



Australian
Human Rights
Commission

everyone, everywhere, everyday

Proposed minor native title amendments

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Australian Human Rights Commission

Submission by the Aboriginal and Torres Strait
Islander Social Justice Commissioner in response
to the Attorney-General's discussion paper on
proposed minor native title amendments

19 February 2009 (extension granted)

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Attorney-General's Department, providing comments on the Attorney-General's discussion paper on proposed minor native title amendments (the discussion paper).
2. The Commission welcomes the Government's commitment to improving the native title system and ensuring that it contributes to reconciliation between Indigenous and non-Indigenous Australians and closing the gap. The Commission also welcomes the Attorney-General's commitment to ensuring that the behaviour and attitude of all parties facilitates effective negotiation and agreement making through the systems established under the *Native Title Act 1993* (Cth) (the Native Title Act).
3. The Aboriginal and Torres Strait Islander Social Justice Commissioner has a statutory responsibility under s 209 of the Native Title Act to provide an annual report to the Attorney-General on the operation of the native title system and the impact of the Native Title Act on the exercise and enjoyment of the human rights of Aboriginal people and Torres Strait Islanders. In total, 15 native title reports¹ have now been submitted to Attorneys-General. Each of these reports identify concerns about the operation of the native title system and how it should be changed to improve the realisation of Aboriginal peoples' and Torres Strait Islanders' human rights.²
4. The recommendations that the Commission makes in this submission draw upon the work of these previous native title reports. A collation of recommendations concerning legislative amendment which have been made to the Government in previous native title reports is provided at Attachment 2.
5. This submission is divided into two parts. Part I directly responds to the Attorney-General's discussion paper for proposed minor amendments to the Native Title Act, and any related recommendations relating to the more effective functioning of the native title system. Part II raises a number of other recommendations for amendment to the Act. These recommendations cover a wide range of issues that have been raised in native title reports or have been raised with the Commission by stakeholders and members of the community.
6. Finally, the Commission would like to note that some of the recommendations made in the submission are to amend the Native Title Act to provide for powers or procedures that are potentially already possible under the law, such as under the *Federal Court of Australia Ct 1976* (Cth) or Federal Court Rules. However, the Commission has received anecdotal feedback that a number of these practices and procedures are not applied by the court or the parties in native title proceedings for varying reasons. Because of this, the Commission

¹ At the drafting stage of this submission, the Native Title Report 2008 was being finalised, making it the 15th report.

² See http://www.humanrights.gov.au/social_justice/nt_report/index.html for previous native title reports.

has recommended that some of these mechanisms be included in the Native Title Act, to more clearly draw those mechanisms to the attention of the courts and parties.

2 Overview of Recommendations

The Commission recommends:

Statements of agreed facts and consent determinations

1. That s 87 be amended to provide the court with the power to rely on a statement of facts agreed between the applicant and primary respondent as the evidence for a consent determination, subject to:
 - a. an opportunity for other parties to make opposing submissions
 - b. an opportunity for the applicant and primary respondent to re-submit the agreed statement of facts to address any concerns raised by the court.
2. That ss 87 and 87A be amended to remove the requirement of the court to consider that an order consistent with the agreement would be 'appropriate'. If the Government does not accept this recommendation, the Commission recommends that the requirement for the court's assessment of 'appropriateness' be limited to circumstances where:
 - a. a government is not a party to the agreement, or otherwise
 - b. affected parties have not received (or had an adequate opportunity to receive) legal advice in relation to the agreement.
3. That s 87 be amended to provide that only parties whose interests are substantially affected by the outcome need to be party to an agreement.

Determinations on matters other than native title

4. That the Government engage in further consultation in respect to enabling the court to make determinations under the Native Title Act of matters other than native title.
5. That the Government explore other options for facilitating settlement negotiations with tradition owners aside from just under the Native Title Act.

Evidence

6. That s 82 be amended to revert to its original wording.
7. If recommendation 6 is not accepted, the Commission recommends:
 - a. that the Native Title Act be amended to provide that the recent Evidence Act amendments relating to evidence of Aboriginal and Torres Strait Islander traditional law and custom be given immediate application to all active native title proceedings, subject to the court's

discretion in part-heard cases to direct which evidence rules should apply.

- b. that s 82 be amended to provide guidance as to how the court should accept evidence in a culturally appropriate form, such as by incorporating aspects of Division 6, Order 78 of the Federal Court Rules.
8. That the Government take steps to ensure that the Federal Court has appropriate funding to draft a Federal Court Equal Treatment Benchbook, as well as to ensure that the Court has sufficient funding to enable appropriate consultations to occur in the preparation of the Benchbook.

Native Title Representative Bodies (NTRBs)

9. That the Native Title Act be amended to provide that, in relation to re-recognition of NTRBs:
 - a. unless the Minister considers that the existing NTRB is operating unsatisfactorily according to s 203AI, no application for re-recognition is required
 - b. where the Minister considers that the NTRB is not operating satisfactorily according to s 203AI, the Minister must undertake an open and formal invitation process for other bodies/ new applicants.
10. That the Native Title Act be amended to empower the Minister to extend relevant administrative time limits imposed on NTRBs under the Act.
11. That the Government consult with NTRBs in respect of whether any particular time limits under the Native Title Act are unrealistic and require amendment.
12. That ss 203AC(1) and 203AH(3) not be amended.
13. That the relevant provisions of ss 203AI and 203BA relating to how a representative body should perform its functions and what organisation structures and processes are to be in place should be consolidated in s 203AI.
14. That s 203AI be amended to provide that, in determining whether the body is operating 'fairly', the Minister can have regard to whether the organisational structure and administrative processes are culturally appropriate or have been adapted to be consistent with an aspect of Aboriginal or Torres Strait Islander law or custom.
15. That any inoperative or superfluous provisions in the Native Title Act, such as those applying to transitionally affected areas, should be repealed, as proposed in the discussion paper.
16. That relevant sections in the Native Title Act relating to NTRBs be consolidated, as proposed in the discussion paper. However, the Commission recommends that NTRBs not be relied upon solely by the government in

undertaking notification and consultation in respect of changes to NTRB areas.

17. That the Native Title Act be amended to require the Minister to notify and consult with the public prior to making a decision to extend an area, vary an adjoining area or reduce an area of an NTRB, and to notify the public of his or her decision and the reasons for that decision.
18. That Part 11 of the Native Title Act be amended to clarify which provisions are intended to be legislative instruments, as proposed in the discussion paper.
19. That ss 203A, 203AA and 203AD be amended to increase the minimum recognition period for representative bodies to three years.
20. That the Government establish an independent panel to advise the Minister for on recognition, re-recognition, and withdrawal of recognition of NTRBs, with amendments to the Native Title Act to provide that the Minister must follow the advice of this panel on relevant matters. If this recommendation is not accepted, the Commission recommends that the Native Title Act be amended to provide detailed criteria for the exercise of ministerial discretion in respect of the recognition, re-recognition, and withdrawal of recognition of NTRBs.
21. That the Government take immediate steps to address the under-resourcing of NTRBs and Native Title Service Providers.

Referral to independent referees

22. That the Native Title Act be amended to enable the referral of particular questions of fact to an independent expert referee, subject to the consent of the applicant and primary respondent, with the costs of the expert to be funded by the government under a designated funding stream.

Reducing the number of parties in native title proceedings

23. That s 84 be amended to:
 - a. raise the threshold for parties seeking to be added as a party under ss 84(3)(a)(i), 84(3)(a)(iii) or 84(5), along the lines of 'a person whose interests are likely to be substantially affected to their detriment in the proceedings' or based on existing statutory or common law tests for standing or joinder as a party in civil proceedings
 - b. require parties seeking to be joined to make an application to the court establishing how their interests are affected, with other parties being given an opportunity to object.
24. That the above amendments be given immediate effect for all active native title proceedings. If this recommendation is not accepted, the Commission recommends that s 84 be amended to provide that the 2007 amendments to s 84 be given immediate effect to all active proceedings, or at the very least to all native title proceedings that have not proceeded beyond the hearing of early evidence.

25. That the Government explore other options to provide a reduced form of participation in native title proceedings, such as for respondents who only wish to ensure that their rights and interests are preserved under any final determination.
26. That s 84 be amended to require the court to regularly review the party list for all active native title proceedings and, where appropriate, to require a party to show cause for its continued involvement.
27. That the Native Title Act be amended to confer on the NNTT the function of advising the court in relation to its conduct of regular reviews of the party list referred to in recommendation 26.
28. That the Native Title Act be amended to direct the court to consider appointing a representative party in circumstances where multiple respondents have substantially the same interest in the proceeding, either upon application by a party or on the court's own motion.

Respondent funding scheme

29. That the Government review the operation of the respondent funding scheme established under s 183 to:
 - a. provide for greater transparency and accountability of decision-making
 - b. introduce mechanisms to facilitate the withdrawal of funding in the case of inappropriate conduct by the party upon application by another party or the NNTT
 - c. provide greater clarity as to when a party has failed to act reasonably, such as by requiring parties to abide by the Commonwealth model litigant guidelines.
30. That s 183 be amended to incorporate the eligibility criteria under the relevant Guidelines for the scheme, particularly to clarify that a respondent is not eligible for funding:
 - i. where the party's legal rights in respect of the land uncontroversially extinguishes native title, such as where the party holds an estate in fee simple
 - ii. unless the Minister is reasonably satisfied that the party's interests will not be adequately represented in the proceedings by a government or other respondent party
 - iii. where the party's involvement in the proceeding is not substantial or likely to be substantial.

Long term adjournments

31. That s 86F be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the applicant and the primary

respondent unless the interests of justice otherwise require, having regard to such factors as:

- a. the prospect of a negotiated outcome being reached
- b. the resources of the parties
- c. the interests of the other parties to the proceeding.

Shifting the burden of proof

32. That the Native Title Act be amended to shift the burden of proof to the respondent once the applicant has met the requirements of the registration test, in line with the discussion of this issue in this submission.
33. That the Government explore options to enable NTRBs to certify a particular group as the traditional owners of particular land and waters, which would act as a presumption of this fact in native title claims and for other relevant purposes.
34. That the Native Title Act be amended to empower courts to disregard an interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.
35. That the Native Title Act be amended to define 'traditional' more broadly than the meaning given at common law, such as to encompass laws, customs and practices that have remained identifiable through time, and to clarify that usufructuary rights, such as those recognised under s 211 of the Native Title Act, should be presumed to be traditional.
36. That s 223 be amended to clarify that claimants do not need to establish a physical connection with the relevant land or waters.

Extinguishment

37. That the Native Title Act be amended to specify that at the earliest possible stage in the proceedings that the court considers it appropriate, the relevant government party must undertake tenure searches and provide a report on extinguishment to all parties and the court.
38. That the Native Title Act be amended to limit extinguishment to the current tenure extinguishment and to repeal the provisions that validate past extinguishment where those extinguishing acts no longer continue to have effect. If the Government does accept this recommendation, the Commission recommends that the Government amend the Native Title Act to provide a greater number of circumstances in which historical extinguishment may be disregarded, such as by extending the non-extinguishment principle to cover:
 - a. all Crown land
 - b. other identified classes of land and waters

- c. any other area identified by the relevant government.

Disentangling the right to negotiate from the right to progress the claim

39. That the Government further examine how the procedural rights afforded under the right to negotiate provisions can be separated from the progress of the native title claim, in line with the discussion of this issue in this submission.

Recognition of commercial native title rights

40. That s 223 be amended to:

- a. clarify that native title can include rights and interests of a commercial nature
- b. provide guidance as to the evidential requirements and potential scope of any such commercial rights.

41. That the Government explore options, in consultation with state and territory governments, Indigenous groups and other interested persons, to enable native title holders to exercise native title rights for a commercial purpose.

Amendments to applications

42. That s 66B be amended to clarify that fresh authorisation is only required when a group is proposing that a new person be added to the applicant. If this recommendation is not accepted, the Commission recommends that s 66B should at least be amended to clarify that fresh authorisation is not required where the composition of the applicant group changes solely due to death or incapacitation of an applicant member.

Corporate applicants

43. That the Native Title Act be amended to allow corporations, whose membership consists *only* of the native title claim group, to be an applicant in native title proceedings.

Compulsory acquisition and the right to negotiate

44. That the Government, through the Council of Australian Governments, pursue consistent legislative protection of the rights of Indigenous peoples to give consent and permission to use and to access their lands across all jurisdictions. If this recommendation is not accepted, or otherwise in the meantime, the Commission recommends that s 26 be amended to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city.

Costs

45. That the Native Title Act be amended to include a mechanism by which the court can have regard to settlement offers when making an order for costs.

Education function for the NNTT

46. That s 108 be amended to confer on the NNTT a formal educative function and to specify that this function should be directed primarily towards educating Aboriginal peoples and Torres Strait Islanders. The Commission recommends further that the Government ensure that the NNTT is provided with sufficient additional resources to undertake this education function.

Tabling of Native Title Reports

47. That s 209 be amended to:

- a. require tabling of Native Title Reports by the Minister, along the line of the requirements under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) for the tabling of Social Justice Reports
- b. require the Minister to formally respond to Native Title Reports, along the lines of s 107 of the *Parliament of Queensland Act 2001* (Qld).

Consultation

48. That, in engaging in further consultations with Indigenous peoples in relation to matters affecting land and waters, the Government abide by Australia's relevant international human rights obligations, such as those referred to in this submission.

