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REFORMING THE CLAIMS RESOLUTION PROCESS: OPPORTUNITIES AND OBSTACLES[1]

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ABSTRACT

In 2007 numerous legislative and administrative changes were made to key aspects of the native title system. Many of those changes affect how native title claims are resolved. The statutory changes have re-oriented aspects of the relationship between the Federal Court and the National Native Title Tribunal, and have given the Tribunal additional powers and functions in relation to the mediation of native title claims. This paper outlines the key changes, and identifies some of their implications and opportunities for a more effective and efficient claims resolution process.

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[1] This paper is extracted from a longer paper presented at the 2007 Native Title Conference in Cairns on 8 June 2007. The full version of this paper is available on the websites of AIATSIS http://ntru.aiatsis.gov.au/conf2007/speakers.html and the National Native Title Tribunal www.nntt.gov.au.

INTRODUCTION[2]

On 7 December 2006, Federal Attorney-General Philip Ruddock introduced legislation to amend the *Native Title Act 1993* (Cth) (NTA) to "provide a platform to enable more efficient and effective outcomes" from the native title system. The legislation was one part of a package of reforms to key aspects of the native title system that the Australian Government had foreshadowed in a series of announcements from September 2005 onwards.[3] Most of the *Native Title Amendment Act 2007* (Cth) commenced on 15 April 2007.

The subsequent *Native Title Amendment (Technical Amendments) Bill 2007*, as amended, passed through both Houses of Parliament in June 2007. The amendments will commence on a date or dates to be proclaimed.

This paper concentrates on aspects of the claims resolution process that were affected by the *Native Title Amendment Act 2007,* primarily those involving the agreement-making process. It identifies eight obstacles to the resolution of native title determination applications (claimant applications) and highlights how amendments to the NTA create opportunities to overcome those obstacles.

The reforms to the native title system (including the legislative changes to the claims resolution process and the administrative changes to respondent funding) will assist the National Native Title Tribunal (the Tribunal) to take more control of the process and focus parties on seeking negotiated outcomes. The Federal Court will continue to supervise the mediation process and the Tribunal will report to the Court. The two institutions will work closely together, and with the parties, in prioritising and progressing the resolution of claims.

OBSTACLES TO, AND OPPORTUNITIES FOR, RESOLVING NATIVE TITLE APPLICATIONS

(a) Parallel mediation processes in different forums

Before the NTA was amended in April 2007, the Federal Court had power to mediate in respect of a native title application whether or not the application had been referred to the Tribunal for mediation. That power was not found in the NTA but in s.53A of the *Federal Court of Australia Act 1976* (Cth). The Court also had a broad discretion not to refer applications to the Tribunal for mediation. As a consequence, it was possible that matters would be mediated concurrently by both the Court and the Tribunal, or were not referred to the Tribunal until some aspects had been mediated by the Court.

The consultants conducting the native title claims resolution review recommended that the NTA be amended to provide that mediation should not be carried out by more than one body at one time.[4] That recommendation and a related option for institutional reform were adopted.[5] In summary:

- The previous general discretion of the Court[6] not to refer matters to the Tribunal for mediation has been removed, thus strengthening the presumption that mediation in native title

[2] Some of this paper draws on "New powers and functions of the National Native Title Tribunal: An overview and analysis", a paper delivered to the Negotiating Native Title Forum in Melbourne on 26 February 2007. Some of the topics were also considered in G Neate, "New powers and functions of the National Native Title Tribunal" April 2007, *Indigenous Law Bulletin*, volume 6, issue 26, pp. 10-12.

[3] Detailed information about the reforms (including the review of the claims resolution process) and the subsequent legislation is available on the website of the Attorney-General"s Department www.ag.gov.au.

[4] G Hiley and K Levy, 2006 *Native Title Claims Resolution Review*, report to the Attorney General, Canberra, Recommendation 1, paras 4.28-4.32.

[5] Option 2 that the Tribunal be provided with an exclusive mediation role with no time limitations on Federal Court intervention: G Hiley and K Levy, above n 4, Chapter 5.

proceedings should take place in the Tribunal. The issue of non-referral will instead be determined under an amended s. 86B(3).

