they are to be conducted fairly, a review or inquiry will have to be conducted with many of the trappings of Court proceedings, including an adequate opportunity for all parties concerned to provide material and make submissions.

104. I believe it is likely that reviews, at least, will be routinely requested by respondents in the course of mediation. It is difficult to imagine a mediation of a native title application in which the respondents could not argue that:

    (i) the issue of 'whether a native title claim group who is a party in [the] proceeding holds native title rights and interests … in relation [sic.] land or waters within the area that is the subject of the proceeding' arises (see proposed s.136GC(2))[16], and

    (ii) a review of the issue would assist them to agree with the applicant on the matters to be dealt with in a determination of native title (see proposed s.136GC(3) and the existing s.86A(1)).

105. At the end of the review or inquiry, there will be no binding determination of any matters in issue in the proceedings, or any real likelihood that a resolution of the proceedings by consent will follow. Respondent parties will be free to ignore the NNTT 'findings' in the event that an opinion or recommendation is made that favours the applicant and insist, as they presently do, on their own assessment of available material and the applicant's chances of success at trial. Anecdotal evidence in relation to the behaviour of government parties strongly suggests that this is exactly what they would do. If the NNTT's opinion is against the applicant, none of the respondent parties are likely to continue to engage seriously in mediation for the consensual resolution of the proceedings. The evidentiary material and argument presented for the purposes of the review or inquiry will have to be presented again by the applicant at trial.

[16] For the sake of accuracy and consistency, it should be noted that a 'native title claim group' is never a party to a native title application proceeding. Rather, the native title claim group authorises an 'applicant' to make the application and prosecute the proceedings on its behalf. The applicant, not the native title claim group, is a party (see s.84 of the Act).

106. All of this will use up a considerable amount of time as well as scarce representative body funds and Commonwealth funding under s.183 of the Act. Where a review or inquiry is held, this can be expected to significantly increase the amount of time and money spent in the mediation stage of native title proceedings.

Burden of reviews and inquiries will fall unfairly on the applicant

107. The burden of reviews and inquiries will fall unfairly on the applicant. This is because:

- the applicant bears the burden of proof in relation to most of the matters in issue in native title proceedings and so it is the applicant's case that will be the subject of the review or the inquiry;

- it is only the applicant whose prospects of a favourable determination will be potentially prejudiced by a review or inquiry, and so it will be only the applicant who will need to take time and care in the conduct of a review of inquiry;

- in fact, it is hard to imagine a situation in which it would ever be in a respondent party's interest to provide any documentation or evidentiary material to the NNTT for use in a review or an inquiry into the central issues involved in a native title application proceedings – it can be expected that the applicant will usually be the only significant 'participating party' (proposed s.136GC(6)) in this sense;

- the already cash strapped representative bodies will have to finance the conduct of any review or inquiry, further stretching the resources available to applicants;

- in the event that the NNTT's opinion is against the applicant, he or she will not have any administrative right of appeal or second opinion - he or she will be faced with the prospect of taking his or her case to trial, since all prospects of a mediated outcome will have disappeared; and

- at the trial, the applicant will then be disadvantaged by the fact that the respondents will have had a dress rehearsal for their opposition to the applicant's case (regardless of what the Act may say about the privacy or without prejudice nature of such reviews and inquiries).

- while statements made at a review and mediation are without prejudice [s136GC(7) and s 136A(4)]:

    - Statements made at a review are not necessarily confidential (s136GD(1));

    - Review reports may be provided to the Federal Court and non-participating parties (s136GE(2)) and presiding member (s136GE(3) without the consent of the participating parties;

- Hearings pursuant to inquiries may be public (s154A(3);

- Inquiry reports and determinations must be provided to the Federal Court (s 164(2).

- The Federal Court may enter the transcript from an application inquiry into evidence [new s 86(2) [item 7]).

108. At the same time, I am not aware of any evidence to the effect that current delays in the mediation of native title claims can generally be sheeted home to the applicants. There is ample anecdotal evidence to support the opposite view, that respondents, including government parties, often delay the resolution of proceedings by taking an inordinate amount of time to review evidence of connection, and by insisting that bureaucratic processes be followed before commencing mediation or negotiation in instances where this should not be required.

