



Appendix 1

Implementation of the claims resolution review

Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
Options for institutional reform			
1. Provide the National Native Title Tribunal (the tribunal) with an exclusive mediation jurisdiction for a period of three years.			
2. Tribunal exclusive mediation power Provide the tribunal with an exclusive mediation role with no time limitation on Federal Court (the court) intervention.	This was the accepted option.	<i>Native Title Act 1993</i> (Cth) (NTA) s86B(2) repealed	Removal of Federal Court's general discretion not to refer matters to tribunal for mediation, court must order there be no mediation by the tribunal in certain circumstances.
3. Provide the Federal Court with greater flexibility in relation to alternative dispute resolution.			
4. Introduce a modified pre-1998 model for resolving native title claims.			



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>5. Create a new native title court. Subsidiary option Create a native title panel or division within the Federal Court. Dr Levy supported the creation of a native title division, Mr Hiley supported the creation of a native title panel.</p>	<p>Not appropriate to enact legislation to create a native title division within the court. Any decision to create a native title panel a matter for the Chief Justice.</p>		
Recommendations			
<p>1. One body mediating at a time</p> <p>That the NTA be amended to provide that, consistent with paragraphs 4.31 and 4.32 [of the Review], mediation should not be carried out by more than one body at the one time.</p>	<p>Accepted. Given its acceptance of Option 2, the Government considered that while a claim is in mediation before the tribunal, the court should be precluded from mediating any aspect of the claim.</p>	<p>NTA s86B(6)</p>	<p>If the Federal Court refers a proceeding to the tribunal for mediation:</p> <ul style="list-style-type: none"> ▪ no aspect of the proceeding is to be referred for mediation under the <i>Federal Court of Australia Act 1976</i>; ▪ no order is to be made requiring the parties to attend before a Federal Court Registrar for a conference with a view to satisfy the registrar that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken.



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>2. New tribunal mediation powers</p> <p>That the tribunal be given the following powers in relation to a matter referred to it by the Federal Court for mediation:</p> <ul style="list-style-type: none"> ▪ to direct a party to attend or participate in a mediation conference; ▪ to direct a party to produce documents for the purposes of mediation within a nominated period or by a nominated date; ▪ to conduct a review of material provided by the applicant (or any other party) to establish whether the native title claim group has, by its traditional laws and customs, connection to the land or waters claimed; ▪ to assess whether the material would support a determination of native title; and ▪ to provide that assessment to a party or parties to the proceedings (subject to an order under s136F of the NTA). 	Accepted.	NTA s136B(1A) s136CA s86A(1), (2) s136G(3B) s86D(3) Div 4AA: ss136GC-GE	<p>Tribunal may direct a party to attend a mediation conference (s136B(1A)).</p> <p>Tribunal may, for the purposes of a conference, direct a party to produce document (s136CA).</p> <p>Tribunal may review the issue of whether a native title claim group who is a party to a proceeding holds native title rights and interests, as defined in subsection 223(1), in to relation land or waters within the area that is subject to proceedings (Div 4AA).</p>
<p>3. New tribunal inquiry power</p> <p>That the tribunal be given a new inquiry function enabling the tribunal to collect evidence and make non-binding recommendations about overlapping claims and other inter-Indigenous and intra-Indigenous issues and about the kinds of matters covered by s225 [of the NTA].</p>	Accepted.	NTA ss138A-G	The tribunal may hold an inquiry in relation to a matter or an issue relevant to the determination of native title under s225.



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>After an application has been referred to the tribunal under s86B of the NTA, the president of the tribunal should be empowered to, of his/her own motion or at the request of a party to the proceeding, direct that the tribunal conduct an inquiry in relation to an issue that, if resolved, is likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application.</p> <p>The president should be empowered to so direct where he/she is satisfied that:</p> <ul style="list-style-type: none"> ▪ the applicant and other relevant parties would participate in the inquiry ▪ the issue is sufficiently important to justify an inquiry, and ▪ the results of the inquiry are likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application. <p>Before directing an inquiry (having regard to the fact that each application is a proceeding before the Federal Court), the president should be required to first consult with:</p>			