Part I – Australian Human Rights Commission’s response to the discussion paper

3 Enable the court to rely on a statement of fact agreed between the parties

3.1 *Statements of fact for consent determinations – ss 87 and 87A*

49. Sections 87 and 87A of the Native Title Act provide that the Federal Court may make consent determinations of native title where it is satisfied that to do so is within its power and is appropriate. The Act does not provide any guidance on how the court should satisfy itself of these matters.
50. The discussion paper asks whether the court should be able to rely on an agreed statement of facts from the parties as the evidence for a consent determination. The Commission supports with this proposal, although recommends that the agreed statement of facts should only require agreement from the applicant and primary respondent.³
51. There can be large numbers of respondents to a claim with differing levels of interest in the proceedings. In some claims the number of respondent parties can reach the hundreds, many of whom may not be actively participating in the claim by the time a consent determination is sought. Some may not be interested in the area covered by the consent determination. For these reasons, a requirement that *all* parties must agree to the statement of facts may render the power to rely on an agreed statement of facts of limited value.
52. However, the Commission acknowledges that a native title determination that confirms exclusive possession applies *in rem*, that is, it is good against the whole world. For this reason, the Commission considers it appropriate that there be a mechanism for other parties to respond.⁴ One such mechanism would be for the court to notify all active parties to the claim of its intention to make a consent determination based on an agreed statement of facts and provide the parties with an opportunity to make submissions.
53. The court must still be satisfied that it is ‘within its power’ to make the determination, The Commission recommends that the court should therefore retain the discretion not to accept an agreed statement of facts where the

³ In native title proceedings, there are usually a number of respondents to any claim, however there is usually one ‘main’ or ‘primary’ respondent. This is usually the state, territory or federal government which represents the general public interests. For ease of reference, this party will be referred to as the ‘primary respondent’ for this submission.

⁴ Although the determination applies *in rem*, there is an extensive notification process for the application, and who can seek party status under s 84 of the Native Title Act, is very broad. Consequently, it is sufficient to simply allow active parties to the claim to object to the statement of facts.

statement does not, or cannot, support a determination that is within the power of the court to make.⁵ However, as discussed below in section 3.2, the Commission recommends removal of the requirement that the court must also be satisfied that the consent determination is ‘appropriate’.

54. The Native Title Act should also be amended to clarify that if the court considers that the statement of facts is not consistent with the claimed native title determination, the parties shall be given an opportunity to re-submit the statement to address any concerns raised by the court.

3.2 Further amendment to s 87 – remove ‘appropriate’

55. An additional issue that arises whenever an agreement is presented before the court under ss 87 or 87A is whether the court considers that making the consent determination that the parties have agreed to is ‘appropriate’ (s87(1) and s87A(4)(b)). In the Commission’s view, this additional hurdle is neither necessary nor appropriate.
56. The Native Title Act is intended to recognise and protect existing native title rights and interests in the land. The parties are intended to be primarily undertaking a fact finding exercise to determine whether the applicant’s native title rights and interests exist and how those rights and interests should be legally recognised. The agreement put before the court is the outcome of that lengthy and comprehensive exercise. Unlike the majority of civil proceedings, native title applications are subject to various additional procedural requirements such as registration and notification. It includes a long and detailed agreement making process in which a government is usually a party to represent and protect the broader public interest. The process often requires large amounts of evidence to be prepared and considered. If, after these processes, the parties have reached an agreement, and it is within the court’s power to make an order reflecting the agreement, the Commission considers that it is unnecessary for the court to undertake a further qualitative assessment as to the appropriateness of the determination.
57. In addition, given that the court may be called upon to approve a consent determination at any stage in the proceeding, the court may be poorly placed to assess the appropriateness of the determination without reviewing the relevant evidence. This undermines many of the advantages that the consent determination procedure seeks to achieve in facilitating the early resolution of native title claims.
58. The Commission recommends that ss 87 and 87A be amended to remove the requirement that the court must be satisfied that an order consistent with the agreement is ‘appropriate’. If the Government does not accept this

⁵ See also section 4.2 and 4.3 of this submission which address the issues of the ‘appropriateness’ of the determination, and the requirement for all parties to agree to the determination, s 87 of the Native Title Act.

recommendation, the Commission recommends that the requirement for the court's assessment of 'appropriateness' be limited to circumstances where:

- a. A government is not a party to the agreement, or otherwise
- b. Affected parties have not received (or had an adequate opportunity to receive) legal advice in relation to the agreement.⁶

3.3 Further amendment to s 87 – remove the requirement that all parties agree

59. Section 87 of the Native Title Act requires the agreement of **all** parties to the proceeding for a consent determination to be made, irrespective of whether each party's interests may be affected by the terms of the agreement.⁷ Given the large number of respondents that are often involved in native title claims, this can require a significant investment of time and resources in order to ensure the involvement and agreement of all parties. Some of the parties may only have minor interests in the proceedings, yet through their involvement (or lack thereof) they may be able to hinder or even prevent the approval of a consent determination agreed to by all other respondents, including the primary respondent.
60. In the decision of *Rubibi Community v State of Western Australia (No 7)*⁸, Justice Merkel recommended that s 87 of the Native Title Act be amended to state that the agreement of parties to a mediated outcome only applies to the parties whose interests are affected by the outcome.⁹
61. The Commission agrees with his Honour's views and recommends that s 87 be amended so as to provide that only the parties whose interests are substantially affected by the outcome need to be party to an agreement made under the relevant Part of the Act.
62. One model for formulating such an amendment would be to mirror the requirements for parties who need to be party to an agreement made under s 87A. This would limit the requirement for consent to parties who hold specific interests *at the time the agreement is made*. Similar to s 87A, s 87 could also allow for other parties to be notified and given the opportunity to make submissions to the court objecting to the proposed determination.
63. The Commission notes that taking steps to reduce and more effectively manage the number of parties to native title proceedings is of great

⁶ See also T McAvoy, 'Native Title litigation reform' (2008), Native Title News, LexisNexis Butterworths, Volume 8 Issue 12 December 2008.

⁷ Although recognising that native title will be granted *in rem*, a party's future rights may still be affected by native title, but the Court should be able to presume that the government party will represent the broader public's interest.

⁸ (2006) FCA 459.

⁹ See also s 4.4 (b) of this submission which address the issue of the removal of parties throughout proceedings, s 84 of the Native Title Act.

importance in improving the overall effectiveness and efficiency of the native title system, not only in respect of consent determinations. Accordingly, section 7.2 of this report discusses a number of further recommendations in relation to the management of party numbers.

4 Enable the court to make determinations that cover matters beyond native title

64. The Commission supports the Government's view that native title is an integral part of closing the gap between Indigenous and non-Indigenous Australians, and should form part of the Indigenous Economic Development Strategy. Drawing the connection between native title and various government policies with a view to improving the lives of Indigenous community members is important, particularly given the significance of country for Indigenous peoples.
65. A holistic approach to agreements is also consistent with the reality of native title law today, being one of the few systems in Australian law which Indigenous peoples can use to realise their hopes and aspirations for their country and community.
66. The progress of a claim and the utilisation of the procedural rights under the Native Title Act often provide a productive forum for Indigenous communities to negotiate with governments and other interested groups in respect of a broad range of issues relevant to the well-being and future viability of Indigenous communities. Such outcomes are already being achieved in some cases, but the Commission considers it appropriate to explore other options to encourage and facilitate parties to reach agreements on a broad range of cultural, social, environmental and economic outcomes.
67. There are a number of matters that could be included in such agreements. A range of these have been discussed in previous Native Title Reports which have examined the detail of some best practice agreements and templates. The issues addressed in such agreements vary depending on the parties and cover cultural, social, economic and environmental issues. Some examples are compensation, training and employment targets, land access, site protection, cultural heritage provisions, environmental management roles, payment of a proportion of royalty streams, recognition of traditional ownership, future dispute resolution procedures, reconciliation statements, tenure resolution, business development and capacity building initiatives.¹⁰
68. In addition, various stakeholders have indicated to the Commission that elevating the legal status of the agreement to that of a court order would be welcomed, as it would ensure that the agreement was formally recognised and more readily enforceable. It could also provide a mechanism through which

¹⁰ See for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2006), chapters 4-6, and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007), chapter 11.

the court and governments could formally recognise traditional ownership, even in cases where native title was not determined to exist for one reason or another. It would also encourage parties to negotiate native title claims more laterally, creatively and flexibly, rather than simply on an 'all or nothing' basis in relation to just the determination of native title.

69. Consistent with the above, the Commission is broadly supportive of exploring options that would enable the Federal Court to make determinations under the Native Title Act to cover a range of matters of agreement between the parties in a native title claim aside from just the determination of native title. However, the Commission has a number of concerns as to how this policy might be practically implemented within the existing framework of the Native Title Act.
70. The discussion paper asks whether the Federal Court should be able to make *determinations* that cover matters beyond native title and what matters should form part of a 'broader determination'. The way these questions are posed suggests that s 225, which defines a 'determination of native title' would be amended. At present, a 'determination of native title' is a determination of the extent and existence of which native title rights and interests will be recognised by Australian law. Any amendment to this provision would involve a fundamental shift in the underlying object and philosophy of the Native Title Act as an Act primarily designed to enable the determination, recognition and protection of native title, rather than other matters in dispute or negotiation between the parties.
71. In addition, if the agreement is to form part of a court order, difficult questions arise as to the level of specificity that the order would require. Would the terms of such an agreement be capable of being expressed with the level of specificity required to constitute a court order, particularly given the breadth and complexity of the matters of agreement that could be covered? And what would be the consequences of a breach, particularly for claimants? For example, if the agreement imposes obligations on the native title claimants through the agreement (such as taking certain actions to maintain the environment in the region), and they cannot maintain that responsibility due to lack of resources, what would be the consequence of a breach? If the order is attached to their native title determination, would a breach jeopardise the recognition of their native title rights?
72. Another consideration is that if the agreement forms part of a court order or is annexed to orders then it will be publicly available. There may be parts of the agreement which, according to traditional law, the claimants may not wish to be made available to the broader public.
73. For the above reasons, the Commission recommends that the Government engage in further consultation on this issue.
74. The Commission also considers that negotiation with traditional owners should not be confined to the processes established under the Native Title Act. Whilst negotiations in the context of resolving native title claims often provide an appropriate vehicle or launching pad for other negotiations relevant to the particular group or land and waters, it can also carry disadvantages for the

claimant group. The high evidential burden of establishing native title can place the claimants in a comparatively poor bargaining position, which is often hampered by limited resources and the inevitably long road of pursuing a native title claim. The Commission therefore recommends that the Government also explore other avenues for facilitating settlement negotiations with traditional owners aside from just under the Native Title Act. The Commission would welcome the opportunity to engage further in the development of such options.

5 Evidence

75. The Commission recommends that the *Evidence Act 1995* (Cth) (the Evidence Act) should not apply to native title proceedings. This is outlined below in section 5.1 of this submission. If this recommendation is not accepted, the Commission makes alternative recommendations in sections 5.2, 5.3 and 5.4 below in respect of the recent amendments to the Evidence Act.

5.1 Evidence Act should not apply to native title claims

76. The wide range of factors that inhibit effective cross-cultural communication while taking evidence of native title have been widely reported. In a recent speech, the CEO of a Native Title Service Provider provided a useful summary of some of these factors:

You are all aware of the cultural, linguistic and historical factors that impact upon Indigenous people's interaction with the legal system. Such factors that include:

- Fragmentation of knowledge as to who can speak on certain matters.
- The complex kinship systems that may influence who can speak to whom.
- The protocols around sorry business and the periods for grieving.
- Different decision-making processes.
- English is a second, third or fourth language for many Indigenous peoples and that Aboriginal English has its own syntax which can cause its own cross-cultural communication difficulties.
- For historical reasons, the deep-rooted and perfectly understandable mistrust that Indigenous people have of the legal system and all those within it – sometimes, even their own legal representatives.
- Many Indigenous people are disadvantaged across the full range of social indicators; health, housing, employment, education, etc – this disadvantage impacts upon their ability to understand and engage in the process

There are countless other factors at play that you have all doubtless had some experience with. In my view those same factors are at play in native title

matters but are considerably magnified; after all native title applications are brought on behalf of 'societies'.¹¹

77. Similarly, in *Ward v Western Australia* Justice Lee stated that:

Of particular importance in that regard is the disadvantage faced by Aboriginal people as participants in a trial system structured for, and by, a literate society when they have no written records and depend upon oral histories and accounts, often localised in nature. In such circumstances application of a rule of evidence to exclude such material unless it is evidence of general reputation may work substantial injustice ...¹²

78. When the Native Title Act was enacted in 1993, the original s 82 provided that the rules of evidence did not apply to native title proceedings, as follows:

82(1) The Federal Court must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt.

(2) The Court, in conducting proceedings, must take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.

(3) The Court, in conducting proceedings, is not bound by technicalities, legal forms or rules of evidence.

79. Section 82 of the Native Title Act was then amended as part of the substantial amendments to the Act made in 1998. Section 82 now reads [the amendments are in *italics*]:

82(1) The Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.

(2) In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings.

(3) The Court or a Judge must exercise the discretion under section 47B of the Federal Court of Australia Act 1976 to allow a person to appear before the Court or Judge, or make a submission to the Court or Judge, by way of video link, audio link or other appropriate means if the Court or the Judge is satisfied that:

(a) the conditions set out in section 47C in relation to the video link, audio link or other appropriate means are met; and

(b) it is not contrary to the interests of justice to do so.

80. Consequently, the Native Title Act now starts from the premise that in native title proceedings, the rules of evidence will apply.

¹¹ K Smith, *Proving native title; discharging a crushing burden of proof*, (Speech delivered at the Judicial Conference of Australia National Colloquium, Gold Coast, 10 October 2008).

¹² *Ward v Western Australia* (1998) 159 ALR 483.