109. In the light of the above, I am particularly concerned that the proposed provisions in relation to reviews do not require the applicant's consent for a review to take place.

Review and inquiry provisions confuse and complicate the native title resolution framework

110. I am concerned that these proposals further complicate the institutional framework for the resolution of native title proceedings. The framework is already complex because both the NNTT and the Court must be involved in every proceeding. The Bill attempts to deal with the confusion and inefficiency arising from the ability of both the NNTT and the Federal Court to mediate claims at the same time.

111. The proposed review and inquiry provisions, however, 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.

112. The confusion is particularly great in relation to the proposed inquiry provisions. While it is relatively clear that reviews, if they are conducted, will take place in the context of, and with a view to advancing, mediation of native title proceedings, it is not at all clear that this is the case with inquiries. The proposed s.138B provides that inquiries are to be commenced by the President of the NNTT, rather than the presiding member, and that this may be on the request of, or after giving notice to, the Chief Justice of the Federal Court, not the presiding judge (see proposed ss.138B(1) and 138D).

113. There is no benefit to any party, and least of all to the applicant, in there being a multiplicity of forums involved in the resolution of native title claims, particularly without any one forum maintaining control over the proceedings. Since the Act already provides that every native title application is to be a proceeding in the Federal Court, it is appropriate, less confusing and efficient

for the presiding judge of the Federal Court to have complete control over the management of those proceedings. This is how all other legal proceedings are managed. The role of the NNTT in relation to the resolution of native title application proceedings should be kept simply to mediation, with the presiding judge having control over whether mediation is to continue or whether the proceedings are unlikely to be resolved other than by judgment on the hearing of the evidence and legal argument.

114. The mediation role of the NNTT is an important one and the integrity of the mediation process should be supported and facilitated by the Act.

There is no demonstrated need for reviews and inquiries

115. I am concerned that these major institutional changes to the native title claim resolution process is being proposed in a Bill without significant argument having been advanced as to the need for these particular changes, or any analysis of the likely costs and benefits of these proposals.

116. There is no argument or analysis in the *Native Title Claims Resolution Review* (the 'Review') in support of the review proposal other than the brief and generalised argument made about the need for the NNTT to have stronger powers to counter any perception that NNTT mediation is a 'soft option' (see paragraphs 4.33 and 4.36 of the report). The Explanatory Memorandum does not shed any further light on the need for or likely benefit of the review proposal.

117. Similarly, little argument or analysis preceded the recommendation in the Review that the NNTT be empowered to conduct inquiries, and there is no discussion of the intended relationship between such inquiries and the proposed NNTT reviews, or between the inquiries and the respective roles presently played by the NNTT and the Federal Court. What discussion there is seems to give some support to the suggestion that in some cases, where there are overlapping claims or disputes between Indigenous parties[17], an inquiry into the available evidence by the NNTT could be useful. There is no argument, however, that this should take place as a process distinct from the mediation of proceedings, or why this should not be done only at the direction of, or at least with the knowledge and consent of, the presiding judge.

118. There does not appear to have been any discussion or analysis of why the range of options currently available in relation to the management and disposal of claims is not sufficient or can be made more useful. Present options and tools for resolving native title application proceedings, or aspects of them, include:

- mediation conducted by the NNTT under Division 4A of Part 6 of the Act,
- the referral of discrete issues of fact or law arising in the context of NNTT mediation to the Federal Court for determination pursuant to ss.86D and

[17] Typically about claim group membership or the respective traditional boundaries of neighbouring claim groups.

136D(1) of the Act (see also Division 3 of Order 78 of the *Federal Court Rules*),

- conferences directed by the Court under Division 2 of Part 4 of the Act, including conferences in which evidence is taken by an assessor appointed by the Court (see also Division 7 of Order 78 of the *Federal Court Rules*),

- case management conferences conducted by the Court for the purpose of managing the conduct of the proceedings(Ref?),

- mediation ordered by the Court and conducted under s.53A of the *Federal Court of Australia Act 1976* and Order 72 *Federal Court Rules*,

- the determination of 'separate questions' of fact or law by the Federal Court under Order 29 of the *Federal Court Rules*, and

- hearings of evidence and argument by the Federal Court.