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<ul style="list-style-type: none"> ▪ the Chief Justice of the Federal Court; ▪ the relevant NTRB (or body performing NTRB functions) for the relevant area; ▪ the federal minister; ▪ the relevant State or Territory government; and ▪ the applicant of any affected native title application. <p>Such inquiries may be directed and conducted in relation to two or more applications where the same issue arises in relation to those applications.</p>			
<p>4. Good faith obligation</p> <p>That consideration be given to formulating a good faith obligation to be included in the NTA and developing a code of conduct for parties involved in native title mediations.</p>	<p>Accepted.</p> <p>Government giving further consideration to possible sanctions for breach of the good faith obligation by legal practitioners.</p>	<p>NTA s136B(4)</p>	<p>Each party and each person representing a party must act in good faith in relation to the conduct of the mediation.</p>
<p>5. User group, regional call overs, Tribunal/Federal Court communication</p> <p>That the court should convene regular user group meetings and regional call overs involving the tribunal. The tribunal and the court should actively seek new methods of improving institutional communication.</p>	<p>Accepted.</p>		<p>The Federal Court has convened regular user group meetings.</p>



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>6. Tribunal right to appear before Federal Court</p> <p>The NTA should be amended to give the tribunal a right to appear before the court and to provide assistance to the court.</p>	Accepted.	NTA s86BA	The tribunal has a right to appear before the Federal Court at a hearing that relates to any matter that is before the tribunal for mediation for the purpose of assisting the court in relation to a proceeding.
<p>7. Federal Court to take into account reports</p> <p>The NTA should be amended to require the Federal Court to take into account any report provided by the tribunal under s136G of the NTA when considering whether to make an order in relation to an application that has been referred to the tribunal for mediation.</p>	Accepted.	NTA s94B	<p>If an application under s61 NTA is referred to the tribunal for mediation, the Federal Court must take into account:</p> <ul style="list-style-type: none"> ▪ any report relating to the mediation under s136G(1), (2) or (3); and ▪ any regional mediation report or regional work plan provided to the court under s136G(2A) or (3A) that covers a state, territory or region that includes the area covered by the application; <p>when it decides whether to make an order relating to the application.</p>



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>8. Regional mediation reports and regional work plans</p> <p>That the tribunal's reporting functions be expanded to enable the court to obtain relevant feedback on a regional basis.</p> <p>The court be empowered to request the tribunal to prepare a regional mediation progress report and/or a regional work plan in respect of a state, territory or region.</p> <p>When so requested the tribunal must prepare such a report.</p> <p>The tribunal may prepare a regional mediation progress report and/or a regional work plan in respect of a state, territory or region to assist the court in progressing the proceedings in the state, territory or region.</p>	Accepted.	NTA s86E s136G(2A)	<p>The Federal Court may request the tribunal to provide:</p> <ul style="list-style-type: none"> ▪ a regional mediation progress report – on the progress of all mediations conducted by the tribunal in relation to areas within the state, territory or region ▪ a regional work plan – setting out the priority given to each mediation being conducted by the tribunal in relation to areas within the state, territory or region.
<p>9. Particularisation of claims</p> <p>That further consideration be given to how claims can be better particularised at an earlier stage of proceedings in order to assist in the identification of relevant issues. This may require applicants to file evidentiary material earlier, preferably at the time of lodging the application (or within a stipulated time thereafter, for example, where the application is made in response to a future act notice).</p>	Government to give further consideration to these issues.		



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>The court should consider making orders for pleadings or other kinds of particularisation. Consideration should also be given to amending the requirements of s61A and s62 [of the NTA] regarding the Form 1.</p>			
<p>10. NNTT's research facilities More use should be made of the tribunal's research facilities and, in particular, its ability to produce research reports. In cases where the tribunal is requested to prepare a research report by the member conducting a mediation, the contents of the report should be disclosed to any party who makes a request. These reports should be supplied following the exercise of a discretion of the presiding member and taking account of any special circumstances.</p>	Accepted.		
<p>11. Database of tenure material That further consideration be given to assisting the tribunal to continue to develop a database of current tenure material. This database should be publicly accessible to parties and their legal representatives.</p>	Government seeking further advice from the tribunal on this recommendation.		
<p>12. Registration test That amendments be made to avoid the requirement for all amended applications to undergo the registration test again if the application has already passed the registration test. In particular:</p>	Considered in the context of the technical amendments to the NTA.		



