

GOVERNMENT RESPONSE TO THE REPORT OF THE NATIVE TITLE CLAIMS RESOLUTION REVIEW

The Native Title Claims Resolution Review was conducted by two independent consultants, Mr Graham Hiley QC and Dr Ken Levy. The Review considered how native title claims could be more efficiently and effectively resolved, primarily through mediation and agreement-making, and examined the role of the Federal Court and National Native Title Tribunal (NNTT) in resolving claims. The Review advised the Australian Government on measures for more efficient management of native title claims within the existing framework of the *Native Title Act 1993* (the NTA).

The consultants provided their report to the Attorney-General on 31 March 2006. The Government has considered the recommendations made in the report and makes the following response. The Government has taken into account advice from the Federal Court and the NNTT in relation to the recommendations.

It will be necessary to make specific amendments to the NTA to give effect to a number of the recommendations. The Government anticipates introducing proposed amendments as part of a larger Bill, towards the end of this year, to give effect to the various elements of the current native title reforms.

Options for institutional reform

The report outlines a number of potential options for institutional reform in Chapter 5. These options are listed below.

Option 1 – Provide the NNTT with an exclusive mediation jurisdiction for a period of three years.

Option 2 – Provide the NNTT with an exclusive mediation role with no time limitation on Federal Court intervention.

Option 3 – Provide the Federal Court with greater flexibility in relation to alternative dispute resolution.

Option 4 – Introduce a modified pre-1998 model for resolving native title claims.

Option 5 – Create a new native title court.

While both consultants concluded there was a need for some institutional reform, the consultants reached different conclusions on the best option for institutional reform.

Mr Hiley recommended that the Court be given greater flexibility in relation to the management of native title claims, including giving the Court the ability to decide when it is appropriate to refer a matter or issue to NNTT mediation (Option 3).

Dr Levy recommended that the current provisions in the NTA requiring the Court to refer matters to NNTT mediation be retained but that the Court be prohibited from conducting mediation while the matter remains with the NNTT (Option 2).

Response: The Government accepts Option 2. After consideration of the options for institutional reform, the Government has concluded Option 2 will best address the structural inefficiencies that exist in the native title system. This option will retain the existing requirement for the Federal Court to refer claims to the NNTT for mediation, but will make it clear the Court cannot conduct its own mediation into an issue which is also being mediated by the NNTT. Option 2 will prevent the duplication of functions that presently occurs whereby the NNTT and Federal Court can both mediate matters at the same time.

Subsidiary option

Chapter 5 of the report also considers the subsidiary option of creating a separate native title panel or division within the Federal Court. Dr Levy supported the creation of a native title division, through amendments to the NTA. Mr Hiley supported the creation of a native title panel.

Response: The Government notes the views of the consultants. It does not consider it appropriate to enact legislation to create a native title division within the Court, and recognises any decision to create a native title panel would be a matter for the Chief Justice.

Recommendations in Chapter 4

Recommendation 1: That the NTA be amended to provide that, consistent with paragraphs 4.31 and 4.32, mediation should not be carried out by more than one body at the one time.

Response: This recommendation is accepted. Given the Government's acceptance of Option 2, the Government considers that while a claim is in mediation before the NNTT, the Court should be precluded from mediating any aspect of the claim.

Recommendation 2: That the NNTT be given the following powers in relation to a matter referred to it by the Federal Court for mediation:

- to direct a party to attend or participate in a mediation conference
- to direct a party to produce documents for the purpose of mediation within a nominated period or by a nominated date
- to conduct a review of material provided by the applicant (or any other party) to establish whether the native title claim group has, by its traditional laws and customs, connection to the land or waters claimed
- to assess whether the material would support a determination of native title, and
- to provide that assessment to a party or parties to the proceeding (subject to an order under section 136F of the NTA).

Response: This recommendation is accepted. In relation to the proposal that the NNTT be given powers to conduct a review and assessment of material, the Government considers such a review should be conducted by a Member of the NNTT who is not the Member responsible for mediating the matter.

Recommendation 3: That the NNTT be given a new inquiry function enabling the NNTT to collect evidence and make non-binding recommendations about overlapping claims and other inter-Indigenous and intra-Indigenous issues and about the kinds of matters covered by section 225.

After an application has been referred to the NNTT under section 86B of the NTA, the President of the NNTT should be empowered to, of his/her own motion or at the request of a party to the proceeding, direct that the Tribunal conduct an inquiry in relation to an issue that, if resolved, is likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application.

The President should be empowered to so direct where he/she is satisfied that:

- the applicant and other relevant parties would participate in the inquiry
- the issue is sufficiently important to justify an inquiry, and
- the results of the inquiry are likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application.

Before directing an inquiry (having regard to the fact that each application is a proceeding before the Federal Court), the President should be required to first consult with:

- the Chief Justice of the Federal Court
- the relevant NTRB (or body performing NTRB functions) for the relevant area
- the Commonwealth Minister
- the relevant State or Territory government, and
- the applicant of any affected native title application.