81. Previous native title reports¹³ have outlined the significant evidentiary difficulties faced by Indigenous peoples seeking to establish the elements of the definition of native title in s 223 of the Act. The standard and burden of proof, and the operation of s 82 in its current form place particular burdens on Indigenous people seeking to gain recognition and protection of their native title, particularly in light of the common barriers to the receipt of Aboriginal and Torres Strait Islander testimony and evidence discussed above.
82. Although s 82 gives the court the power to order that the parties are not bound by the rules of evidence, it is rarely used by the courts. When it is used, the Commission is informed that the rules are not being applied consistently. Neither the 1998 amending legislation nor the accompanying secondary materials such as the Explanatory Memorandum and second reading speech provide guidance on what factors may justify an order setting aside the rules of evidence. As a result, the scope and application of the s 82 discretion is far from clear. The section was described by the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation as ‘an enigma with no judicial determination of what this entails’.ⁱ
83. In light of widely acknowledged difficulties in relation to the receipt of Aboriginal and Torres Strait Islander evidence in court, and the acute impact of these difficulties in native title proceedings, the Commission recommends that s 82 should revert to its original wording, to provide the court with greater flexibility in admitting and assessing native title evidence.
84. The Commission acknowledges that recent amendments to the Evidence Act now provide exceptions to the hearsay and opinion evidence rules and allow for evidence in narrative form. These amendments are discussed further in section 5.3 of this submission below. Suffice to note here, however, that the Commission does not consider that these amendments will provide a complete solution to the problems of Indigenous evidence. This is particularly so for elements of native title which do not go to proving the content of traditional law and custom, such as evidence of genealogy, which under the recent amendments to the Evidence Act will still be subject to the hearsay and opinion evidence rules.

5.2 Oral versus written evidence – the court’s focus on reliability of evidence

85. It is widely accepted and understood that Aboriginal and Torres Strait Islander societies have an oral tradition of knowledge. This includes oral intergenerational transfer of knowledge and oral transfer of rules around the responsibility, protection and maintenance of knowledge. However, native title

¹³ see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, Human Rights and Equal Opportunity Commission (2002), Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission (2005) and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007).

jurisprudence has demonstrated a strong preference for written evidence over oral evidence in proving the maintenance of society and the content and observance of traditional laws and customs since colonisation.

86. In many native title cases, the court has referred to the role of written European evidence in proving or disproving aspects of traditional laws and customs at the time of sovereignty. For example, in the *Yorta Yorta* case, the High Court observed:

As to the second of the questions identified (requiring identification of the nature and extent of the entitlement which the indigenous inhabitants enjoyed), the primary judge said that "[t]he most credible source of information concerning the traditional laws and customs of the area" was to be found in Curr's writings. He went on to say that:

"The oral testimony of the witnesses from the claimant group is a further source of evidence but being based upon oral traditional passed down through many generations extending over a period in excess of two hundred years, less weight should be accorded to it than to the information recorded by Curr."

In the Full Court¹⁴, Black CJ concluded that this approach made no proper allowance for adaptation and change in traditional law and customs in response to European settlement, and in this Court the claimants submitted that Black CJ was correct in this conclusion. At least to the extent that the primary judge's inquiry was directed to ascertaining what were the traditional laws and customs of the peoples of the area *at the time of European settlement*, the criticism is not open. The assessment of what is the most reliable evidence about *that* subject was quintessentially a matter for the primary judge who heard the evidence that was given, and questions of whether there could be later modification to the laws and customs identified do not intrude upon it. His assessment of some evidence as more useful or more reliable than other evidence is not shown to have been flawed. The conclusion the primary judge reached did not begin from the impermissible premise that written evidence about a subject is inherently better or more reliable than oral testimony on the same subject. The assessment he made of the evidence was one which no doubt took account of the emphasis given and reliance placed by the claimants on the writings of Curr.¹⁵

87. As the judgment in *Yorta Yorta* makes clear, the weight given by the courts to written over oral evidence is ultimately a matter of which evidence the court considers to be more reliable. However, the Commission is concerned about the developing trend in native title claims to give preference to written evidence where it conflicts with the oral evidence of the applicant in respect to the content and observance of traditional laws and customs.
88. The Commission acknowledges that legislative amendment to address this issue is problematic given that assessment of evidence is a matter for the trial

¹⁴ (2001) 110 FCR 244 at 265-266 [69]-[72].

¹⁵ *Members of the Yorta Yorta community v Victoria* (Yorta Yorta) [2002] HCA 58, per Gleeson CJ, Gummow and Hayne JJ, [paras 62-63]. In my Native Title Report 2007, I also summarised the courts comments on written versus oral evidence in the Noongar decision and the Wongatha decision.

judge and will vary greatly from case to case. In Part II of this submission the Commission recommends adjustment to the onus of proof in native title claims. This recommendation would assist in redressing the problems identified above in relation to oral versus written evidence, by shifting the onus of proof to the respondent in relation to disproving relevant elements of native title.

89. The Commission also recommends that the Government take steps to ensure that the Federal Court has appropriate funding to draft a Federal Court Equal Treatment Benchbook to provide greater guidance on assessing the reliability of oral evidence provided by Indigenous people.¹⁶ The Commission emphasises the importance of appropriate consultation with Indigenous groups in the preparation of any such Benchbook. Accordingly, the Government should also ensure that the Court has sufficient funding to enable such consultations to occur in the preparation of the Benchbook.

5.3 Application of the Amended Evidence Act

90. In July 2008, the Commission made a submission to the Senate Legal and Constitutional Affairs Committee in its Inquiry into the Evidence Amendment Bill 2008.¹⁷ In the submission, the Commission supported the proposed amendments to the Evidence Act which now provide exceptions to the hearsay and opinion rule for evidence of Aboriginal and Torres Strait Islander traditional law and custom. The amendments will remove an injustice that Aboriginal peoples and Torres Strait Islanders have long faced in the Australian legal system because of their oral tradition of knowledge.
91. However, the amendments only apply to proceedings that have commenced hearing after 1 January 2009. The amendments state that a hearing is considered to have begun when any evidence has been taken.
92. It is over 15 years since the commencement of the Native Title Act. Since that time, hundreds of claims have been commenced, all of which are at various stages of progression. The early evidence procedure adopted in native title claims also means that many claims would be regarded as having commenced hearing for the purposes of the above amendments, notwithstanding that they are still in their relatively early stages.
93. Limiting the application of the above amendments to proceedings that have commenced hearing after 1 January 2009 will therefore fail to capture a large number of active native title claims.

¹⁶ Most other jurisdictions in Australia have such Benchbooks, except for the Federal Court. For further information see 'Submissions of the Aboriginal and Torres Strait Islander Social Justice Commissioner on Common Difficulties Facing Aboriginal Witnesses' filed in *Giblet & Ors v State of Queensland & Anor* (Federal Court proceedings no QUD300/2005), available at http://www.humanrights.gov.au/legal/submissions_court/amicus/giblet_aboriginalwitnesses20mar07.html.

¹⁷ A copy of the Commission's submission is available at: http://www.humanrights.gov.au/legal/submissions/2008/20080730_evidence.html

94. In previous native title reports, the Aboriginal and Torres Strait Islander Social Justice Commissioner commented that the application of the Evidence Act to Indigenous witnesses in native title proceedings is unjust.¹⁸ In the interests of justice, the Commission considers that the Government should ensure that the best evidence possible in support of a claim is before the court, and consequently, that the amendments apply as broadly as possible.
95. The Commission acknowledges that if the recent amendments to the Evidence Act were to be given immediate effect in all active native title claims, it may create difficulties in those proceedings that are part-heard. However, the Commission notes that the 1998 amendments (which provided that the Evidence Act applies to native title proceedings unless the court ordered otherwise) were given immediate effect, even in respect of native title claims that were part-heard, without regard to what impact this amendment would have on the claimants, the interests of justice, the costs to parties who had already collected evidence, or the tactics and the running of the proceeding.
96. An example of a claim that was impacted by the application of the Evidence rules midway through proceedings is the Yorta Yorta case. The High Court commented that:

When the primary judge was hearing evidence in this matter the *Native Title Act* provided that, in conducting proceedings under the Act, the Federal Court, first¹⁹, was "not bound by technicalities, legal forms or rules of evidence" and, secondly²⁰, "must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt". It may be that, under those provisions, a rather broader base could be built for drawing inferences about past practices than can be built since the 1998 Amendment Act came into operation. By that Act a new s 82 was enacted. Section 82(1) now provides that the Court is bound by the rules of evidence "except to the extent that the Court otherwise orders". (In the present case the parties were invited by the primary judge to make submissions about the effect of this amendment on the evidence that had already been received in the matter but nothing was said then, or in this Court, to turn on that point.)...²¹

97. If the Commission's recommendation that the Evidence Act not apply to native title proceedings is not accepted, the Commission recommends that the Native Title Act should be amended to provide that the recent Evidence Act amendments relating to evidence of Aboriginal and Torres Strait Islander traditional law and custom should be given immediate application to all active native title proceedings.
98. However, the Commission acknowledges that in the case of part-heard matters, it may be contrary to the interests of justice for the evidence rules to

¹⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, p 36 and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, pp 174-178, Australian Human Rights Commission, Sydney. At: http://www.humanrights.gov.au/social_justice/nt_report/index.html.

¹⁹ *Native Title Act 1993* (Cth), s 82(3).

²⁰ *Native Title Act 1993* (Cth), s 82(1).

²¹ *Members of the Yorta Yorta community v Victoria* (Yorta Yorta) [2002] HCA 58, [para 81].

change mid-stream. The Commission therefore considers that the court should retain a discretion to direct which evidence rules should apply, having regard to the interests of justice and any specific cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders. The court should also be given a discretion to permit a party to re-open evidence already adduced in appropriate cases, such as where the party's case was significantly prejudiced by the application of the evidence rules applying at the relevant time.

5.4 Further amendment to existing s 82

99. Subject to the above recommendations in relation to s 82, the Commission considers that s 82 could be amended to provide guidance as to how the court should accept evidence in a culturally appropriate form. For example, s 82 could incorporate aspects of Division 6, Order 78 of the Federal Court Rules.

6 Native Title Representative Bodies (NTRBs)

100. NTRBs are essential to the operation of the native title system. Any changes that would increase their effectiveness in representing their Indigenous constituents would undoubtedly assist the proper working of the Native Title Act.

6.1 Extending recognition of NTRBs

101. The Commission considers that removing the requirement for existing NTRBs to submit applications for re-recognition would be beneficial where the NTRB is performing satisfactorily. There are a number of benefits to this approach, particularly if minimum recognition periods of only one year are maintained.²² These primarily include the cost and resource savings from not requiring an NTRB to submit a detailed application. Instead, the already under-resourced bodies would be able to focus on running the claims.
102. However, where the NTRB has not been performing satisfactorily, the process for applying for re-recognition as an NTRB should be an open tender process and should not be limited to those bodies the Minister invites to apply. Such an approach would ensure that the best possible body for that area can operate as the NTRB.
103. Accordingly, the Commission recommends that Part 11 of the Native Title Act should be amended to provide that, in relation to re-recognition of NTRBs:
- a. Unless the Minister considers that the existing NTRB is operating unsatisfactorily according to s 203AI, no application for re-recognition is required.

²² See recommendations below in section 7.8 in which the Commission recommends a minimum three year recognition period.

- b. Where the Minister considers that the NTRB is not operating satisfactorily according to s 203AI, the Minister must undertake an open and formal invitation process for other bodies/ new applicants. That process should not be limited to bodies / applicants invited by the Minister to apply under s 203A(1).

6.2 Extensions of time for NTRBs

104. Where administrative time limits are imposed on NTRBs under the Native Title Act, the Commission agrees that it is appropriate for the Minister to have the power to extend those time limits in appropriate cases. This would enable the Minister to take into consideration factors that are beyond the NTRB's control, such as the impact of severe under-resourcing. The Commission also recommends that the Government consult with NTRBs in respect of whether any particular time limits are unrealistic and in need of amendment.

6.3 Recognition and withdrawal process

105. The discussion paper is unclear about which provisions result in the Minister appearing to have pre-empted his or her decision, or how prejudicial material would come before the Minister. However, both the recognition and withdrawal process require the Minister to give notice to a body that he or she is considering the application and would either like more information (s203AC(1)) or requests the body to make a submission because withdrawal of recognition is being considered. (s203AH(3)). These processes, although they may be lengthy and resource intensive, ensure that NTRBs have the greatest chance to satisfy the Minister that recognition should not be withdrawn. This helps to ensure continuity of representation and the smooth conduct of proceedings already underway. It is unclear how removing these procedural mechanisms would prevent prejudicial information being before the Minister. In fact, it should increase the amount of information upon which the Minister can make his or her decision.
106. If ss 203AC(1) and s203AH(3) are the provisions to which the discussion paper is referring, then the Commission does not recommend that any amendment be made.

6.4 Sections 203BA and 203AI

107. The Commission agrees that s 203AI unnecessarily replicates the requirements under s 203BA as discussed in the discussion paper. The Commission recommends that the relevant provisions of these two sections relating to how a representative body should perform its functions and what organisation structures and processes are to be in place should be consolidated in s 203AI.
108. However the Commission recommends that s 203AI be amended to ensure that in determining whether the body is operating 'fairly', the Minister can have regard to whether the organisational structure and administrative processes

are culturally appropriate or have been adapted to be consistent with an aspect of Aboriginal or Torres Strait Islander law or custom.

6.5 *Transitionally affected areas*

109. The Commission agrees that any inoperative or superfluous provisions in the Native Title Act such as those applying to transitionally affected areas should be repealed, as proposed in the discussion paper.