Recommendation 12

Items 53-55 and 56 to 67 should not be enacted.

If items 53 to 55 provisions are enacted, they should be amended so that:

- reviews require the consent of the applicant;

- statements made at a review should be confidential as well as without prejudice (s136GD(1)) and require the consent of the parties before disclosure can be made;

- review reports should only be provided to the Federal Court and non-participating parties (s136GE(2)) with the consent of the participating parties;

If items 56 to 67 are enacted, they should be amended so that:

- inquires should not be requested prior to a general referral to mediation (omit s138B(3));

- Inquiry hearings should not be public (s154A(3) unless the parties consent;

- inquiry reports and determinations should not be provided to the Federal Court (s.164(2) without the consent of the parties.

Provision for consent determination in relation to part only of a claim area – item 35

119. The Act provides for the Court to determine native title in relation to part only of a claim area on the agreement of the parties (see s.87(3)). Proposed new s.87A limits the range of parties whose agreement is needed for such a determination to be made.

120. I strongly support the intention of proposed s.87A but recommend its amendment to avoid the possible confusion that could result from its present wording.

121. It is not clear what is meant by 'each registered native title claimant in relation to any part of the determination area …' in s.87A(1)(c)(ii). Perhaps what is meant is 'the applicant in any other proceeding to an application for a determination of native title in relation to any part of the area', if it is meant to cover those instances in which there are overlapping claims. I note that the phrase 'registered native title claimant' is presently used only in connection with the future act provisions.

122. If the reference to an registered native title body corporate in s.87A(1)(c)(iii) is intended to relate to applications for revision of an existing determination pursuant to s.13(1)(b), that should be made clear.

123. Thought should be given to clarifying the intended application of this sub-paragraph.

Recommendation 13

Item 35 should be amended to clarify the meaning of the reference in s.87 to 'each registered native title applicant'.

Registration test not to apply to some amended claims – items 69-71

124. I support the intention of the proposed new s.190A(1A) [item 71] which appears to exempt from the application of the registration test, previously registered native title claims amended because of a part-determination of the claim under new s.87A (item 35).

125. However, the drafting of the proposed new s.190(3)(a) [item 69] is not entirely clear. The proposed section does not clearly have the effect of deeming the amendment of a claim which has been partially determined under s.87A for the purposes of registration. The proposed new s.190(3)(a) should be amended to make this deemed amendment clear and accordingly clarify in what way the Register is to be amended.

126. I note that the Review recommended that a broader range of amended applications be exempted from the application of the registration test (see recommendation 12). I understand that the other exemptions from the application of the registration test are intended to be the subject of further 'technical amendments' to the Act which have not yet been drafted. I support the tenor of the Review recommendation and believe that there are a wide range of amended applications that should not be subjected to the registration test.

Recommendation 14

Item 69 should be amended to clarify that s.190(3)(a):

- applications which are partially determined under s.87A are automatically deemed to be amended to exclude the determined area, and

- such alteration may be made to the Register without the application of the registration test.

Summary dismissal of certain native title applications is discriminatory– items 36, 2 & 73

127. I am strongly opposed to the proposed amendments in:

    - Item 36, which would insert a new s.94C requiring the Court to dismiss proceedings relating to applications that appear to have been made to attract the application of the 'right to negotiate' provisions when the 'future act' concerned has been done, except where there are compelling reasons not to do so,

    - Item 2, which would insert a new s.66C, which provides for the Registrar of the NNTT to 'advise' the Court of matters relevant to the exercise of the powers in the new s.94C;

    - Item 73, which would insert new sub-ss.190D(6) and (7), empowering the Court to dismiss an application that has failed the merits aspect of the registration test applied by the Native Title Registrar.

128. The proposed amendments are discriminatory in that they treat native title application proceedings differently to other proceedings, apply a different standard to the dismissal of native title application proceedings than is applied in all other cases and the effect of these amendments is prejudicial to the interests of applicants.