Such inquiries may be directed and conducted in relation to two or more applications where the same issue arises in relation to those applications.

Response: This recommendation is accepted. The Government also proposes legislative amendments to require the Court to consider the findings of such an inquiry where the inquiry addresses matters relevant to a particular claim. The Court would maintain the discretion to determine what evidentiary weight should be accorded to the findings of an inquiry.

Recommendation 4: That consideration be given to formulating a good faith obligation to be included in the NTA and developing a code of conduct for parties involved in native title mediations.

Response: This recommendation is accepted. The Government is giving further consideration to possible sanctions for breach of a good faith obligation by legal practitioners.

Recommendation 5: That the Court should convene regular user group meetings and regional call overs involving the NNTT. The NNTT and the Court should actively seek new methods of improving institutional communication.

Response: This recommendation is accepted.

Recommendation 6: The NTA should be amended to give the NNTT a right to appear before the Court and to provide assistance to the Court.

Response: This recommendation is accepted. The Government notes that the NNTT can currently appear before the Court in native title matters at the discretion of the Court but agrees it would be preferable to include the right to appear in the Native Title Act to ensure a consistent approach is taken in all native title matters.

Recommendation 7: The NTA should be amended to require the Federal Court to take into account any report provided by the NNTT under section 136G of the NTA when considering whether to make an order in relation to an application that has been referred to the NNTT for mediation.

Response: This recommendation is accepted.

Recommendation 8: That the NNTT's reporting functions be expanded to enable the Court to obtain relevant feedback on a regional basis.

- (i) The Court be empowered to request the NNTT to prepare a regional mediation progress report and/or a regional work plan in respect of a State, Territory or region. When so requested the NNTT must prepare such a report.
- (ii) The NNTT may prepare a regional mediation progress report and/or a regional work plan in respect of a State, Territory or region to assist the Court in progressing the proceedings in the State, Territory or region.

Response: This recommendation is accepted.

Recommendation 9: That further consideration be given to how claims can be better particularised at an earlier stage of proceedings in order to assist in the identification of relevant issues. This may require applicants to file evidentiary material earlier, preferably at the time of lodging the application (or within a stipulated time thereafter, for example, where the application is made in response to a future act notice). The Court should consider making orders for pleadings or other kinds of particularisation. Consideration should also be given to amending the requirements of sections 61A and 62 regarding the Form 1.

Response: The Government agrees to give further consideration to these issues.

Recommendation 10: More use should be made of the NNTT’s research facilities and, in particular, its ability to produce research reports. In cases where the NNTT is requested to prepare a research report by the member conducting a mediation, the contents of the report should be disclosed to any party who makes a request. These reports should be supplied following the exercise of a discretion of the presiding member and taking account of any special circumstances.

Response: This recommendation is accepted. The Government understands that NNTT research reports are normally made available to parties on request but agrees this practice should be promoted and adopted on a consistent basis.

Recommendation 11: That further consideration be given to assisting the NNTT to continue to develop a database of current tenure material. This database should be publicly accessible to parties and their legal representatives.

Response: The Government notes there are significant technical and legal issues associated with the proposal for a database of current tenure material. The Government is seeking further advice from the NNTT on this recommendation.

Recommendation 12: That amendments be made to avoid the requirement for all amended applications to undergo the registration test again if the application has already passed the registration test. In particular, we recommend the following.

- (i) An amended application should not to be subject to the registration test, unless the Court orders otherwise, where a claimant application is amended to:
 - reduce the area of land or waters covered by the application
 - reduce the list of asserted native title rights and interests, or
 - remove the name of a deceased applicant where other applicants remain.
- (ii) Where a claimant application is amended to replace a deceased person as applicant, the amended application is not to be subject to the registration test if the Native Title Registrar is satisfied that:
 - the amendment has been certified by the relevant representative body, or
 - the amended application was accompanied by an affidavit sworn by the new applicant stating that the new applicant is authorised by the other persons in the native title claim group to deal with matters arising in relation to the application and stating the basis on which the new applicant is so authorised (see subsections 64(5) and 190C(4)).
- (iii) Where an amendment is made which is not to be subject of the registration test, the Native Title Registrar must amend the Register to reflect that amendment as soon as possible.

Response: This recommendation is being further considered in the context of the Government’s proposals for technical amendments to the NTA.

Recommendation 13: That amendments be made to the authorisation provisions in the NTA to remove ambiguities. For example, it seems appropriate to clarify whether:

- lack of authorisation is fatal to a claim
- authorisation that might have been defective can be later ratified or otherwise cured, and
- the registered native title claimants must be unanimous in giving instructions, executing agreements and otherwise, or whether a majority is sufficient, or whether some other rules should apply, for example, rules similar to those in sections 251A and 251B.

Response: This recommendation is being further considered in the context of the Government's proposals for technical amendments to the NTA.