6.6 *Changes in representative body areas*

110. The discussion paper suggests changes to the procedures that must be undertaken when the Minister is considering changing the representative body's area. The Commission supports consolidating the relevant sections of the Native Title Act for the sake of clarity and simplicity as proposed in the discussion paper. However, the Commission does not support the proposal to remove the public notification and consultation requirement.
111. Although NTRBs may undertake consultation with relevant parties, there are a number of reasons why this mechanism should not be solely relied upon by the Government. For example, NTRBs may not have the resources or capacity to undertake comprehensive consultation.
112. In 2005, the United Nations Committee on the Elimination of Racial Discrimination concluding observations on Australia stated:
- The Committee recommends that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land.
113. Changing the operation area of an NTRB can have significant consequences for the Indigenous peoples of that region. This in turn impacts on their right to land. As such, they should have the opportunity to learn of any proposed change and make comment. The right to be heard separately from the NTRB's own consultation process is particularly important for Indigenous people who may not agree with (or even be aware of) the NTRB's views on the change.
114. Additionally, NTRBs and members of relevant communities may have conflicting interests in informing the Minister's decision. By relying solely on NTRBs to engage in public consultation in relation to this matter, this risks creating tension within and between affected communities and NTRBs.
115. The Commission recommends that the Native Title Act be amended to require the Minister to notify and consult with the public prior to making a decision to extend an area, vary an adjoining area or reduce an area of an NTRB, and to notify the public of his or her decision and the reasons for that decision.

6.7 Determinations

116. The Commission agrees that it would be beneficial to clarify which provisions in Part 11 are intended to be legislative instruments, and which are not, as proposed in the discussion paper.

6.8 Further amendments to Part 11 – improving the security and independence of NTRBs

117. The *Native Title Report 2007*²³ made recommendations for further amendment to Part 11 of the Native Title Act to improve the security and independence of NTRBs. An overview of those recommendations is provided below.

(a) *Minimum of three year recognition period.*

118. NTRBs are recognised for limited, fixed terms of between one and six years. A minimum period of one year may be granted in certain circumstances.²⁴

119. Short recognition periods have a number of negative impacts on NTRBs, including:
- It increases the workload of representative bodies in applying for re-recognition.
 - It undermines the ability of representative bodies to make medium to long term plans that are essential if representative bodies are to be effective.
 - It creates a perception that representative bodies are insecure, temporary organisations whose existence is dependent upon ministerial discretion and political expediency.
 - It makes it more difficult to attract and retain staff, by rendering NTRBs unable to offer long term job security.

120. The combined effect of the above factors mean that it can be very difficult for NTRBs to build a profile and operate as respected, long-term organisations. A longer minimum period for recognition, of at least three years, would therefore increase the stability and standing of representative bodies.

121. The Commission recommends that the Native Title Act be amended to increase the minimum recognition period for representative bodies to three years. This will require amendment to ss 203A, 203AA and 203AD.

²³ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007) chapter 3.

²⁴ See *Native Title Act 1993* (Cth), ss 203A-203AA and s 203AD.

(b) *Administrative decision to provide recognition*

122. NTRBs rely on government funding, yet must also ensure that they represent Aboriginal peoples and Torres Strait Islanders views and interests in negotiations with government and when undertaking a range of their functions.
123. The Commission highlights the need for representative bodies to maintain an appropriate level of independence from government to ensure the integrity of the native title system.
124. However, the changes made to the Native Title Act in 2007 reduced the autonomy of NTRBs from government interference by widening the discretion of the Minister in deciding whether to recognise an NTRB. Following these changes, when giving recognition to an NTRB, the Minister only needs to be satisfied that the body is, or will be able to, perform the functions of a representative body satisfactorily. In the Commission's view, the breadth of this discretion renders the Minister's decision virtually unreviewable.
125. NTRBs must be free from perceived or actual pressure from government over how they pursue the recognition and protection of native title. There is a need for transparent, objective and predictable decision-making about representative bodies to ensure administrative fairness, and to ensure that representative bodies are not intimidated into not pursuing the interests of their constituents for fear of funding cuts or de-recognition where those interests conflict with those of the Minister.
126. Accordingly, the Commission recommends that the breadth of Ministerial discretion in Part 11 of the Native Title Act should be reduced. There should also be increased transparency and independence of the decision making in respect of recognition, re-recognition and withdrawal of recognition of NTRBs. In particular, the Commission recommends that the Government establish an independent panel to advise the Minister on recognition, re-recognition, and withdrawal of recognition of NTRBs, with amendments to the Native Title Act to provide that the Minister must follow the advice of this panel on relevant matters. If this recommendation is not accepted, the Commission recommends that the Native Title Act be amended to specify detailed criteria for the exercise of ministerial discretion in recognition, re-recognition, and withdrawal of recognition of NTRBs.

(c) *Resourcing of NTRBs*

127. A factor which has significantly impacted on the ability of native title claimants and other parties to negotiate and reach outcomes through the native title system has been the under-resourcing of NTRBs and Native Title Service Providers (NTSPs). Various native title reports make recommendations about resourcing of these bodies.²⁵ The Commission also directs the Committee to the Commission's submission to the Government's discussion paper on native

²⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007) chapter 3.

title payments which discusses this issue further. Suffice to note here that the Commission recommends that the Government take immediate steps to address the under-resourcing of NTRBs and NTSPs.

7 Other changes to improve the conduct of native title litigation

7.1 *Inquisitorial processes, such as use of referees*

128. In various native title reports, the Aboriginal and Torres Strait Islander Social Justice Commissioner has commented on the inappropriate nature of, and the negative consequences that flow from, the adversarial system in which native title is determined. The Commission supports changes that will shift the focus of proceedings to an inquisitorial approach. It has been reported that former Deputy President of the NNTT and NSW Supreme Court judge Hal Wootten has written of the native title process in Australia:

To leave the consequences of these policies to litigation in private actions based on existing rights, in courts designed to settle legal rights by an adversary system within a relatively homogeneous community, is at once an insult to the Indigenous people and a prostitution of the courts.²⁶

129. The new referral powers contained in the Federal Justice System Amendment (Efficiency Measures) Bill (No. 1), which allow the court to refer questions arising from proceedings to a referee for inquiry and report, may go some way to reducing the negative impacts that the adversarial setting has on native title claimants and the outcomes reached.
130. The collection of expert evidence is a time-consuming and expensive aspect of native title litigation. Accordingly, the Commission considers that it is sensible to provide a mechanism by which the court can decide particular questions of fact, such as in respect of genealogy, by referring the question to one independent expert referee, rather than via multiple and conflicting expert reports and testimony put forward by the parties.
131. However, the Commission cautions that such a power should only be used with the agreement of the applicant and the primary respondent. Involvement in such an inquiry process will presumably require considerable time and resource commitments from the parties. In addition, the available pool of appropriate expert referees is small and parties may legitimately hold strong views about the appropriateness of a particular referee, particularly where the relevant question referred is pivotal to the claim.
132. The Commission notes that requiring the consent of parties is consistent with the inquiries function provided for under Division 5 of Part 6 of the Native Title Act. This Division provides for an inquiry to be undertaken by the NNTT at the request of the court (and in other circumstances). However, s 138B(2)(b)

²⁶ Chief Judge Joe Williams, 'Confessions of a Native Judge: reflections on the role of transitional justice in the transformation of Indigeneity', (2008) 3(14) *Land, Rights, Laws: Issues of Native Title* p 8.

provides that the applicant that is affected by the proposed inquiry must agree to participate. This consent is necessary for the efficient progression of the claim and to ensure that resources are not diverted away from the process that is already underway.

133. The Commission therefore recommends that any new power of the Federal Court to refer questions arising in proceedings to a referee for inquiry and report should be limited in native title proceedings to circumstances in which the applicant and the primary respondent agree to the inquiry.
134. Finally, the Commission is concerned that the Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) and the accompanying material do not state who will pay the costs of the independent expert. If the costs are shared between the parties, it could have significant implications for NTRBs and the running of that claim and their other claims. If the court bears the cost, this could create a disincentive for the court to use the power. The Commission considers that the most appropriate party to pay the expert's costs is the Australian Government. Ideally, a separate funding stream would be established by the Government under the Attorney-General's portfolio for this purpose.

7.2 Reducing the number of parties to native title proceedings

135. As discussed in section 4 of this submission, a major hindrance to native title proceedings can simply be the number of parties to the proceeding. Addressing the problems associated with excessive party numbers is therefore critical to improving the efficiency of the native title system. This could be achieved through a number of complementary mechanisms.

(a) Application for party status

136. Section 84 of the Native Title Act identifies who can become a party to a native title claim. In essence, the Act divides potential parties into two groups; those who have a specified interest in the proceeding, and those who fall within broad catch-all provisions.
137. Members of the first group identified above have automatic standing as a party under one of the following provisions :
- Section 84(3)(a)(ii): the person claims to hold native title in the area covered by the application.
 - Section 84(3)(a)(i): the person has an interest specified in s 66(3)(a)(i) – (vi) by virtue of:
 - a. s 66(3)(a)(i): a registered native title claimant in relation to any of the area in the application.
 - b. s 66(3)(a)(ii): a registered native title body corporate in relation to any of the area covered by the application.

- c. s 66(3)(a)(iii): a representative Aboriginal or Torres Strait Islander body for the area covered by the application.
 - d. s 66(3)(a)(v): the Commonwealth Minister.
 - e. s 66(3)(a)(vi): the local government body for the area covered by the application.
138. Members of the second group identified in [136] above have standing as a party under one of the following provisions :
- Section 84(3)(a)(iii): the person's interest, in relation to land or waters, may be affected by a determination in the proceedings.²⁷
 - Section 84(3)(a)(i), by virtue of s 66(3)(a)(iv): any person who, when the notice of the claim is given, holds a proprietary interest, in relation to any of the area covered by the application, that is registered on a public register maintained by government.
 - Section 84(5): the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.²⁸
139. The provisions identified in [138] above provide extremely broad tests for party status. The net result is that in native title proceedings, party numbers can reach the hundreds. In addition, the breadth of these tests means that, exceptional cases aside, there is virtually no prospect of the applicant successfully challenging the addition of a particular respondent. In the Native Title Report 2007, the Aboriginal and Torres Strait Islander Social Justice Commissioner outlined the negative impact on the realisation of Indigenous peoples' native title rights by having excessive numbers of parties involved in the proceedings.²⁹ One of these is that party numbers can hamper the ability of the parties to reach agreements, as well as exponentially increasing the costs and delays of pursuing a claim.
140. The Commission considers that the thresholds for party status identified in [138] are too low and require adjustment.
141. The Commission acknowledges that native title claims have the potential to impact on a wide range of persons, who might understandably seek involvement in the proceeding to ensure that their interests are represented and taken into account. However, the Commission considers that the current balance is poorly struck and has resulted in overwhelming numbers of respondents being added, sometimes with only marginal relevance to the

²⁷ People applying for party status under this provision must state in writing to the court that they wish to be a party within a time frame specified under s 66.

²⁸ People use this provision to become a party where they haven't applied within the time frame required to apply under s 84(3)(a)(iii).

²⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007), chapter 4.

claim. This has unquestionably resulted in excessive delays, costs and frustration of settlement efforts throughout the native title system.

142. The Commission also notes that a government party usually takes the primary role in defending native title claims. In doing so, the government's role is primarily to ensure that a wide diversity of community views and interests are represented, as well as to test the validity of a native title claim by essentially acting as contradictor to the claim.
143. In order to strike a more appropriate balance, the Commission recommends that the sections mentioned in [138] above, that is, ss 84(3)(a)(iii), 84(5), and 66(3)(a)(iv), be amended along the lines of 'a person whose interests are likely to be substantially affected to their detriment by a determination in the proceedings.'
144. Alternatively, the threshold for addition as a party under these provisions could be amended to reflect more traditional tests for standing in civil proceeding, such as the 'special interest' test under general law³⁰ or the 'person aggrieved' test under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).³¹ Another alternative would be to require the party seeking to be joined to satisfy the requirements of Order 6 Rule 8 (Addition of Parties) of the Federal Court Rules. Each of these approaches has the benefit of providing a degree of certainty and predictability by drawing upon a well developed body of law.
145. In addition to adjusting the threshold for inclusion as a party, the Commission considers that the procedure for becoming and remaining a party also requires adjustment.
146. The Commission recommends that the Government amend s 84 so that persons applying for party status under the provisions identified in [138] above must make an application to the court setting out how their interests are likely to be substantially affected if the court were to make the determination sought in the application.³² The applicant and the primary respondent should then have an opportunity to make submissions to the court opposing the addition of the party.
147. The court would of course retain the discretion as to whether to join the person as a party. However, by raising the threshold for addition as a party, as well as requiring the proposed respondent to carry the burden of proof in establishing

³⁰ *Australian Conservation Foundation v Commonwealth* (1978)146 CLR 493. See further *Onus v Alcoa* (1981) 149 CLR 27; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Benefit Fund Pty Ltd* (1998) 194 CLR 247.

³¹ Section 5. See, generally, *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 54 FLR 421; *United States Tobacco Co v Minister for Consumer Affairs* (1988) 83 ALR 79; *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509; *Right To Life Association (NSW) Inc v Secretary, Department of Human Services and Health & Anor* (1995) 56 FCR 50; *Ogle v Strickland* (1987) 13 FCR 306.

³² The Commission acknowledges that persons who become parties under [137] have interests of a nature that they would be substantially affected by a determination if it is made, and consequently they should not be required to make a formal application to the court to be joined as a party.

why they should be added, this would contribute to the more effective management of the number of parties to claims. In particular, applicants and primary respondents would have a firmer basis on which to challenge the addition of parties whose interests appear peripheral or adequately represented by other parties, together with a formal opportunity to make that challenge before the court.