129. In all cases, the Court has:

    - a discretion to dismiss a proceeding for 'default' by the applicant, including failure to comply with a direction given in relation to conduct of the proceedings, pursuant to Order 35A of the *Federal Court Rules*, and

    - a discretion to summarily dismiss a proceeding in which no reasonable cause of action is disclosed, which is frivolous or vexatious, or which is an abuse of process, pursuant to Order 20 rule 2 of the *Federal Court Rules*.

130. There is no justification in principle for these new provisions. Nor has any argument been advanced as to why the Court's existing discretions are not sufficient for the management of native title applications (eg Recommendation 16 of the Report does not contemplate introducing special grounds for dismissing native title applications) The proposed amendments adopt a 'presumptive' approach to the dismissal of certain native title applications which effectively places the onus on the applicant to 'show cause' as to why the application should not be dismissed.

131. If the Court has not already dismissed native title applications in the exercise of its ordinary discretions to do so, this is surely most likely to be an indication that:

- there are good reasons why the proceedings should not be considered to be in 'default' or to be an abuse of process, or

- there are sound public policy considerations having regard to which the claims should remain on foot.

In this case, the right that is generally available to all citizens, to have their lawful applications determined by the Court should be available to a native title applicant. If the proper exercise of the Court's discretions to dismiss pursuant to Order 20 or Order 35A, or pursuant to its residual discretion, does not support the dismissal of a native title application, there should be no other basis on which the application is liable to be dismissed. To enact otherwise is unfair to native title claimants, and may be unlawfully discriminatory on the basis of race.

132. I have concerns specific to each of the proposals as follows.

Dismissing 'future act claims' after the future act has occurred – items 2 and 36

133. Under these proposed provisions, the Court is not only empowered to dismiss native title applications in the circumstances to which the proposed s.94C [item36] applies, but it is obliged to do so unless there are unspecified but limited 'compelling reasons not to do so' [s 94C(3)].

134. The proposed provisions simultaneously:

- Broaden the Court's discretion to dismiss proceedings in circumstances that do not apply to any other applications to the Court, and

- Restrict the Court's discretion to direct the conduct of proceedings by requiring the Court to dismiss proceedings in the prescribed circumstances.

For these reasons they are discriminatory and contrary to the ordinary principles according to which judicial discretion may be exercised.

Recommendation 15

Items 36 and 2 should not be enacted because they are discriminatory.

If items 36 and 2 are enacted, they should be amended so that:

- Information provided by the NNTT Registrar under the new s 66C [item 2] should not, of itself, be sufficient for the dismissal of proceedings;

- The Court is not obliged to dismiss the proceedings but retains its discretion to do so.

Dismissing claims that do not pass the registration test – item 73

135. It is proposed that where, in the 'opinion' of the Registrar of Native title applications,[18] an application fails the 'merit conditions' of the registration test[19] [s.190D(6), item 73), the Court may dismiss the application [s.190D(7), item 73] if:

- it is satisfied that the application will not be registered if amended; and
- there is no other reason why the application should not be dismissed.

136. In dismissing an application on this basis, the Court is to rely on the Registrar's exercise of an administrative function, the primary purpose of which is to determine whether the applicant is to be afforded procedural rights under Division 3 of Part 2 of the Act in relation to proposed future acts.

137. The application for the registration test is a wholly inappropriate basis for the exercise of a discretion to dismiss proceedings because:

- the registration test is applied by an administrative officer not a judicial officer;
- the application of the registration test was never intended to have any purpose beyond determining whether an application would have the status of a 'registered' claim entitling the applicants to procedural rights in relation to future acts. It has no significance in the ultimate resolution of an application;
- the matters to be considered under s.190B, while relevant to the merits of a claim, are not the same as the matters to be determined by the Court when giving judgment on a native title determination application;
- the Registrar's delegates have interpreted the requirements of s.190B quite differently over time, with the result that an application that was accepted for registration is later rejected for registration when it is reassessed because of an amendment; and
- in some respects, the Registrar's delegates have interpreted s.190B to be a more restrictive test than that in s.223, which defines 'native title'[20].