- While a matter is referred to mediation by the Tribunal, the Federal Court is prevented from conducting mediation under the *Federal Court of Australia Act 1976* or holding certain conferences by a Court registrar under the Federal Court Rules to determine whether all reasonable steps have been taken by the parties to achieve a negotiated outcome.[7] This new provision is to ensure that mediation cannot be conducted by both institutions at the same time. The prohibition is limited to mediation. It does not, for example, prevent the Court from using other forms of alternative dispute resolution at the same time a matter is in mediation with the Tribunal.
- The provisions about the cessation of mediation allow the Court, among other things, to order that mediation by the Tribunal cease if it considers that there is no likelihood of the parties being able to reach agreement in the course of mediation by the Tribunal on, or on facts relevant to, any of the matters set out in s. 86A(1) or (2).[8] In other words, if mediation by the Tribunal is not working, the Court can order that mediation by the Tribunal cease and refer it to another mediator.

(b) Connection issues

For native title claim groups, one of the most difficult aspects of the claims process is establishing that they have native title rights and interests in relation to the land or waters claimed.[9] That is often referred to as proving "connection" to those areas.[10]

The amendments to the NTA have enhanced the Tribunal's existing role in the mediation of connection by enabling the Tribunal, in certain circumstances, to:

- carry out a review of whether there are native title rights and interests, or
- hold an inquiry in relation to a matter or issue relevant to a determination of native title.

Review of whether there are native title rights and interests: The President of the Tribunal is empowered, on the recommendation of the Tribunal member presiding over the mediation, to refer for review by another member (or Presidential consultant) the issue of whether the native title claim group holds native title rights and interests in relation to land or waters within the application area.[11] The presiding member can only make the recommendation if he or she considers that the review would assist the parties to reach agreement in relation to matters listed in s.86A(1) of the NTA.[12]

Parties who give documents or information to the review can participate in the process.[13] According to the Explanatory Memorandum, "[i]t will be essential to have at least one participating party to a

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[6] *Native Title Act 1993* (NTA) s.86B(2). The subsection has been repealed.

[7] NTA s. 86B(6).

[8] NTA s. 86C(1)(b).

[9] For the definition of "native title" and "native title rights and interests" see NTA s.223.

[10] The term "connection" is probably a shorthand expression for that part of the definition of "native title" that refers to people, by their traditional laws and traditional customs, having "a connection with the land or waters": NTA s.223(1)(b).

[11] NTA s. 136GC(1), (2), (4).

[12] NTA s. 136GC(3).

[13] NTA s. 136GC(6).

review, although it may only be necessary to have one such participating party".[14] Presumably a review would not be conducted unless the applicant agrees to participate.

Unless the parties agree otherwise, any word spoken or act done in the course of the review will be subject to without prejudice privilege.[15]

Mediation may continue during the conduct of the review and the member undertaking the review may give progress reports to the presiding member if the reviewer considers that providing the report would assist in progressing the mediation.[16]

The member conducting the review can prohibit disclosure of information given, statements made, or the contents of any document produced, in the course of the review.[17]

The written report of the review *must* be made available to the presiding member and the participating parties.[18] A copy *may* also be given to the Court and the other parties to the proceeding (that is, such provision is discretionary).[19]

The member conducting the review cannot direct the production of documents. Only a member presiding at a mediation conference has that power.[20] Nor can the member conducting the review compel parties to participate in it. Participation is purely voluntary. Reviews are meant to be done "on the papers". There is no facility for holding hearings and if these are required an inquiry would be preferable.

If a native title application inquiry (see below) is being held, the Tribunal cannot conduct a review at the same time in relation to the same area.[21]

Native title application inquiries: The President of the Tribunal (on his or her initiative, at the request of a party, or at the request of the Chief Justice of the Federal Court) may direct the holding of an inquiry by the Tribunal in relation to a matter or an issue relevant to the determination of native title under s.225 of the NTA.