148. Finally, the Commission acknowledges that the 2007 amendments to s 84³³ included some positive elements.³⁴ For example, the amendments provide that a party's interests must be 'in relation to land or waters' and that a court must consider whether it is in the interests of justice to add the party to the proceeding. However, the Commission is concerned that these amendments only apply to applications lodged on or after the date the amendments came into effect in that year. The result is that the amendments do not apply to the 500 or so native title claims that have already been commenced.
149. The Commission has recommended above that the threshold for the addition of parties under s 84 should be amended. The Commission considers that these changes should have immediate effect and apply to all proceedings that have already been commenced. If this recommendation is not accepted, the Commission recommends that the Native Title Act be amended to provide that the 2007 amendments to s 84 apply to all native title proceedings, or at the very least to all native title proceedings that have not proceeded beyond the hearing of early evidence.
150. The Commission further recommends that the Government also explore options to enable a reduced form of participation in native title proceedings for certain respondents. For example, whilst some respondents may wish to participate fully in the proceedings, including through adducing evidence and participating in settlement negotiations, others may seek only to be added as a party to ensure that their rights and interests are preserved under any final determination. For such parties, affording full procedural and other rights in the claim may not be necessary. A tiered system of participation may allow for certain procedural matters, including many of those discussed in this submission, to be dealt with more expeditiously by only requiring the consent of the 'key players' to the proceeding, usually the claimant and the government party.

(b) Removal of parties throughout proceedings

151. When notice of a native title claim is given, any person who, at the time the notice is given, holds a proprietary interest that is registered on a public register in relation to any of the area covered by the application has an automatic entitlement to become a party to the proceeding.³⁵ However, many

³³ The 2007 amendments slightly amended the test for party status by requiring that the interest is in 'relation to land or waters' and other minor changes.

³⁴ See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007* (2008), p 35.

³⁵ See *Native Title Act 1993* (Cth), s 84(3)(a)(i) and *Native Title Act 1993* (Cth), s 66(3)(iv).

people who become parties when the claim is first made may lose their relevant interest as the claim progresses. This might be due to changed circumstances over the intervening years or due to the fact that extinguishment is often not considered until late in the proceeding.

152. Section 84 details a number of ways a party may be removed from the proceeding, such as through leave of the court after the proceeding has begun.³⁶ Section 84(9) also states that the court is to consider making an order that a person cease to be a party if the court is satisfied that the person no longer has interests that may be affected by a determination in the proceeding. However, the Commission has been told by users of the system, that the court's power to remove parties is under-utilised. The Commission considers that if the above recommendation to raise the threshold for a party's addition as a party were to be adopted then this would provide one mechanism through which the court's power to remove parties may be more effectively utilised. This is because it would enable claimants and respondents to more effectively challenge the ongoing involvement of parties whose interests have faded or disappeared during the life of the claim.
153. An additional way to ensure a regular 'clean up' of the party list would be to amend s 84(9) of the Act to require the court to regularly review the party list for all active native title proceedings and, where appropriate, to require a party to show cause for its continued involvement. To assist the court to do so, the National Native Title Tribunal (NNTT) could undertake an advisory role to the court. The NNTT has the expertise and access to the information necessary to undertake such a review and could be required to advise the court on parties that no longer hold the necessary interest to maintain party status.³⁷

(c) *Representative parties*

154. Another mechanism for more effectively managing the number of parties to native title claims is through the use of representative parties.
155. Representative parties are used in Federal Court proceedings in a number of circumstances. Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the Federal Court Act) enables representative complaints to be commenced in the Federal Court by one or more of the persons to the claim as representing some or all of the other persons, if:
- a. seven or more persons have claims against the same person;
 - b. the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

³⁶ *Native Title Act 1993* (Cth), s 84(7).

³⁷ Section 136DA already allows a member of the NNTT to refer to the Federal Court the question of whether the party should cease to be a party. However, the Commission is recommending that the court be required to actively clean up the party list for active native title proceedings at set intervals, with the NNTT providing specific advice on who it considers retains an interest.

- c. the claims of all those persons give rise to a substantial common issue of law or fact.
156. Order 6, Rule 13 of the Federal Court Rules deals with representative respondents. It enables the court, at any stage in proceedings, to appoint any one or more of the respondents to represent others with the same interests.
157. While there is nothing preventing the court using the representative party mechanism provided by Order 6, Rule 13 in native title proceedings, the Commission understands that it is rarely used. The Commission recommends that the Government consider amending the Native Title Act to specifically direct the court to give consideration to appointing a representative party in native title proceedings in respect of multiple respondents with substantially the same interest, either upon application by a party or on the court's own motion.

7.3 Funding of non-claimant parties: s 183

158. Through s 183 of the Native Title Act, respondents may be funded by the Commonwealth under the 'respondent funding scheme' to participate in native title proceedings.³⁸
159. The Commission considers that it is important to ensure that decisions made under this scheme are appropriate and that respondent parties funded under the scheme are not having a negative impact on the overall functioning of the native title scheme. At present, however, there is currently very little transparency as to the implementation and operation of this funding scheme. In particular, there is little information available on which parties are being funded to participate in the proceedings, how the relevant Attorney-General Guidelines³⁹ are being applied and whether the ongoing funding of particular parties is appropriate. For example, in 2006, the Australian National Audit Office observed that:

[The Attorney-General's Department] is unable to evaluate either the effectiveness of the Respondents Scheme at either the individual grant level or the contribution the programme is making to the larger Native Title System outcome.⁴⁰
160. The Commission therefore recommends that the Government consider introducing mechanisms for ensuring that decision-making under s 183 is made more transparent and accountable.
161. The Commission also queries whether there is currently an adequate mechanism by which funding can be withdrawn in respect of respondents that

³⁸ For more information see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007), chapter 4.

³⁹ *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* (2006)

⁴⁰ Australian National Audit Office, *Administration of the Native Title Respondents Scheme*, Audit Report No.1 (2006-2007), p133. At <http://www.anao.gov.au/>, (viewed January 2009).

inappropriately undermine the conduct or resolution of a claim. The Commission notes that the Guidelines allow for the withdrawal of funding in certain circumstances, including where the respondent acts unreasonably.⁴¹ However, the Guidelines do not articulate a mechanism by which other parties or the NNTT can apply to the Attorney-General to have a party's funding withdrawn, such as where the NNTT is of the view that the party has refused to make a bona fide and reasonable endeavour to resolve the dispute.⁴²

162. In addition, the reference in the guidelines to a failure to act reasonably is not defined or clarified. The Commission considers that it might be appropriate for s 183 or the Guidelines to be amended to stipulate that recipients of funding under the scheme must agree to abide by the Commonwealth model litigant guidelines scheduled to the Legal Service Directions and that failure to so comply may result in withdrawal of funding.

163. In relation to eligibility for receiving funding, the Commission notes that s 183(3) of the Native Title Act currently states that the Attorney-General can grant funding if he or she considers that it is 'reasonable'. The Attorney-General's Guidelines give a list of considerations for the Attorney-General in determining reasonableness.⁴³ However this list is merely a guide and is not legally binding on the Minister. The Commission considers that it may be appropriate to incorporate the criteria relating to eligibility for funding within the terms of s 183 itself. In particular, the Commission considers that s 183 should clarify that a respondent party is not be eligible for funding:

- a. where the party's legal rights in respect of the land uncontroversially extinguishes native title, such as where the party holds an estate in fee simple, on the basis that that party's rights are already adequately protected under the terms of the Native Title Act itself
- b. unless the Minister is reasonably satisfied that the party's interests will not be adequately represented in the proceedings by a government or other respondent party
- c. where the party's involvement in the proceeding is not substantial or likely to be substantial, such as where a party intends to assume a limited role in the proceeding contemplated in the Commission's recommendation at [150] above.

7.4 Further amendment to s 86F – long term adjournment

164. In the course of collecting information for the Native Title Report 2008, a number of stakeholders suggested that the Native Title Act should allow the parties (where the applicant and the primary respondent consent) to request a

⁴¹ *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* (2006), Division 7.9.

⁴² See generally *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459.

⁴³ *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* (2006), Part 5.

long term adjournment. This would give the parties the room and time to negotiate ancillary outcomes, without being under pressure from the court to resolve the determination of native title. For example, Victorian Attorney-General Robert Hulls MP commented:

The problem sometimes arises where these broader outcomes are not being realised because of pressure from the Court to resolve the native title question more quickly. This can lead to missed opportunities for traditional owners, or ancillary agreements that are difficult to implement because the policy development behind them was rushed. Preparing for regular court appearances can divert resources from making progress on negotiating broader agreements.⁴⁴

165. Under s 86F of the Native Title Act, the court can order an adjournment to help negotiations. It may do this on its own motion or on application by a party. The court can then end the adjournment on its own motion, on application by a party, or if the NNTT reports that the negotiations are unlikely to succeed.⁴⁵ However, the NNTT has stated in respect of s 86F that the parties 'should not assume that alternative or even related agreement-making will be accepted by the Court as legitimate reason for delaying resolution of the claim'⁴⁶
166. The Commission recommends that s 86F be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the applicant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as:
- a. the prospect of a negotiated outcome being reached
 - b. the resources of the parties
 - c. the interests of the other parties to the proceeding.

Part II – The need for further reform

167. Part I of this submission responds to the issues raised in the discussion paper. However, in releasing that paper, the Attorney-General encouraged organisations to make submissions on further recommendations for reform to the system. This Part will make some such recommendations.
168. The Native Title Act has received a wide array of criticisms and there is certainly considerable room for improvement beyond those matters flagged in the discussion paper. Significantly, the United Nations has expressed a number of concerns with the current system. For example, in 2005 the United

⁴⁴ R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

⁴⁵ *Native Title Act 1993* (Cth), s 86F(3) and 86F(4).

⁴⁶ NNTT *Native title claims: overcoming obstacles to achieve real outcomes*.

Nations Committee on the Elimination of Racial Discrimination, in its concluding observations on Australia, stated:

- a. The Committee notes with concern the persistence of diverging perceptions between governmental authorities and indigenous peoples and others on the compatibility of the 1998 amendments to the Native Title Act with the Convention. The Committee reiterates its view that the *Mabo* case and the 1993 Native Title Act constituted a significant development in the recognition of indigenous peoples' rights, but that the 1998 amendments roll back some of the protections previously offered to indigenous peoples and provide legal certainty for Government and third parties at the expense of indigenous title. The Committee stresses in this regard that the use by the State party of a margin of appreciation in order to strike a balance between existing interests is limited by its obligations under the Convention (art. 5).
- b. The Committee recommends that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.

169. Similarly, in 2000, the Human Rights Committee stated:

The Committee is concerned, despite positive developments towards recognizing the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (*Mabo*, 1992; *Wik*, 1996) and enactment of the Native Title Act of 1993, as well as actual demarcation of considerable areas of land, that in many areas native title rights and interests remain unresolved and that the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands. ...

In particular, the Committee recommends that the necessary steps be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.

170. The Commission makes a number of recommendations for further amendment to the Native Title Act which it considers will go some way to alleviating the above concerns, by further protecting the rights of Aboriginal peoples and Torres Strait Islanders. These recommendations will also contribute to the government's policy of obtaining better outcomes from the native title system. Due to time restraints, the discussions of relevant issues below are not intended to be exhaustive and the Commission would welcome the opportunity to discuss or develop these proposals further.

8 Shifting the burden of proof

171. The Commission has significant concerns that the evidential burden of proving native title is simply too great.

172. In 2005, the United Nations Committee on the Elimination of Racial Discrimination concluding observations on Australia, stated:

The Committee is concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands.

The Committee wishes to receive more information on this issue, including on the number of claims that have been rejected because of the requirement of this high standard of proof. It recommends that the State party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of indigenous peoples to their land.⁴⁷

173. It cannot be disputed that Indigenous peoples lived in Australia prior to colonisation and that the Crown was responsible for the dispossession of Indigenous peoples throughout Australia. It has also been acknowledged by governments over time through various policies, laws and statements of recognition, including the creation of land rights regimes and other mechanisms, that Indigenous peoples are the traditional owners of the land.
174. It is in this context that the Commission argues that it is unjust and inequitable to continue to place the demanding burden of proving all the elements required under the Native Title Act on the claimants.
175. The Commission considers that at least some of the burden of proving native title should be shifted. A shift in the burden would also improve the operation of the system. As the Chief Justice of the High Court of Australia stated:

Despite the significant decisions which have been made in the High Court and in the Federal Court since the NT Act was enacted, the essential nature of the process created by the first rules set out in *Mabo (No 2)* and the burdens and the costs which they impose have not been greatly mitigated over the years. There has been an increasing number of mediated determinations, but they still seem to involve long and costly investigations and negotiations. In the absence of a national land rights statute, the rules for the determination and definition of native title rights set out in the NT Act *cannot seem to shake off the logistical difficulties imposed by the requirement for proof of connection.*⁴⁸

176. Others have argued that the burden should be shifted to those who were responsible for the dispossession. As one academic put it:

⁴⁷ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005). At <http://www.austlii.edu.au/au/journals/AILR/2005/37.html> (viewed January 2009).

⁴⁸ Chief Justice R French, *Rolling a rock uphill? – Native Title and the myth of Sisyphus*, (speech delivered at the Judicial Conference of Australia National Colloquium, 10 October 2008), p16 (our emphasis).