It appears to me that Item 73 is designed to deal with the backlog of native title claims that have still not been subjected to the registration test as amended in 1998.

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[18] See item 72, which introduces a new s 190D (1B) requiring a statement on whether all conditions in s190B have been satisfied and whether s 190C has been satisfied to be included in the Registrar's reasons for decision in relation to the application of the registration test. Of itself, item 72 is innocuous enough. In combination with item 73, it is repugnant.

[19] Section 190B. Explanatory Memorandum para 2.210.

[20] For example, the Registrar's delegates are currently refusing to register applications in which the claim group is described using a formula that includes reference to a person's self identification, and/or acceptance by the group, as being part of the group. But the Court has made determinations in which the native title holding group is described in exactly that way.

Recommendation 16

Item 73 should not be enacted.

Item 73 is discriminatory and inconsistent with the ordinary principles governing the judicial discretion to summarily dismiss proceedings.

If a new basis for summary dismissal of native title applications is to be enacted, it should be consistent with the ordinary principles governing the judicial discretion.

In any case, the requirement in item 72 should not, of itself, be sufficient basis upon which to exercise a discretion to dismiss proceedings.

SUBMISSIONS IN RELATION TO SCHEDULE 3 – AMENDMENTS IN RELATION TO PRESCRIBED BODIES CORPORATE

138. PBCs are the entities through which native title is held and managed after a native title determination is made. They are the end product of the native title recognition and protection process established by the Act.

139. The Bill proposes a minor, technical amendment to the Act as it applies to PBCs. However, this amendment paves the way for significant regulatory changes to PBC functions and the way that PBCs operate. I am concerned that the proposed legislative amendments to PBCs, considered together with proposed regulatory amendments, will limit native title holders' statutory rights to be consulted about and consent to future acts on their lands.

140. It is anticipated that there will be further amendments to the Act which affect PBCs.[21] In particular, the Attorney General has recommended changes to the Act to:

- limit third party funding,[22] and
- enable the appointment of default PBCs.[23]

Further, the Attorney-General has recommended changes to the PBC Regulations to:

- clarify the circumstances when certificates authorising PBC activity may be issued,[24] and
- allow non-Indigenous membership of PBCs.[25]

141 The present amendment should not be considered in isolation from these other proposed amendments to the Act and PBC Regulations.

142 Like representative bodies, PBCs do not have adequate resources to perform their functions. Indeed, this lack of resources, rather than any problem inherent in the

[21] See Attorney-General's Department, *Technical amendments to the Native Title Act Discussion Paper* (22 November 2006); Attorney-General's Department, *Technical amendments to the Native Title Act Discussion Paper 2* (22 November 2006); Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, *Report on the Operation of NTRBs* (October 2006); Aboriginal and Torres Strait Islander Social Justice Commissioner Submission to the Attorney-General's Department on the *Second Discussion Paper: Technical Amendments to the Native Title Act 1993* (22 December 2006).
[22] Attorney General's Department, *Structures and Process of Prescribed Bodies Corporate* (27 October 2006), Recommendation 1, para 25 para 8.10.
[23] Attorney General's Department, *Structures and Process of Prescribed Bodies Corporate* (27 October 2006), Recommendation 15, para 8.27.
[24] Attorney General's Department, *Structures and Process of Prescribed Bodies Corporate* (27 October 2006), Recommendation 6, para 7.12.
[25] Attorney General's Department, *Structures and Process of Prescribed Bodies Corporate* (27 October 2006), Recommendation 8, para 7.18.

functions of PBCs themselves, is the primary concern expressed by native title holders and others in relation to the operation of PBCs.[26]

143 The Government:

> 'has taken the view that it is not solely responsible for funding of PBCs, and that it is appropriate that the State and Territories and proponents of activity, who are the primary beneficiaries of land development, contribute to the costs of such development'.[27]

144 I am concerned that, considered in light of the Government's view about PBC funding, proposed changes to PBCs' statutory functions are an attempt to limit government and third party liability for funding both PBCs and the NTRBs that assist them.