Recommendation 14: That the notification requirements in subsection 66(3) of the NTA be amended to provide the Court with greater flexibility in relation to who should be notified and as to when people are to be notified. In particular, we make the following recommendations.

- (i) Section 66 should be amended to allow the Court to order notification of potentially affected interested holders at any time which it considers appropriate.
- (ii) The President of the NNTT should be empowered to direct the Registrar not to notify an application under subsection 66(3) of the NTA where:
 - a claimant application is lodged in response to a notice under section 29 of the NTA and is registration tested within four months of the notification day (see paragraph 30(1)(a) and subsection 190A(2)), and
 - it is apparent that the application is primarily for the purpose of securing the right to negotiate.

If subsequently the President is satisfied that the application should be notified, the President should be required to direct the Registrar to notify the application under subsection 66(3).

Response: This recommendation is being further considered in the context of the Government's proposals for technical amendments to the NTA.

Recommendation 15: The NTA should be amended to require the Court to order that a claimant application be dismissed where:

- the application was made in response to a notice under section 29 of the NTA
- the future act has occurred, and
- the applicant has not produced connection material or sought to advance the substantive resolution of the application.

The Court should not be required to order a claimant application to be dismissed if there are compelling reasons not to do so.

Response: This recommendation is accepted.

Recommendation 16: The NTA should be amended to deal with the following claims as follows.

(i) Dealing with unregistered claimant applications: Where a new claimant application does not satisfy all of the conditions of the relevant part of the registration test in section 190B of the NTA (conditions about the merits of the claim), the Federal Court must order that the claim be dismissed unless the Court is satisfied that:

- the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period
- there are good prospects of a negotiated outcome, or
- there are other reasons why the application should not be dismissed.

In deciding whether an application should not be dismissed, the Court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material.

(ii) One year after the proposed amendments to the NTA commence to operate, the Native Title Registrar must apply the registration test to:

- all claimant applications that are not on the Register of Native Title Claims, and
- claimant applications that did not have to undergo the registration test.

The registration test should be re-applied (or applied as the case may be) to determine whether each application would satisfy all of the conditions of the relevant part of the registration test in section 190B of the NTA (conditions about the merits of the claim). If an application would not satisfy all those conditions, the Native Title Registrar must inform the applicant of the reasons why the application would not satisfy the conditions and invite the applicant to amend the application or provide additional information within a nominated period.

If the application is not amended or the additional information is not provided, the Native Title Registrar must report to the Federal Court about the current status of the application and the reasons why it is not registered. Where the Court receives such a report from the Native Title Registrar, the Court must order that the claim be dismissed unless the Court is satisfied that:

- the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period
- there are good prospects of a negotiated outcome, or
- there are other reasons why the application should not be dismissed.

In deciding whether an application should not be dismissed, the Court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material.

Response: This recommendation is accepted.

Recommendation 17: That the NNTT and parties be encouraged to make greater use of the provisions in the NTA and of the Federal Court Rules such as Order 29 rule 2 to refer particular issues of fact and law to the Court for determination.

Response: This recommendation is accepted.

Recommendation 18: The NNTT should refer to the Federal Court for determination the question of whether a party should be removed if it considers that a party does not have a relevant interest. Such referral should be dealt with by a Court registrar under judge-delegated powers.

Response: This recommendation is accepted.

Recommendation 19: That consideration be given to amending the ‘party’ provisions of the NTA (section 84) to allow an industry body to intervene in a representative capacity if one or more of its members is or was otherwise entitled to be a party and wishes the industry body to represent him, her or them. This should be subject to the Court’s discretion to refuse permission to intervene as appropriate, to allow intervention on terms, and to later remove the industry body if relevant circumstances change.

Response: This recommendation is accepted.

Recommendation 20: That consideration be given to limiting the right of participation of a third party (that is, a non-government respondent party) to issues that are relevant to its interests and the way in which they may be affected by the determination sought.

Response: This recommendation is accepted.

Recommendation 21: That the Court and other relevant participants be encouraged to give greater priority to the holding of limited evidence and preservation hearings, coupled with contemporaneous dispute resolution.

Response: This recommendation is accepted to the extent that it is consistent with the Government response to Recommendation 1. While limited evidence and preservation hearings can be conducted by the Court while a matter is in mediation before the NNTT, the Court should not engage in mediation in relation to the preservation hearing while the claim remains before the NNTT. The Court should also consult with the NNTT on the timing of such hearings, to avoid disruption to the NNTT mediation.

Recommendation 22: That section 137 of the NTA not be amended.

Response: This recommendation is accepted.

Recommendation 23: That the NTA be amended to empower the Chief Justice to request that the NNTT hold an inquiry of the kind outlined in Recommendation 3, subject to the President's consideration of the availability of resources and the likely workload of the proposed inquiry.

Response: This recommendation is accepted.

Recommendation 24: That the Court be encouraged to adopt a practice note setting out the Court's preferred method for managing native title claims to ensure all parties have a shared understanding of the process.

Response: This recommendation is accepted.