...the question should not be how we can deal with indigenous 'claims' against the state, but rather how can the colonisers legitimately settle and establish *their* own sovereignty.⁴⁹

177. Such an approach is not inconsistent with the Native Title Act. The preamble states that the High Court has held that the common law 'recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands.' A presumption in favour of the existence of native title rights and interests would simply recognise and give respect to this fact.
178. The Commission notes that there are currently a number of laws in which the burden of proof shifts to the respondent in respect of certain elements. This is typically in situations where the respondent is the more appropriate party to prove the relevant issue, such as because the relevant information is in the control or mind of the respondent.
179. For example, in a claim of indirect sex discrimination under the *Sex Discrimination Act 1984* (Cth), once an applicant has established that a particular requirement, condition or practice disadvantages women, the onus then shifts to the respondent to establish that the requirement, condition or practice is reasonable in the circumstances.⁵⁰ Similarly, s 664 of the *Workplace Relations Act 1996* (Cth)⁵¹ provides that in claims alleging termination of employment for a proscribed reason (including sex, marital status, pregnancy, family responsibilities and absences from work during maternity leave or other parental leave⁵²), the onus is on the respondent to establish that the termination was not for a proscribed reason.⁵³
180. If the burden of proof were shifted to the respondents after an applicant had satisfied the registration test, in most cases the government party would

⁴⁹ D Short, 'The social construction of Indigenous 'Native Title' land rights in Australia', (2007), 55(6) *Current Sociology* 857, p 872 (original emphasis). At <http://csi.sagepub.com/cgi/reprint/55/6/857.pdf> (viewed January 2009).

⁵⁰ *Sex Discrimination Act 1984* (Cth), s 7C. See further Australian Human Rights Commission, 'Chapter 4 The Sex Discrimination Act', (2009), *Federal discrimination Law Online*, p 55. At <http://www.hreoc.gov.au/legal/FDL/chap4.html> (viewed January 2009).

⁵¹ See further, in relation to establishing causation under the *Racial Discrimination Act 1975* (Cth), HREOC, *An International Comparison of the Racial Discrimination Act 1975: Background Paper No 1* (2008), Chapter 8.

⁵² *Workplace Relations Act 1996* (Cth), s 659(2)(f) and (h).

⁵³ See, eg, *Bognar v Merck Sharp Dohme (Australia) Pty Ltd* [2008] FMCA 571, [47]: 'By virtue of s.664 of the WR Act, the respondent bears the onus of proving that it did not terminate the applicant's employment for a prohibited reason, or for reasons that included a prohibited reason.' See also *Liquor, Hospitality Miscellaneous Union, Liquor & Hospitality Division, NSW Branch on behalf of its member, Wayne Roberts v Woonoona Bulli RSL Memorial Club Ltd* [2007] FCA 1460, [21]: 'In this proceeding it is thus not necessary for the Union to prove that Mr Roberts' employment was terminated for the reason, or for reasons including the reason, that he refused to negotiate in connection with, make or sign an AWA. However, the Club will have established a defence to the Union's application if it has proved that Mr Roberts' employment was terminated for a reason or reasons that do not include a proscribed reason.' See also *Tandoegoak Anor v Marguerite Gerard Pty Ltd* [2007] FMCA 621, [38]: 'The Court is cognisant of the reverse onus of proof contained in s 664 of the Act.' See also *Abrahams v Qantas Airways Ltd* [2007] FMCA 634, [10].

presumably take on the role of adducing evidence to rebut the relevant presumptions. In the Commission's view, this is appropriate. The government party is the most likely party to hold the relevant information. It also has the resources to commit and is the party that undertook the extinguishing act by granting the interest in land in the first place.

181. The Commission does not consider that shifting the burden of proof to the primary respondent in native title cases would result in opening the 'flood-gates' for native title claims. The Native Title Act already includes a number of procedural mechanisms that act as a safeguard. For example, there are extensive notification provisions which ensure any opposing claim group and other interests have an opportunity to be represented.
182. In addition, the registration test administered by the NNTT acts as an important safeguard. Part 7 of the Native Title Act provides for the registration test, and what a registration application should include. Under s 190B, the conditions about merits of a claim are set out. These include that the claimants must:
 - a. Identify the area
 - b. Identify the claim group
 - c. Identify the native title rights and interests claimed
 - d. Identify the factual basis for a claim
 - e. Satisfy the Registrar that there is a prima facie case that the native title rights and interests can be established.
183. The Commission does not recommend amending the registration test. Indeed, the Commission cautions that, if the onus of proof were to be adjusted as recommended, it would be necessary to ensure that the criteria or application of the registration test does not become harder for claimants to satisfy. If this were to occur, then the end result would be that the current problem is simply shifted to an earlier stage which would additionally jeopardise important procedural rights that are gained through registration testing and place the assessment of evidence outside the court system.
184. In addition to the reasons outlined above, a number of procedural benefits would flow from shifting the burden of proving some elements of native title to the respondents. For example, it would encourage governments to progress native title claims without insisting that applicants first provide comprehensive connection reports. Additionally, a presumption gives governments greater incentive to provide the information they hold earlier in the proceedings to clarify the areas of dispute. For example, there would be an incentive for governments to collate tenure information at the same time as compiling their proof to rebut any of the presumptions (discussed below).

8.1 Presumptions

185. The Commission considers that once the registration test is satisfied, there are a number of questions of facts that should be presumed in favour of the applicants. In a recent paper, current Chief Justice of the High Court proposed a draft provision for the Native Title Act in relation to the statutory form such presumptions could take, as follows:

- (1) This section applies to an application for a native title determination brought under section 61 of the Act where the following circumstances exist:
 - (a) the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group;
 - (b) members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional;
 - (c) the members of the native title claim group, by their laws and customs have a connection with the land or waters the subject of the application;
 - (d) the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.
- (2) Where this section applies to an application it shall be presumed in the absence of proof to the contrary:
 - (a) that the laws acknowledged and customs observed by the native title claim group are traditional laws and customs acknowledged and observed at sovereignty;
 - (b) that the native title claim group has a connection with the land or waters by those traditional laws and customs;
 - (c) if the native title rights and interests asserted are capable of recognition by the common law then the facts necessary for the recognition of those rights and interests by the common law are established.⁵⁴

186. The Commission supports the enactment of a provision in the terms suggested by his Honour above.

⁵⁴ Justice Robert French, 'Lifting the burden of native title – some modest proposals for improvement' Federal Court, Native Title User Group, Adelaide, 9 July 2008, copy available at: http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf

8.2 Rebutting the presumptions

187. The respondents would then have an opportunity to adduce evidence to rebut any of the above presumptions. Further statutory clarification would also be required in respect of such rebuttal, as discussed below.

(a) Traditional Owners of the land

188. The Commission considers that the presumption that the claimants are the traditional owners of the land should only be rebuttable by a respondent if it can show there is a justifiable basis to believe that another group were, or are, the traditional owners. In such a case, the onus would be on that respondent to adduce evidence to prove that the claimant group is not the same society as that at sovereignty. Evidence of a substantial dispute over traditional ownership or overlapping claims could be tendered as evidence to dispute traditional ownership. However, in these cases the government party should be required to assist the Indigenous parties to resolve the disputes between them and to establish who the traditional owners are for the relevant area.

189. The Commission notes that the Native Title Act would also require articulation of how a particular group meets the definition of being a traditional owner. The meaning of this expression under s 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* may not necessarily be appropriate for the Native Title Act. Further consultation with Indigenous groups on this issue would therefore be required.

190. The Commission also considers that NTRBs or NTSPs could potentially play a role in certifying a particular group as the traditional owners of particular land. The Commission notes that NTRBs and NTSPs are often uniquely well placed to make such assessments, due to their familiarity with local communities. Whilst such certification may not be capable of constituting conclusive proof of traditional ownership, it may provide an appropriate starting point for establishing a presumption of traditional ownership. Such a certification process might also provide an avenue for recognition of traditional ownership for other purposes, without the group necessarily being required to meet the onerous registration test under the Native Title Act.

(b) Substantial interruption

191. The Commission recommends that the Native Title Act should specify that, where an applicant meets the registration test, continuity in the acknowledgement and observance of traditional law and custom shall be presumed, subject to any evidence of substantial interruption. This would clarify that the onus rests with the respondent, usually the government party, to prove a substantial interruption rather than for the applicants to prove continuity.

192. Furthermore, the Commission considers that the interpretation of ‘substantial interruption’ developed at common law requires amendment. In the Native Title Report 2007⁵⁵, the Aboriginal and Torres Strait Islander Social Justice Commissioner summarised the native title claim of the Larrakia people. That case illustrates the vulnerability and fragility of native title, whereby a break in continuity of traditional laws and customs for just a few decades (post World War Two) was sufficient for the court to find that native title did not exist. The Commission considers such a comparatively minimal interruption should not be sufficient to defeat a claim to native title, especially in cases where the claimant group, like the Larrakia, has revitalised their culture, laws and customs following such a short interruption.

193. In the *Larrakia* case, Justice Mansfield recognised in his judgment the strength of the Indigenous society before him. After giving his conclusion that native title did not exist, he stated:

It is a conclusion which is not intended to, and should not, be seen as meaning that the Larrakia people do not presently exist as a society in the Darwin area with a structure of rules and practices directing their affairs. They clearly do.⁵⁶

194. To avoid such an outcome occurring again, the Commission recommends that the Government amend the Native Title Act to address the court’s inability to consider the reasons for interruption in continuity. Such an amendment could empower courts to disregard any interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

(c) *Definition of traditional*

195. The Commission recommends that the Native Title Act should also provide greater clarity as to what the respondent must prove to rebut the presumption that the laws and customs observed are ‘traditional’. The Commission also considers that such statutory clarification should also amend the meaning of ‘traditional’ developed at common law, which has become unduly restrictive.

196. The Commission recommends that ‘traditional’ should encompass laws, customs and practices that have remained identifiable through time. This would go some way to allowing for Indigenous peoples’ rights to culture⁵⁷ and would also clarify the level of adaptation allowable under the law. The Commission also considers that usufructuary rights, such as those recognised under s 211 of the Native Title Act, should be presumed to be traditional.

⁵⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007), chapter 7.

⁵⁶ *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [938].

⁵⁷ See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Human Rights and Equal Opportunity Commission (2008), chapter 3.

(d) *Requirement for physical connection*

197. The Commission recommends that the Native Title Act should clarify that the definition of native title in s 223 does not require that the claimants have a physical connection with the land or waters.
198. Requiring evidence of physical connection sets an unnecessarily high standard which may prevent claimants who can demonstrate a continuing spiritual connection to the land from having their native title rights protected and recognised.
199. The Commission notes that such an amendment would not alter, but merely codify the common law position on this issue. Since the Full Federal Court decision in *De Rose*,⁵⁸ the courts have repeatedly rejected the need for 'on-going or continual physical occupation of the land' by the claimants. However, the Commission considers that statutory codification would nevertheless be of further assistance in clarifying this issue for courts and parties.

9 Extinguishment

9.1 Consideration of extinguishment earlier in proceedings

200. An issue that has been criticised by a number of stakeholders is that extinguishment issues are ordinarily considered too late in the proceedings. The Commission agrees that it would advantage all parties if areas in which native title has been extinguished were established early in the proceedings. Such an approach would reduce the number of parties to the proceedings (as some could then be removed) and it would help the remaining parties to identify areas of contention and those over which there is no issue. This would further assist parties to identify where early evidence could be taken and reduce the resources required to pursue the claim further.
201. The Commission considers that the appropriate party to provide tenure information is the government party. The government party typically holds the relevant information, is in the best position to undertake a thorough search, has the resources to commit, and was the party that undertook the extinguishing act by granting the interest in land in the first place.
202. The Commission recommends that the Native Title Act specify that at the earliest possible stage in the proceedings that the court considers it appropriate, the relevant government party must undertake tenure searches and provide a report on extinguishment to all parties and the court.

⁵⁸ *De Rose v South Australia No 2* (2005) 145 FCR 290.

9.2 Extension of the non-extinguishment principle/ historical tenure

203. The preamble to the Native Title Act states:

where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect⁵⁹.

This is not what occurs in practice.

204. After the 1998 amendments to the Act, the circumstances in which native title rights are extinguished permanently were expanded significantly. As the Federal Court recognised in *Northern Territory v Alyawarr*:

The preamble declares the moral foundation upon which the NT Act rests. It makes explicit the legislative intention to recognise, support and protect native title. That moral foundation and that intention stand despite the inclusion in the NT Act of substantive provisions, which are adverse to native title rights and interests and provide for their extinguishment, permanent and temporary, for the validation of past acts and for the authorisation of future acts affecting native title.⁶⁰

205. As discussed in Native Title Report 2002, the breadth and permanency of the extinguishment of native title through the Native Title Act is contrary to Australia's international human rights obligations.⁶¹ It is also an unnecessary approach, without a satisfactory policy justification.

206. The Commission recommends that the Native Title Act be amended to limit extinguishment to the current tenure extinguishment and repeal the provisions that validate past extinguishment where those extinguishing acts no longer continue to have effect.

207. If the extinguishment provisions were amended in this way, the outcomes achieved under the Act would improve. The cost and resources required to undertake historical tenure research would be reduced significantly and native title proceedings would be simpler and faster to resolve.

208. If the Government does accept this recommendation, the Commission recommends that the Government consider amending the Native Title Act to provide a greater number of circumstances in which historical extinguishment may be disregarded. The Act already provides examples of where prior extinguishment has been disregarded in ss 47 to 47B. The circumstances in which this occurs could be expanded by amending the Act to include a new provision/s. For example the non-extinguishment principle could be extended to cover:

⁵⁹ *Native Title Act 1993* (Cth), preamble.

⁶⁰ (2005) 145 FCR 422 at [63].

⁶¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, chapter 2. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport02/chapter2.html#1.2 (viewed 12 January 2009).

- a. all Crown land
 - b. other identified classes of land and waters
 - c. any other area identified by the relevant government.
209. Both recommendations would require some mechanism for transitional provisions to clarify the date on which 'current' tenure is established.
210. The Commission acknowledges that the approaches recommended in this section will not do away with all historical tenure research that is required. Any extinguishment of native title that occurred after the enactment of the *Racial Discrimination Act 1975* (Cth) will still need to be examined more closely in order to determine whether compensation is payable to the claimants under that Act. But overall, a rule which disregards historical extinguishment should reduce the number of circumstances in which compensation under the Racial Discrimination Act may apply.