The amendment paves the way for regulatory amendment

145 The Bill proposes to amend 58(e) of the Act [item 2], which relates to agent PBCs' ability to enter into agreements.

146 The amendment removes the current requirement that, in order to enter into an agreement, agent PBCs must consult with native title holders, who must also authorise the entry into the agreement [s 58(e)(i)]. Under the new s.58(e), the PBC would have to make the agreements 'in accordance with processes set out in the Regulations'.

147 The Bill's explanatory memorandum notes that these consultation requirements are not imposed on trust PBCs.[28] To the extent that the proposed amendment places the same legislative requirements on agent and trust PBCs, it may be characterised as a technical amendment.

148 However, the NT(A) Bill explanatory memorandum goes on to state: [29]

> This item will enable implementation of a measure in the PBC report to remove the statutory requirement for PBCs to consult with the common law holders on all agreements and decisions affecting native title (Recommendation 5). The PBC Report considered the existing requirements imposed a very significant burden on some PBCs and that compulsory consultation should only be applied to decision to surrender native title rights and interests in land or waters.

149 When considered together with the proposed regulatory changes, it becomes clear that the proposed amendment anticipates substantial changes to PBC functions that limit native title holders' rights in relation to future acts.

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[26] See, eg, minority report of Senator Rachel Siewert of the Greens to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account *Report on the Operation of Native Title Representative Bodies* (March 2006) 85. Recommendation 18 of the Committee in this report appears to have been taken up the Attorney General in Recommendation 2 of the *Structures and Process of Prescribed Bodies Corporate* (27 October 2006).

[27] Attorney General's Department, *Structures and Process of Prescribed Bodies Corporate* (27 October 2006), para 5.1.

[28] Para 3.3, p 74 of the NT(A) Bill Explanatory Memorandum.

[29] Para 3.2 p 73 of the NT(A) Bill Explanatory Memorandum.

150 For this reason, and because it is not clear that there will be any future opportunity to comment on these proposed regulatory changes to PBC functions, I set out my concerns about those changes below.

Proposed regulatory changes to PBC functions

151 The principal function that a PBC performs is that of consulting with and obtaining the consent of native title holders to future acts on native title lands. Two of the main proposed changes to PBCs system appear to narrow the ambit of this function by:

- amending the definition of 'native title decisions' in the PBC Regulations to reduce the circumstances in which a PBC is required to consult with and obtain the consent of native title holders, and

- clarifying the PBC Regulations relating to the issue of authorisation certificates, possibly in such a way as to limit the circumstances in which it is necessary for a PBC to consult with native title holders about future acts.

Narrowing the definition of 'native title decisions' limits the kinds of future acts that native title holders are entitled to be consulted about

152 PBCs must consult with and obtain the consent of 'common law holders' of native title before making a 'native title decision'.[30]

153 A 'native title decision' is currently defined in Regulation 8(1) of the PBC Regulations to mean:

…a decision:

(i) to **surrender** native title rights and interests in relation to land or waters; or
(ii) to do, or agree to do, any other act that would **affect** the native title rights or interests of the common law holders. (Emphasis added).

154 It is assumed that 'surrender' of native title extinguishes the title.[31]

Section 227 of the NTA states that:

An act affects native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

155 In addition to being a 'native title decision' for the purposes of the PBC consultation and consent provisions, an act affecting native title is also a future act.[32] Where

[30] Regulation 8(2).
[31] 'Surrender' is not defined in the NTA. However, it is understood in the common law of native title to mean the voluntary giving up of native title or any right to claim native title.
[32] Section 24AA of the NTA cf s 233 of the NTA.

native title has been recognised, the consultation and consent provisions apply in addition to the future act regime. While the future act regime imposes obligations on proponents of future acts, the consultation and consent provisions impose obligations on PBCs.

156 The consultation and consent provisions provide an additional level of protection of recognised native title rights and interests by ensuring that the entity charged with the management of the title conscientiously ascertains what and whose interests may be affected by a future act and who those interests are held by according to the customary law of the native title holders.