The direction can only be made if the applicant agrees to participate and the President is satisfied that the resolution of the matter or issue concerned would be likely to lead to:

- an agreement on findings of fact,
- the resolution or amendment of the application, or
- something else being done in relation to the application.[22]

Before the President directs the holding of an inquiry, at least seven days written notice that the Tribunal intends to hold an inquiry must be given to the applicant, the Chief Justice of the Federal Court, the Commonwealth and relevant State or Territory Ministers, the native title representative body (or a person or body performing the functions of a representative body) and any other person who is a party to the proceeding.[23]

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[14] *Native Title Amendment Bill 2006*, Explanatory Memorandum, para 2.136.

[15] NTA s. 136GC(7).

[16] NTA ss. 136GC(9); 136GE(3).

[17] NTA s. 136GD.

[18] NTA s. 136GE(1).

[19] NTA s. 136GE(2).

[20] NTA s. 136CA.

[21] NTA s. 138E(2).

[22] NTA s. 138B(1), (2).

[23] NTA s. 138D.

Inquiries may only be undertaken where the relevant proceeding is in mediation with the Tribunal and the proceeding raises an issue relevant to a determination under s.225. However, a request to hold an inquiry may be made, before the proceeding is referred to the Tribunal.[24] While inquiries can cover more than one proceeding, each proceeding must have been referred to the Tribunal for mediation.

Participation in an inquiry will be entirely voluntary. Unlike other inquiries conducted by the Tribunal, there will be no capacity to subpoena witnesses or documents.[25]

The parties to an inquiry are the applicant, the relevant State or Territory Minister and the Commonwealth Minister (if they advise in writing that they wish to be a party) and, with leave of the Tribunal, "any other person" who notifies the Tribunal in writing that they wish to become a party.[26]

As these inquiries are intended to assist in the mediation of applications, hearings are generally to be held in private. The Tribunal may direct instead that they be held in public. The customary and cultural concerns of Aboriginal peoples and Torres Strait Islanders must be given due regard in making such a direction.[27]

Mediation may continue while an inquiry is underway if the presiding member considers that it is appropriate.[28] An inquiry must cease if the relevant part of the proceeding ceases to be in mediation with the Tribunal.[29] It may also cease if the President so directs on the basis that a party to the inquiry no longer wishes to participate.[30] The latter is discretionary and whether or not a direction is made will depend upon a variety of factors including the importance of the party to the inquiry and the stage the inquiry has reached.

The report of an inquiry must state findings of fact and may make recommendations but these are not binding on the parties to the inquiry.[31] A copy of the report must be given to the Federal Court and each of the parties to the inquiry.[32] The Court must consider whether to receive into evidence the transcript of evidence of an inquiry and may adopt any recommendation, findings of fact, decision or determination of the Tribunal in relation to the inquiry.[33]

(c) People who are, but should not be, parties to native title proceedings

As a general rule, before there can be a consent determination of native title, every party to the proceeding must agree to it.[34] In some cases (particularly where there are scores, if not hundreds, of respondent parties) it can be difficult to obtain the consent of all parties and the requisite documentation of that agreement. For logistical as well as substantive reasons it is important to ensure that only those people with a relevant interest become, or remain, parties to the proceeding. Given the many years that often elapse between the notification of a claimant application and its resolution, it is possible that some parties will not retain relevant interests in the claimed area. For example, this may be because they have sold their interest or because the claim area is reduced in such a way that their

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[24] NTA s. 138B(3).

[25] NTA s. 156(7).

[26] NTA s. 141(5).

[27] NTA s. 154A.

[28] NTA s. 138E(1).

[29] NTA s. 138F(1), (2).

[30] NTA s. 138F(3).

[31] NTA s. 163A.

[32] NTA s. 164.

[33] NTA s. 86(2).

[34] *Munn v Queensland* (2001) 115 FCR 109.

interests are no longer affected. If people who should not be parties retain that status, a consent determination might be delayed or even denied.