10 Disentangle the right to negotiate from the progress of the native title claim

211. An issue that was highlighted as part of the 2007 changes to native title was the number of claims that were lodged to secure procedural rights such as the right to negotiate. A significant number of these claims have never been progressed to determination for varying reasons, particularly lack of resources.
212. The procedural rights protected under the right to negotiate provisions in the Native Title Act are of significant value. The utilisation of these rights is the door for many Indigenous peoples' participation and engagement in the economy, and provides the key to participation in industries and enterprises on or in respect of the relevant land and waters. The economic significance of these rights was identified by the Attorney-General and the Minister for Families, Housing and Community Services and Indigenous Affairs as a reason for the recent discussion paper on how to improve the benefits that flow from agreements made through this system.
213. The right to negotiate which is triggered by having a native title claim registered, operates through the future acts regime of the Native Title Act. The granting of procedural rights after registration recognises that the claimants have a prima facie case; that is, it is likely they are the traditional owners of the relevant land and waters. However, pursuing a claim and negotiating an agreement using the right to negotiate are two very different activities with potentially very different outcomes. Kevin Smith, the CEO of Queensland South Native Title Services stated:

The reality is that this current unprecedented resource sector boom presents an opportunity for a good number of clients to engage in the real economy for the first time and possibly *only* time. On the other hand, my clients are acutely aware that a native title determination application allows for the recognition of rights and interest to land and waters for the benefit of both current and future generations.

The [Native Title Act] sets up a real conflict of duty for many of our clients; the duty of prosecuting a claim to ensure that substantive rights and interests are recognised while simultaneously discharging their moral duty to their claim group to exercise procedural rights to negotiate fair compensation for mining on their ancestral lands. The irony, somewhat perversely, is that under the current arrangements they must do the former to preserve the latter. The perversity lies in the reality that after two hundred years of valiantly and defiantly withstanding waves of colonisation the legislation that delivered *some* hope might in fact be the Tsunami that dashes *all* hope. Not because they do not want to engage in both processes but because of the bureaucratic, highly legalistic and expensive burden of being simultaneously engaged in *both* processes.

One might argue, 'The claim group will just have to use the mining compensation money to prosecute their claim'. The obvious response, being 'Why should they have to when the tax-payer is footing the entire bill for respondents to resist the claims, the Tribunal to mediate and the court to determine the application'.⁶²

214. Mr Tony McAvoy, barrister, has similarly suggested that the two processes should be 'de-coupled'. He suggests that the NNTT should become a 'procedural rights oversight and management body'. The procedural rights would still be granted on the basis of passing the registration test, after which the claimants could be a 'native title procedural rights holder'. The claimants could then indicate if they wished to apply for a native determination.⁶³
215. One benefit of the approach that McAvoy has identified is that if claimants could discontinue on the basis that they would retain procedural rights, a number would take that opportunity, reducing the applications before the Federal Court.
216. The Commission recommends that the Government further examine how the procedural rights afforded under the right to negotiate provisions can be separated from the progress of the native title claim.

11 Recognition of commercial native title rights and interests – ss 211 and s223

217. The Government has stated that it considers that Indigenous communities should be using their native title rights to leverage economic development.⁶⁴ The link between native title and economic development has been further acknowledged by the Government through its decision to include native title in its Indigenous Economic Development Strategy.

⁶² K Smith, Chief Executive Officer of the Queensland South Native Title Services, Speech delivered at the JCA Colloquium, Friday 10 October 2008, Surfers Paradise.

⁶³ T McAvoy, *Native Title Litigation Reform*, Frederick Jordan Chambers, Sydney, 24 November 2008.

⁶⁴ J Macklin, *Beyond Mabo: Native title and closing the gap*, (delivered at the James Cook University, Townsville, 21 May 2008) p 3.

218. Various native title reports have commented on the existing scope for using native title for commercial benefit, and have identified some limitations in the system that may prevent a community from being able to use native title rights to support their economic development aspirations.
219. One of these problems was outlined in the Native Title Report 2007, which used the example of fishing rights to outline aspects of the common law that appear to be preventing recognition of any commercial aspect of native title rights and interests. Specifically, the courts have often appeared to take the view that customary Indigenous laws and customs for the purpose of native title do not include commercial activity. This perception has created a false dichotomy that customary rights are mutually exclusive to commercial rights.⁶⁵
220. There is growing evidence that this dichotomy is neither necessary nor accurate. For example, the story discussed in Native Title Report 2007 of the Gunditjmara peoples in Victoria is an example of a community that was able to prove that their ancestors had established an ancient aquaculture venture. The Federal Court recognised their native title rights and the Gunditjmara peoples are now using these rights to re-establish commercial eel farming.
221. A significant amount of recent anthropological and archeological research supports the existence and operation of trade between Australian Indigenous peoples and others. The trade was with other Indigenous peoples both domestically and internationally. This enterprise and economy has yet to be fully recognised by the native title system and the courts.
222. Alternatively, the evidential bar for establishing the relevant bundle of native title rights has been set so high as to exclude or significantly limit the prospect of commercial rights being recognised. For example, in *Yarmirr* at first instance, in response to evidence of trade with neighbouring tribes in clay, bailer shells, cabbage palm baskets, spears and turtle shells, Olney J held:
- The so-called 'right to trade' was not a right or interest in relation to the waters or land. Nor were any of the traded goods 'subsistence resources' derived from either the land or the sea.⁶⁶
223. His Honour also observed that evidence of trade with Macassan fishermen related only to the gathering of trepang, but did not assist in establishing rights or interests in relation to other resources of the sea.⁶⁷
224. The above line of reasoning reveals a very narrow approach to the characterisation of the relevant right. In addition to an uninterrupted practice of commercial fishing, his Honour appeared to require further proof of a specific

⁶⁵ For further info see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007) chapter 10.

⁶⁶ *Yarmirr & Ors v Northern Territory & Ors* (1998) 82 FCR 533 at 587[D].

⁶⁷ *Ibid* 588[C]. This approach appears to have been endorsed by Beaumont and von Doussa JJ in the Full Court, where their Honours noted: '...the group was confronted with obvious difficulties in seeking to prove title to resources of the kind in question, given their diversity of specific character and location in a relatively large area of sea.' *Commonwealth v Yarmirr & Ors* (2000) 101 FCR 171 at 231 [253].

traditional right to have done so before he would accept it as a 'right or interest in relation to waters'. Furthermore, even if a community could establish such a continuous right, his Honour's reasoning then calls for a 'drilling down' to the particular species being traded (such as Trepan), rather than allowing a more generic right to trade in the marine resources of the claim area.

225. The Commission recommends that the Government clarify that the definition of native title in s 223 can include rights and interests of a commercial nature. This would help to clarify for the courts that native title rights and interests should not be regarded as inherently non-commercial. Such an amendment could also provide guidance as what evidential requirements must be met in establishing a commercial native title right and the scope of that right. For example, it could clarify that evidence of traditional laws and customs relating to trade in a particular resource of the claim area is sufficient to establish a right to trade in **any** resources of the claim area.
226. The Native Title Report 2007 also raised the problem that even if commercial native title rights and interests are proven and recognised by the court, the commercialisation of those native title rights would remain subject to relevant state and territory laws and regulations by virtue of s 211.⁶⁸
227. Section 211 of the Native Title Act provides for the interaction of:
- a. native title rights and interests that include recognising a right to undertake certain activities (such as fishing or hunting)
 - b. Commonwealth, state or territory government regulation of that activity (such as licensing).
228. If a government regulates an activity under the section, then that regulation does not apply to restrict native title rights and interests to the extent that the activities are undertaken for personal, domestic or **non**-commercial needs. As a result, even if Indigenous people can overcome all of the s 223 requirements, any commercial use of their native title rights remain subject (and vulnerable) to government regulation. In short, having travelled the long road to establish a commercial native title right, the claimant would nevertheless still need to join the queue for the applicable permit or licence to engage in commercial activities.
229. The Commission recognises that there are valid reasons why regulation of a commercial activity in respect of native title rights is necessary, particularly in respect of protecting public safety, competing rights and interests and the environment. However, the Commission recommends that the Government explore options that would limit the impact of government regulation in relation to holders of native title rights in appropriate cases.

⁶⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007) chapter 10.

230. For example, the Government could explore options with state and territory governments to afford priority treatment for native title holders in obtaining applicable permits and licences to commercialise the relevant right. Alternatively, the Government could explore options for developing limited markets for particular commercial activities, such as trade within and between particular native title groups in a particular industry. Such limited markets could be freed from more complex layers of regulation that might otherwise apply and could be adapted to be more culturally appropriate to the particular groups and activities.
231. For the above reasons, the Commission recommends that that s 223 be amended to:
- a. clarify that native title can include rights and interests of a commercial nature
 - b. provide guidance as to the evidential requirements and potential scope of any such commercial rights.
232. The Commission further recommends that the Government explore options, in consultation with state and territory governments, Indigenous groups and other interested persons, to enable native title holders to exercise their native title rights for a commercial purpose.

12 Amendments to Applicants – s 66B

233. Prior to the 2007 changes to the Native Title Act, where a group of persons were authorised to be the applicant for a native title claim, it was implicit that the authorisation remained in effect in respect of so many of the persons who remain willing to so act.⁶⁹ That is, new authorisation of the applicant under s 61 was not needed where one member of the applicant group died or was no longer willing to act. Re-authorisation of the applicant was only required if a new member was added to the applicant.
234. Justice Spender said of the law before the 2007 amendments:

It is important to remember that the persons who are authorised by a native title claim group to make an application are not authorised merely to make the application, but also to '*deal with matters arising in relation to*' the application. If one person comprising an 'applicant' were to die, it would be contrary to the purpose of the Native Title Act to require there to be a further authorisation meeting to authorise another group of persons (perhaps constituted by the remaining members of the '*originally specified persons*') to be the 'applicant'. Such a frustration of proceedings, perhaps proceedings well advanced, would be antithetical to the purpose of the Native Title Act. That is the paramount consideration, but the gross waste of time and resources also serves to

⁶⁹ See the decisions of *Chapman v Queensland* (2007) 159 FCR 507 (2006) 154 FCR 233; *Butchulla People v Queensland* (2006) 154 FCR 233 and *Doolan v Native Title Registrar* (2007) 158 FCR 56.

indicate that an interpretation of 'applicant' which avoids all of these consequences is clearly to be preferred.⁷⁰

235. However, s 66B was amended in 2007 to insert two additional clauses into the reasons why applicants need to be re-authorised. These were:
- a. paragraph 66B(1)(a)(i) – where a person consents to his or her replacement or removal
 - b. paragraph 66B(1)(a)(ii) – the person has died or become incapacitated.
236. The Explanatory Memorandum to the Bill which made the amendments stated that s 66B would now be the only mechanism through which any changes to the applicant could be made.
237. In 2008, the Federal Court considered the amended s 66B in *Sambo v Western Australia*⁷¹ (Sambo). In that case, the Federal Court concluded that even when a person comprising the applicant has died, Parliament's intention was that 'there is to be an authorisation by the claim group of the replacement applicant, whether or not the deceased person is replaced by another person as part of the applicant'.⁷² That is, since the 2007 changes to the Native Title Act, the only means whereby 'any changes can be made to the composition of the applicant' is via s 66B.⁷³ The court held that changes cannot be made to the applicant under Order 6, rule 9 of the Federal Court Rules.
238. It follows from the decision in Sambo that even where a person who forms part of the applicant dies, or consents to their removal, the remaining persons who make up the applicant cannot continue without fresh authorisation. Such a requirement can have serious ramifications for the proceeding. Authorisation meetings are resource intensive and inevitably result in delays in progressing the claim.
239. It also follows from the decision in Sambo that if one member dies, then until fresh authorisation is gained, there is arguably no longer an authorised applicant to act on behalf of the claim group. This potentially could jeopardise the whole proceeding. For example, until the re-authorisation process has been complied with, the status and capacity of the applicant to progress the claim is uncertain. It is not clear who can give instructions to legal representatives to respond to court orders and undertake negotiations.
240. The Commission agrees that fresh authorisation is appropriate where a new person is added to the applicant.

⁷⁰ *Doolan v Native Title Registrar* (2007) 158 FCR 56 para 70.

⁷¹ [2008] FCA 1575.

⁷² *Ibid* [29].

⁷³ National Native Title Tribunal, 'Replacing the applicant – must use s66B', (2008), Hotspots Issue 29. At <http://www.nntt.gov.au/News-and-Communications/Newsletters/Native-title-Hot-Spots-archive/Documents/Hot%20Spots%2029/Sambo%20v%20WA.pdf> (viewed January 2009).

241. The Commission recommends that s 66B be amended to clarify that fresh authorisation is only required when a group is proposing that a new person be added to the applicant. At the very least, s 66B should be amended to clarify that fresh authorisation is not required where the composition of the applicant group changes solely due to death or incapacitation of an applicant member.