157 Consultation with and the consent of native title holders to activity on native title land is therefore critical to:

(i) the validity of future act agreements.[33]

(ii) the ability of native title holders to protect their native title rights and interests, to regulate the use of and activity on native title land, and

(iii) the legitimacy of future acts, in the sense that they represent the discharge of the state's obligations to Indigenous peoples, most relevantly the right to prior informed consent.

158 I am concerned that the proposed amendment to Regulation 8 of the PBC Regulations to amend the definition of 'native title decisions' reduces the kinds of future acts that PBCs are required to consult with native title holders about and obtain the consent of native title holders to. The mere giving of notice of a future act to a PBC, without an obligation on the PBC to consult about that act, means that native title holders will not be relevantly informed about that act and will have no opportunity to give their specific consent to it.

Voluntary regulation does not guarantee native title holder's rights

159 I agree with the Attorney-General's view that the proposed amendment of the consultation and consent provisions 'would not affect the ability of native title holders to impose additional consultation and consent requirements on their PBC through the PBC rules'.[34]

160 However, without legislative support, there is no guarantee of the rights currently protected by the consultation and consent provisions and no consistent standard against which they could be measured.

161 Further, the consequences of making the consultation and consent procedures an optional part of the rules of association of a PBC are complex and far-reaching and include the following:

[33] See, eg, Regulation 8(7) of the PBC Regulations 'An agreement that gives effect to a native title decision of a PBC has no effect to the extent that it applies to the decision, if the body corporate does not comply with this regulation.'

[34] Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate* (27 October 2006), para 7.6.

- non-compliance with statutory requirements for consultation and consent may affect the validity of future act agreements (see eg Reg 8(7)). Non-compliance with internal rules of an association will not affect the validity of the future act agreement and will be of no consequence to the proponent. Rather, liability will accrue on corporate officers. The 'risk' associated with PBC conduct in relation to future acts is therefore placed on PBC officers;

- the Registrar of Aboriginal Corporations would be the arbiter of what are acceptable consultation and consent procedures by virtue of her power to approve rules of association and to issue a certificate of incorporation to a proposed PBC.

- rules of association, including consultation and consent rules, may ordinarily only be enforced by the members of the corporation and then only in limited circumstances. The larger group of native title holders would have no rights to enforce the procedure.

Certificates authorising PBC activity should not be a substitute for adequate consultation

162 PBC Regulation 9(2) allows PBCs to certify their compliance with the consultation and consent requirements pursuant to a written certificate of authority:[35]

> (a) that the common law holders have been consulted about, and have consented to, the proposed decision; or
>
> (b) that:
>
> (i) the proposed decision is of a kind about which the common law holders have been consulted; and
>
> (ii) the common law holders have decided that decisions of that kind can be made by the body corporate.

163 Such authorities must be signed by five members of the PBC whose native title rights and interests are affected by the proposed decision.[36]

164 On one reading, sub-regulation 9(2)(a) allows a PBC to prove that it has discharged its consultation and consent functions by engaging with the whole native title holding group in relation to a particular future act. Sub-regulation 9(2)(b) appears to allow a PBC to obtain an authority from the native title holding group to execute its consultation and consent obligations in a particular way. For example, the group could authorise the PBC to consult with particular individuals regarding a particular class of future acts proposed in a particular area of the determination area. If such consultation had been completed and consent obtained, the authorisation could empower the PBC to issue a certificate under sub-regulation 9(2)(a).

[35] Reg 9(2)(a) of the PBC Regulations.
[36] Reg 9(3) of the PBC Regulations.

165 The Attorney-General has recommended that:

> The PBC regulations should be amended to clarify the circumstances in which 'standing authorisations' may be issued to a PBC, and, in particular, to provide that only one certificate needs to be issued with each authorisation.[37]

166 It is unclear whether or how this recommendation would change the above interpretation of regulation 9(2). However, the Attorney-General seems to be of the view that such an amendment would authorise the doing of a certain class of acts by the PBC without consulting the native title holders in each instance. On this reading Regulation 9(2) allows the native title holders to issue a broad executive authority to a PBC to make native title decisions on its behalf, but such an interpretation is at odds with the overall purpose of the consultation and consent provisions.