New limitations on who can become a party: Although much of the previous scheme concerning parties remains, s.84 of the NTA has been "tightened up" to make it more difficult to "automatically" become a party to proceedings. Some persons who previously could become parties by giving notice to the Court will now only become parties if they have an "interest, in relation to land or waters" that may be affected by a determination in the proceedings.[35]

Further, the power of the Court at any time to join a person as a party has been amended so that being joined as a party requires not only that the person's interests may be affected by a determination but also that "it is in the interests of justice" that the person be so joined.[36]

These new provisions apply only to applications lodged on or after the "commencing day".[37]

Remaining a party - referral of a question about whether a party should cease to be a party: If the Tribunal member presiding at a mediation conference considers that a party does not have a relevant interest in the proceeding, the member may refer to the Federal Court the question of whether a party should cease to be a party to the proceeding.[38] A "relevant interest" for this purpose is an interest that may be affected by a determination in the proceeding.[39] The procedural requirements for referring such a question are being finalised with the Court.

If such a question has been referred to the Federal Court, the presiding member may continue the mediation if he or she considers that it is appropriate.[40]

For example, the Tribunal might refer such a question to the Federal Court where a claimant application has been amended to remove certain areas or categories of land from the claim area and, as a consequence, some parties" interests are no longer affected by the claim. Analysis of current tenures in the claim area or the tenure history of the area might also disclose that some parties do not have interests that could be affected. Such analysis can be, and often is, conducted by the Tribunal's geospatial specialist staff under the NTA.[41]

(d) Consent determinations over part of an area covered by a native title application require consent of all parties

Although a consent determination may be negotiated over part of a claimed area, the NTA previously required that every party to the proceeding consent to the determination, even if some parties had no interest in relation to the proposed determination area.[42]

The NTA has been amended to make it easier to obtain a consent determination over part of the area covered by a native title application. Subject to it being within power and appropriate, the Court may make a determination of native title in relation to the area in the terms sought by the persons specified in s.87A. This means that a consent determination may be made without the consent of a party to the

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[35] NTA s. 84(3)(a)(iii). The phrase "interest, in relation to land or waters" is defined in s.253.

[36] NTA s. 84(5).

[37] *Native Title Amendment Act 2007*, Item 78.

[38] NTA s. 136DA(1).

[39] NTA s. 136DA(6).

[40] NTA s. 136DA(5).

[41] NTA ss. 78(2)(b), 108(3)(a).

[42] *Munn v Queensland* (2001) 115 FCR 109 at [9]-[12], [16].

proceedings where that party does not hold a specified type of interest in the determination area and who is not otherwise listed. This includes:

- parties with lesser interests in the determination area, and
- those parties who have an interest in the area covered by the application but outside the determination area.

Such parties may object to the Court making a determination in the terms sought. In deciding whether to make the consent determination the Court must take into account any objections from those parties.[43]

When a consent determination is made under this scheme, the application will be deemed to be amended to reduce the area covered by the application to what is left.[44] The registration test will not be applied to these "amended applications", and if the application is registered, the entry in the Register of Native Title Claims can be amended to reflect the change in the area covered by the application.[45]

(e) Tribunal's lack of powers to direct attendance and production of documents

The consultants conducting the claims resolution review considered that the Tribunal did not have adequate powers to effectively perform its mediation role.[46] The NTA has been amended to give the presiding Tribunal member power to:

- direct a party to attend a mediation conference,
- for the purposes of a mediation conference, direct a party to produce a document on or before a specified day if the member considers that the production of the document (in the party's possession, custody or control) may assist the parties to reach agreement on any of the matters in s.86A(1) or (2).[47]

These powers are quite limited in their scope. Members conducting reviews or inquiries will not be able to use them. Further, the power to direct that documents be produced cannot be used to compel a party to create a document, nor can it be used to obtain documents subject to legal professional privilege.[48] That exception could cover many documents of relevance to mediation. The power to direct a party to attend a mediation conference does not extend to directing a party's representative to attend a conference.

There is no power to enforce such directions. The Tribunal will continue to have to rely upon the Court to make appropriate orders. Where a party refuses to comply with the direction, the presiding member may report to the Federal Court that the direction has not been complied with.[49] Where that report is given to the Court, the Court may make orders in similar terms to the directions that were given.[50] A failure to comply with the Court orders may give rise to cost orders or contempt proceedings.

For example, such powers could be used, to give effect to regional work plans that have been endorsed by the Federal Court at a regional directions hearing or case management conference. The general

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[43] NTA s. 87A(5).