13 Corporate applicants – s 61

242. The Commission recommends that the Native Title Act be amended to allow corporations, whose membership consists *only* of the native title claim group, to be an applicant in native title proceedings.⁷⁴
243. Section 61 of the Native Title Act provides for native title applications to be made by a person or persons claiming to hold native title either alone or with others. The Federal Court's interpretation of this provision in *Western Australia and the Northern Territory of Australia v Patricia Lane, Native Title Registrar and Others*⁷⁵ had the effect of removing the capacity to claim native title through an incorporated body. In that case Justice O'Loughlin stated that s 61 requires an application to be made by a person or persons claiming to hold native title either alone or with others. The result is that native title applications must be made by natural persons.
244. This creates difficulties, as the 'applicant', which may be comprised of many people, must be of one mind. When this is questioned or if a member of the applicant needs to be removed or becomes unable to perform that role then it creates difficulty for the whole claim group who must go through the procedures set out in the Act, including re-authorisation (in all circumstances post-*Sambo*).
245. Giving the claim group the option of authorising a corporate entity as the applicant would have a number of benefits. These include:
- a. The decision makers would be the directors of the corporation. This would make it easier for the claim group's legal representatives to obtain instructions quickly and with certainty.
 - b. The internal rules of the corporation would determine the process for the removal and replacement of directors and what happens on death or incapacitation of a director.
 - c. The procedures set out in the corporation's rules and the decision making framework set up under it would be determined by the members of the corporation, that is, the claimants. Those rules could be tailored by the group so as to be culturally appropriate. In the case the rules are not followed, the actions of the corporation could be challenged in separate proceedings.

⁷⁴ For further information, see T McAvoy, 'Native Title litigation reform' (2008), ALRC Reform, unpublished.

⁷⁵ [1995] FCA 1484 (24 August 1995).

- d. The claim group would have a corporate entity that is already constituted, in preparation for it then taking on the role of acting as the registered native title body corporate if a determination of native title is ultimately made.

246. The Commission recommends that s 61 be amended to allow a corporation, whose membership consists wholly of the native title claim group, to apply for native title.

14 Compulsory acquisition and the right to negotiate – s 26

247. Native Title Report 2008⁷⁶ provides a discussion of the decision in *Griffiths v Minister for Lands, Planning and Environment*⁷⁷ (Griffiths) in which the High Court found that the legislative provision to acquire land ‘for any purpose whatsoever’⁷⁸, including native title, provides the Minister with the power to acquire native title in the land.

248. In his dissenting judgment in Griffiths, Justice Kirby outlined the *sui generis* nature of native title, and the history of Indigenous land rights in Australia as reasons why the acquisition of native title should be treated differently to other interests in land. This approach is consistent with relevant international human rights principles.

249. When the Native Title Act was enacted, it provided a measure of protection from compulsory acquisition by providing native title claimants with a right to negotiate with the government over the acquisition of native title for the benefit of third party private interests. This protection was considered by many to be an important measure of respect for traditional law and custom. It has been said by previous Aboriginal and Torres Strait Islander Social Justice Commissioners that the right to negotiate provisions (as they were originally enacted) were not a ‘windfall accretion’ or gift of government; but an intrinsic component of native title to the land.⁷⁹

250. In the Native Title Report 1997, the compulsory acquisition of native title for the benefit of third parties was discussed in light of the Wik 10 point plan amendments. These amendments removed the right to negotiate for the acquisition of native title for the benefit of third party private interests when the land involved is inside a town or city.⁸⁰ The amended Act reduced the right to negotiate to a much lesser procedural right to object.⁸¹

⁷⁶ See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Human Rights and Equal Opportunity Commission (2008) chapter 3, for more information.

⁷⁷ [2008] HCA 20.

⁷⁸ Under s 43(1) of the *Lands Acquisition Act* (NT).

⁷⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996*, Human Rights and Equal Opportunity Commission (1996) p 19.

⁸⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1997*, Human Rights and Equal Opportunity Commission (1997) p 96-100.

⁸¹ S Brennan, ‘Compulsory acquisition of native title land for private use by third parties’ (2008) 19 *Public Law Review* 179.

251. These amendment provide another example of how by treating Aboriginal peoples' and Torres Strait Islanders' traditional laws and customs as a form of the western legal property right, the Native Title Act unwittingly destroys many of the *sui generis* characteristics of the very laws and customs it was apparently designed to recognise and protect.
252. One of these characteristics is the notion of controlling access to and activities on traditional estates, which is a consistent feature of Indigenous law. It is 'what a Pitjantjatjara man once defined as "the first law of Aboriginal morality – always ask"⁸².
253. The Commission considers that the basis for the right to control access as an intrinsic right of native title to traditional estates seems to have been overlooked as the procedural rights attached to native title have been amended or removed. In the end, although native title can now be acquired in the same way as any other interest in land, because of the nature of native title rights and interests, and the type of land the rights are recognised over (that is, in many cases, crown land), governments are more willing and more likely to acquire native title rights and interests than any other property interest.⁸³
254. The Commission recommends that the Attorney-General, through the Council of Australian Governments, pursue consistent legislative protection of the rights of Indigenous peoples to give consent and permission to use and to access their lands across all jurisdictions. A best practice model would be to legislatively protect the right of native title holders to give their consent to any proposed acquisition.
255. A second best option would be to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city. That is, amend s 26 of the Native Title Act.

15 Costs – s 85A

256. The significant financial costs of pursuing a native title claim are of great concern. The Commission is also informed that inappropriate behaviour of parties has often contributed to such costs, by adding to delays.
257. In his concluding comments in *Rubibi*⁸⁴, Justice Merkel recommended one way the court could use costs orders to encourage parties to act in a flexible manner which promotes negotiation. He suggested that after a determination of native title has been made, formal and confidential offers of settlement that were made between the parties in the course of mediation should be presented to the trial court so that it can decide whether adverse costs

⁸² Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1997*, Human Rights and Equal Opportunity Commission (1996) p 18.

⁸³ See for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2008) chapter 3.

⁸⁴ *Rubibi Community v Western Australia* [2001] FCA 607.

consequences should follow for the parties for whom the final outcome was not greater than that offered in the mediation.

258. Given the unique nature of native title rights and interests it may be a difficult task for the Court to determine which outcome was 'greater'. Requiring parties to put offers made before the court may also act as a disincentive for parties to make formal offers during negotiation.
259. However, the Commission considers that providing the court with the power to consider offers made during negotiation in determining costs, may act as a useful incentive for parties to negotiate fairly and avoid such an adverse costs finding. The Commission therefore recommends that the Native Title Act be amended to include a mechanism by which the court can have regard to settlement offers when making an order for costs.

16 The role of the NNTT in education – s 108

260. The native title system is indisputably complex. Lawyers and government Ministers often have difficulty grappling with the Native Title Act, even after many years of experience with the jurisdiction. It is virtually impenetrable for some Indigenous peoples to comprehend, particularly when English is a second or third language and native title is the first time they have had direct contact with the Western legal system. Respondent parties also have great difficulty and often still hold strong, but at times baseless, concerns that native title poses a significant threat to their property.
261. As a result, proceedings are sometimes initiated and impeded because a range of parties lack an understanding of how the Act operates and what outcomes can be achieved under it. The Commission considers that education and information about the native title system is therefore essential to ensuring its effective operation and to ensuring that Indigenous peoples have a proper understanding of what to expect from the process. Surprisingly, however, no body in the native title system has a formal educative role.
262. Part 6 of the Native Title Act provides the functions and operation of the NNTT. Section 108 sets out the NNTT's functions, some of which are related to education and providing information, such as its research function and the function to assist proceedings and inquiries and the like. Under these provisions, the NNTT has undertaken some education responsibilities, but it has done so in a limited way. The NNTT has also commented on the importance of greater dissemination of information and education in improving the native title system.
263. For example, recently the NNTT translated a native title documentary into Mandarin:

A Chinese translation of a native title documentary has been produced in response to the increasing number of Chinese investors in Australia's mining sector.

The National Native Title Tribunal produced the Chinese subtitled version of its 15 years of native title documentary to promote Chinese investors' understanding of Australia's native title laws.

...

"Knowledge about native title, some of the history, the outcomes and the expectations will help Chinese investors to understand Indigenous peoples' native title rights and the process for negotiating agreements with them," ...⁸⁵

The Commission considers that the knowledge referred to in the passage above would also be of great benefit to Indigenous peoples in understanding their own rights and the processes for having those rights protected, yet there are no translations of the DVD into Indigenous languages.

264. The Commission recommends that s 108 be amended to confer on the NNTT a formal educative function. As the native title system was introduced as a special measure intending to advance and protect Aboriginal peoples and Torres Strait Islanders, the amendment should specify that this educative function should be directed primarily towards educating Aboriginal peoples and Torres Strait Islanders. The Commission recommends further that the Government ensure that the NNTT is provided with sufficient additional resources to undertake this education function.

17 Tabling Native Title Reports – s 209

265. Section 209 of the Native Title Act requires that the Aboriginal and Torres Strait Islander Social Justice Commissioner report annually on the operation of the Native Title Act and the effect it has on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islanders. This function is fulfilled through annual Native Title Reports.
266. However, there is not statutory mechanism that mandates the tabling of the Native Title Reports before Parliament.
267. By contrast, pursuant to s 46C(1)(a) of the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act) the Aboriginal and Torres Strait Islander Social Justice Commissioner is required to report annually on the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders. This function is fulfilled through annual Social Justice Reports. However, when these issues relate to land and waters, they form part of the Native Title Report. Section 46M of the HREOC Act requires the Attorney-General to table the Social Justice Reports in Parliament within 15 sitting days of receipt. The Minister must also provide all state and territory Attorneys-General with copies of the report.

⁸⁵ National Native Title Tribunal, 'Native title documentary translated into Chinese', (media release 10 December 2008). At <http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Chinesesubtitles.aspx?Mode=PrintFriendly> (viewed January 2009).

268. The Commission recommends that s 209 of the Native Title Act should be amended along similar lines to the requirements under the HREOC Act in relation to the tabling of Social Justice Reports. The Commission also considers that the Native Title Act also include provisions requiring the relevant Minister to formally respond to the Native Title Report, along the lines of s 107 of the *Parliament of Queensland Act 2001 (Qld)*.⁸⁶

18 Consultation

269. The Commission acknowledges that the Attorney-General has committed to consulting on any further changes that may be made to the Native Title Act. The Commission welcomes this commitment and would like to emphasise the importance of consulting with Indigenous peoples on any changes that affect lands and waters.
270. When the Government undertakes consultation with Indigenous peoples, it should be guided by:
- a. The United Nations *Guidelines on engaging the marginalised* which requires participation of Indigenous peoples based on the principle of free, prior and informed consent. It also provides that governments must establish transparent and accountable frameworks for engagement, consultation and negotiation with Indigenous peoples and communities.
 - b. The Declaration on the Rights of Indigenous Peoples which guarantees Indigenous peoples' rights to give their free, prior and informed consent before decisions are made which affect their lands (article 28). The Declaration also urges states to consult and operate in good faith with Indigenous peoples in order to obtain free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (Article 18).
 - c. The ICCPR (particularly Article 1 - the right to self determination) which, as the Human Rights Committee has stressed in its concluding observations on Australia, requires Indigenous peoples be given a stronger role in decision-making over their traditional lands and natural resources.
271. The Commission submits that undertaking negotiations in accordance with the above instruments and principles is the most appropriate means of ensuring that the Government fulfils Australia's international human rights commitments.

⁸⁶ Section 107 of the Parliament of Queensland Act 2001(Qld), provides for Ministerial response to committee, and provides that a response that outlines recommendations to be adopted and how and in what time frame; recommendations that will not be adopted and the reasons for not adopting them; and compliance provisions for the response.

19 Additional matters not addressed in this submission

272. The Commission notes that a number of significant issues with the native title system have not been discussed in this submission. This is because the discussion paper is focused on possible amendments to the Native Title Act, and does not contemplate significant changes to the underlying framework of native title. Additionally, due to time restraints, some significant topics have only been touched on or mentioned briefly in this submission, but which deserve more thorough policy development and consultation with Indigenous people.
273. The Commission notes for example that important topics such as the following have not been discussed in any great detail in this submission:
- a. Strengthening the procedural rights in the Act.
 - b. Reducing the acts which extinguish native title.
 - c. Assessing the impact of native title being found to be a 'bundle of rights'.
 - d. Increasing the effectiveness of the compensation provisions.
 - e. Assessing the appropriate role and standardisation of connection reports.
 - f. Removing proceedings from an adversarial setting.
 - g. Creating consistency between land rights legislation and native title.
274. The Commission considers that the above issues are important to the overall success and fairness of the native title system and require further consideration and consultation by the Government. The Commission would welcome the opportunity to participate in any such further inquiry.

20 Attachment 1 – Australian Labor Party Platform and Constitution

275. In the Australian Government's National Platform and Constitution⁸⁷, the Australian Labor Party stated that it:

- understands that land and water are the basis of Indigenous spirituality, law, culture, economy and well-being
- acknowledges that native title and land rights are both symbols of social justice and valuable economic resources to Indigenous Australians
- recognises that a commitment was made to implement a package of social justice measures in response to the High Court's Mabo decision, and will honour this commitment
- fully supports native title as a property right under Australian law
- fully supports the statutory recognition of inalienable freehold title under the *Aboriginal Land Rights (Northern Territory) Act 1976* and the right of property owners to provide free, prior and informed consent to any major changes affecting their interests
- believes that negotiation produces better outcomes than litigation and that land use and ownership issues should be resolved by negotiation where possible
- will facilitate the negotiation of more Indigenous Land Use Agreements and ensure that traditional owners and their representatives are adequately resourced for this task
- believes that the independence of native title representative bodies should be supported to enable them to freely advocate on behalf of the people they represent. It will evaluate the performance of these bodies against transparent indicators, including how satisfied traditional owners are with the service they have received
- will address the chronic staffing retention issues of native title representative bodies by supporting professional development and mentoring opportunities
- will ensure adequate resourcing for the core responsibilities of Prescribed Bodies Corporate.

⁸⁷ Australian Labor Party, *Australian Labor Party National Platform and Constitution* (2007). At: www.alp.org.au/platform/, chapter 13, paras 91-104.

**21 Attachment 2 – Discussion of major topics for amendment in
previous Native Title Reports**