167 The real problem with Regulation 9 is sub-regulation 9(3), which requires the signature of five PBC members whose rights and interests would be affected by the future act. Not all native title holders identified in a native title determination must become members of the PBC. It may be that relevant 'affected common law holders' are not members of the PBC. Sub-regulation 9(4) provides that where this is the case, the authority must be signed by five members and all of those PBC members whose rights are affected. This does not, however, cover the situation where no 'affected common law holders' are current members of the PBC. It also highlights the problem of how an 'affected common law holder' can be identified (and signature obtained) in the absence of a particular proposed future act/native title decision.

168 I would therefore suggest that Regulation 9 be amended to endorse the first interpretation given above and, where consultation and consent requirements have been discharged pursuant to a 'procedural' authorisation, certification of such discharge may be issued by the PBC together with the 'affected common law holders', whether or not they are members of the PBC. Such an approach would:

- be consistent with other authorisation procedures in the NTA, which distinguish, for example, between the native title holding group and the named applicants;[38]
- allow non-compliance with authorised procedures to be enforceable as part of the statutory scheme and therefore affect the validity of agreements not complying with them,[39] and

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[37] Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate* (27 October 2006), Recommendation 6, p 21 para 7.12.

[38] The various authorisation requirements of the NTA (including s 62, 62A, 251A and 251B), receive some discussion and recommendation for clarification in the Attorney-General's *Technical Amendments to the Native Title Act 1993: Second Discussion Paper* (22 November 2006), paras 41-47 and in the *Native Title Claims Resolution Review* (Hiley & Levy, 31 March 2006), 34-35. Relevant provisions of the NTA S 251, s.66B . Note also the similarity between regulations 8(4) and (5) of the PBC Regulations and s.251B on customary and agreed decision-making processes for the authorisation of consultation and consent procedures and native tile applicants. The jurisprudence on the replacement of applicants under s.66B of the NTA provides the most developed thinking around the authorisation of individuals to act for and on behalf of the native title claimant group.

- provide for adequate and appropriate consultation with native title holders in relation to decisions affecting their land, in terms of both the procedure adopted and decision itself.

Non-Indigenous membership is unnecessary and contrary to the purpose of PBCs

169 The Attorney-General suggests that non-Indigenous membership of PBCs should be allowed in order to make PBC structures 'more representative of the broader community in which they live'[40] and recommends that:

> The PBC regulations should be amended to remove the requirement that all members of a PBC be native title holders and associated safeguards should be included to ensure the protection of native title rights and interests.[41]

170 There is no justification for making PBC structures 'more representative of the broader community in which they live'. PBCs are vehicles for the representation of communal native title. Their representative function is limited to the representation of those holders. The proposed amendment should be opposed on this basis.

171 The membership provisions of the CATSI Act provide for detailed definition of and differentiation within groups which in turn facilitate the consultation functions of PBCs. These may be unnecessarily complicated by the provision of non-Indigenous membership of PBCs.

172 Officers of Indigenous corporation did formerly have to be members of the corporation. This limited the pool of management skills to those of the native title holders. The CATSI Act:

- does not require directors to be Indigenous or members of the corporation;[42]
- prescribes detailed directors' duties and supervision and enforcement regimes for those duties; and
- applies directors' duties to both officers and certain staff of an Indigenous corporation.[43]

174 In this way, the CATSI Act addresses long-standing human resource concerns in relation to Indigenous corporations. Changes to the PBC Regulations on these grounds are unnecessary.

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[39] Regulation 8(7) of the PBC Regulations. Note this gives individual native title holders a cause of action against the PBC.
[40] Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate* (27 October 2006), para 7.17.
[41] Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate* (27 October 2006), para 7.18.
[42] Section 246-1 of the CATSI Act.
[43] See s 683-1(6) of the CATSI Act.

Recommendation 17

Item 2 should not be enacted but should be deferred until the next round of amendments so that all proposed changes to the NTA relevant to PBCs, and amendments to the PBC Regulations, can be considered together.

At that time, amendments clarifying the purpose of Regulation 9(2) should be considered.

Tom Calma
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25 January 2007.