[44] NTA s. 64(1B), (1C).

[45] NTA ss. 190(3)(a), 190A(1A).

[46] G Hiley and K Levy, above n 4, paras 4.33, 4.34.

[47] NTA ss. 136B(1A), 136CA.

[48] *Native Title Amendment Bill 2006,* Explanatory Memorandum para 2.102.

[49] NTA s. 136G(3B).

[50] NTA s. 86D(3).

timetable having been set by the Court, the Tribunal could ensure that the timetable is met by directing that specified parties attend mediation conferences or produce specified documents. That would build on a coordinated approach between the Court, the Tribunal and the parties.[51]

(f) Conduct of the parties

Parties and agreed outcomes: The native title scheme expressly favours resolution of claims by agreement. But the NTA and the structures created by it cannot compel agreement.[52] It is the parties who will determine whether, what and when any outcomes are agreed in relation to native title claimant applications. What they are willing to put on the table in their negotiations, as well as how they behave towards each other, are critical to the outcomes.

Good faith requirement: One of the reforms that has attracted considerable interest and comment is the requirement to act in "good faith" in mediation. The scheme is, in essence, as follows:

- Each party and each party's representative "must act in good faith" in relation to the conduct of the mediation.
- If the presiding member of the Tribunal considers that a party or a party's representative "did not act or is not acting in good faith" in relation to the conduct of a mediation, the presiding member may report that failure to the person or body specified, or to the Federal Court.
- The protection of "without prejudice privilege" provided in relation to words spoken or acts done at a mediation conference does not apply to those reports to the Federal Court or a legal professional body.
- If the presiding member considers that a Commonwealth, State or Territory government party or that party's representative "did not act or is not acting in good faith" in relation to the conduct of a mediation, the annual report of the Tribunal may include details of that failure and "the reasons why the presiding member considers that the conduct was not in good faith".[53]

The obligation to act in good faith will provide an incentive to improve behaviour and to focus the attention of the parties and their representatives on the seriousness of the mediation process and the need to approach mediation in a professional manner and with a spirit of good will.

Current good faith requirement in the NTA: The inclusion of a good faith requirement in relation to native title proceedings is not new. The NTA already requires, in the context of the right to negotiate regime, all negotiation parties to negotiate in good faith.[54] The Tribunal is regularly required to rule on whether parties have negotiated in good faith in order to ascertain if the Tribunal has jurisdiction to arbitrate in relation to the dispute.[55] The content of the obligation to negotiate in good faith in that context has been the subject of numerous Federal Court decisions and Tribunal determinations.[56] As

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[51] See *Franks v Western Australia* [2006] FCA 1811.

[52] As Justice French noted recently: "Mediation is necessarily consensual. No party can be directed to reach agreement about a pending application or any part of it." *Franks v Western Australia* [2006] FCA 1811 at [37].

[53] NTA ss. 136B(4), 136GA(1)-(3), (7), (8), 136GA(4), (7), (8), 136A(4), 136GA(3), (4), 136GB, 133(2A).

[54] NTA s. 31.

[55] NTA s. 36(2).

[56] The most significant Federal Court decisions are: *Risk v Williamson* (1998) 87 FCR 202, *Strickland v Minister for Lands (WA)* (1998) 85 FCR 303, *Walley v Western Australia* (1999) 87 FCR 565 and *Brownley v Western Australia (No 1)* (1999) 95 FCR 152.

early as 1996 the Tribunal outlined indicia for guidance in determining if a party was negotiating in good faith.[57]

The indicia of good faith for the mediation of claimant applications have yet to be developed. Some of those indicia may be different from the indicia in relation to shorter, more targeted commercial negotiations with respect to high impact exploration or the right to mine. Nonetheless, the concept of acting in good faith has been embedded in the NTA since its commencement, and the requirement to act in good faith in claim mediation is the extension of a well settled and accepted concept in the right to negotiate scheme.

Requirement to mediate in good faith in other Australian legislation: The requirement to negotiate or mediate in good faith has increasingly been inserted in legislation at both a Commonwealth and State level. For example the *Administrative Appeals Tribunal Act 1975* requires that when a matter is referred for alternative dispute resolution “each party must act in good faith in relation to the conduct of the alternative dispute resolution concerned”.[58] In almost every Australian state there were provisions in industrial relations and other legislation requiring negotiations to be done in good faith.

Content of the obligation: The NTA does not define what constitutes “good faith”. Acting on a recommendation of the claims resolution review, the Attorney-General’s Department is currently working on a proposed code of conduct. A draft document will be sent to the States and Territories, the representative bodies, industry bodies, the Federal Court, the Tribunal and the Aboriginal and Torres Strait Islander Social Justice Commissioner for comments. The Tribunal is cooperating with the Department in the preparation of such a code. The Tribunal considers that if there is to be an obligation to act in good faith, the parties and their representatives should be provided with guidance on what is expected of them.

In addition to any code that may be developed, the President of the Tribunal is preparing a direction pursuant to s.123 of the NTA that will give guidance to Tribunal members on the procedures to be followed when deciding whether a party or their representative has not acted or is not acting in good faith, or whether to make a report on an alleged breach of good faith. The Tribunal will adopt transparent practices aimed at ensuring a consistency of approach amongst members and in a manner that will ensure that all parties and their representatives are accorded procedural fairness.

Some general observations can be made at this stage. It is not a failure to act in good faith if there is a legitimate basis for a party behaving in a particular manner. For example, a party may refuse to mediate on the basis that there are points of law requiring clarification before substantive mediation can proceed or because the native title application is fundamentally flawed. However, the party refusing to mediate should explain their position to the presiding member.

Any lawyer appearing at a mediation conference should be able to clearly and properly articulate the party’s position in relation to the issues to be discussed at the conference. If they cannot do so, they should say so and explain why they have not obtained or have been unable to obtain instruction.

The insertion of an obligation to act in good faith is not a “silver bullet” that will immediately turn around all mediations. The obligation should bolster the chance of a successful mediation. Accordingly, the reporting of a breach of this obligation is a serious step to be taken only when necessary to preserve the integrity of the mediation process.

(g) Lack of a regional perspective to planning and prioritising the resolution of claimant applications

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[57] *Western Australia v Taylor* (1996) 134 FLR 211, at 225.

[58] *Administrative Appeals Tribunal Act 1975* ss. 34A(5), 34B(4).

Experience has shown that the most effective and efficient way of managing hundreds of native title applications through the native title system is to adopt a state-wide or regional approach. Although each native title application is unique, there are many common factors affecting the potential resolution of each claim in a state or region. For example, each native title representative body has numerous claims in its area, each State or Territory is a respondent to every claim in its jurisdiction, many claims overlap one or more other claims, and some parties or their representatives are involved in numerous claims. The Federal Court and the Tribunal recognise that limits on financial and human resources and a range of other factors affect the progress of individual claims or clusters of claims.

The Federal Court[59] and the Tribunal are moving toward a more regional approach to claim management. The Tribunal is assessing every claimant application as part of its new National Case Flow Management Scheme. Each claimant application will be allocated (or reallocated) to the Registrar's List, Regional List or Substantive List. The process will ensure that the Tribunal operates from a regional basis in adopting a nationally consistent approach to case flow management and the allocation of its resources.

The amended NTA empowers the Tribunal to provide the Court with:

- a report on the progress of all mediations conducted by the Tribunal in relation to areas within a State, Territory or region (a "regional mediation progress report"), and
- a work plan setting out priority given to each mediation being conducted by the Tribunal in relation to areas within the State, Territory or region (a "regional work plan").[60]

Such reports are provided to assist the Court in progressing proceedings in a State, Territory or other regions of Australia and may be provided on the initiative of the Tribunal or at the request of the Court.[61]

The preparation and presentation of such plans and reports have the potential to substantially improve how claimant applications are prioritised and progressed in regions. The amendments to the NTA formalise a useful practice that has developed in parts of the country in recent years. They confirm the role of the Tribunal in working with native title representative bodies and parties in a region to prioritise work on claims and optimise the allocation of scarce resources. Such planning takes the focus off the progress of individual claims and onto the relationship between claims in a region, allowing longer term prioritisation and planning to be more transparent for all the participants. It may be appropriate to involve the relevant funding agencies in such planning to secure programs that can be delivered. The support of the Court will be necessary for this regional process to succeed.

(h) Communication between the Tribunal and the Federal Court

The consultants made various recommendations about improving communication between the Tribunal and the Federal Court. Such communication, by formal and informal means, can improve coordination between the institutions.[62] The Attorney-General has also stressed the need for better communication between the Tribunal and the Court. Various amendments are aimed at formalising and facilitating such communication.

Tribunal's right of appearance before the Court: The Tribunal has been given the right to appear before the Court at a hearing in relation to a matter while that matter is with the Tribunal for mediation

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[59] See the *Notice to Practitioners: Conduct of native title proceedings in the Federal Court of Australia*, 13 June 2007

[60] NTA s. 136G(3A).

[61] NTA ss. 136G(3A), 86E(2), 136G(2A).

[62] G Hiley and K Levy, n 4, paras 4.43-4.56, Recommendations 5-8.

for the purpose of assisting the Court in relation to a proceeding.[63] The Tribunal may also appear at a hearing to determine whether the Court should refer a matter to it for mediation.[64] The President of the Tribunal has the power to direct who will appear before the Court to represent the Tribunal.[65]

The right to appear is not subject to the leave of the Court. In some circumstances the person who appears on behalf of the Tribunal will be subject to the agreement of relevant parties.[66] A person appearing before the Court on behalf of the Tribunal is subject to the "without prejudice" privilege in relation to what is said or done at a mediation conference or in the course of a review.[67]

Tribunal's reports to the Court: The types of reports that the Tribunal may (or must, as the case may be) make to the Court has been expanded. In addition to mediation progress reports in relation to individual claimant applications,[68] the following reports may be made:

- regional mediation progress reports,
- regional work plans,
- reports concerning a failure to comply with a direction of the presiding member, and
- reports on the failure to act in good faith in relation to a mediation.[69]

The Court is required to take the reports or work plans into account in determining whether mediation should cease.[70] More significantly, the Court is required to take into account any Tribunal reports made under the relevant section of the NTA when it decides whether to make an order relating to an application that has been referred to the Tribunal for mediation.[71]

Other communication: The consultants recommended that other means of communication be used to improve coordination between the Court and the Tribunal. These could include individual user group meetings and regional call-overs involving the Tribunal, as well as informal meetings between the Chief Justice, provisional docket judges and the President and members of the Tribunal. Various options for improved communication are currently being discussed by representatives of the two institutions, including jointly convened user group meetings.

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[63] NTA s. 86BA(2).

[64] NTA s. 86BA(1).

[65] NTA s. 123(1)(ca).

[66] NTA s. 136GC(8) and (12) (a member who has conducted a review or assisted in the conduct of a review of whether a native title claim group holds native title rights and interests), s.138C(2) (a member who has conducted or assisted at a native title application inquiry).

[67] NTA ss. 136A(4), 136GC(7), 86BA(3).

[68] NTA ss. 86E(1), 136G(1), (2), (3).

[69] NTA ss. 86E(2)(a), 136G(2A), 136G(3A)(a), 86E(2)(b), 136G(2A), 136G(3A)(b), 136G(3B), 136GA(4).

[70] NTA s. 86C(5).

[71] NTA s. 94B.

CONCLUSION

In assessing the amendments to the NTA and associated reforms, it would be unwise to focus unduly on the new powers and functions to be conferred on the Tribunal. Rather, the focus should be on how the parties can work together to secure just and enduring outcomes in a timely way. The native title scheme needed improvement, and *all* system participants should address the way they operate so that more efficient and effective outcomes are achieved. The amendments, together with associated administrative changes, comprise a significant step in ensuring that the substantial public monies invested in the native title system achieve reasonable outcomes within reasonable time frames.[72]

[72] Over the past nine financial years (1997-98 to 2005-06), the Commonwealth allocated over $900 million to native title: G Hiley and K Levy, above n 4.

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