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>An amended application should not be subject to the registration test, unless the court orders otherwise, where a claimant application is amended to:</p> <ul style="list-style-type: none"> ■ reduce the area of land or waters covered by the application; ■ reduce the list of asserted native title rights and interests; or ■ remove the name of a deceased applicant where other applicants remain. <p>Where a claimant application is amended to replace a deceased person as applicant, the amended application is not to be subject to the registration test if the Native Title Registrar is satisfied that:</p> <ul style="list-style-type: none"> ■ the amendment has been certified by the relevant representative body; or ■ the amended application is accompanied by an affidavit sworn by the new applicant stating that the new applicant is authorised by the other persons in the native title claim group to deal with matters arising in relation to the application and stating the basis on which the new applicant is so authorised (see ss64(5) and 190C(4)) [of the NTA]. <p>Where an amendment is made which is not to be subject of the registration test, the Native Title Registrar must amend the Register to reflect that amendment as soon as possible.</p>			



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>13. Ambiguities in authorisation provisions</p> <p>That amendments be made to the authorisation provisions in the NTA to remove ambiguities. For example, it seems appropriate to clarify whether:</p> <ul style="list-style-type: none"> ▪ lack of authorisation is fatal to a claim; ▪ authorisation that might have been effective can later be ratified or otherwise cured; and ▪ the registered native title claimants must be unanimous in giving instructions, executing agreements and otherwise, or whether a majority is sufficient, or whether some other rules should apply, for example, rules similar to those in ss251A and 251B [of the NTA]. 	<p>Considered in the context of the technical amendments to the NTA.</p>		



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>14. Notification of people</p> <p>That the notification requirements in s66(3) of the NTA be amended to provide the court with greater flexibility in relation to who should be notified and as to when people are to be notified. In particular:</p> <p>Section 66 should be amended to allow the court to order notification of potentially affected interested holders at any time which it considers appropriate.</p> <p>The president of the tribunal should be empowered to direct the registrar not to notify an application under s66(3) of the NTA where:</p> <ul style="list-style-type: none"> ▪ a claimant application is lodged in response to a notice under s29 of the NTA and is registration tested within four months of the notification day (see s30(1)(a) and s190A(2)); and ▪ it is apparent that the application is primarily for the purpose of securing the right to negotiate; and ▪ if subsequently the President is satisfied that the application should be notified, the president should be required to direct the registrar to notify the application under s66(3). 	<p>Considered in the context of the technical amendments to the NTA.</p>		



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>15. Dismissal of claimant applications: claims lodged in response to future act notices</p> <p>The NTA should be amended to require the court to order that a claimant application be dismissed where:</p> <ul style="list-style-type: none"> ▪ the application was made in response to a notice under s29 of the NTA; ▪ the future act has occurred; and ▪ the applicant has not produced connection material or sought to advance the substantive resolution of the application. <p>The court should not be required to order a claimant application to be dismissed if there are compelling reasons not to do so.</p>	Accepted.	NTA s94C	<p>The Federal Court must dismiss an application made by a person under s61 if:</p> <ul style="list-style-type: none"> ▪ the application is for a determination of native title in relation to an area; and ▪ it is apparent from the timing of the application that it is made in response to a future act notice given in relation to land or waters within the area; and ▪ the future act requirements are satisfied in relation to each future act identified in the future act notice; and <p>either:</p> <ul style="list-style-type: none"> ▪ the person fails to produce evidence in support of the application despite a direction by the court to do so, or to take other steps to have the claim sought in the application resolved despite a direction by the court to do so; or



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
			<ul style="list-style-type: none"> ▪ in a case to which subparagraph (i) does not apply, the court considers that the person has failed, within a reasonable time, to take steps to have the claim sought in the application resolved.
<p>16. Dismissal of claimant applications: failure to meet the merit test part of the registration test</p> <p>Amend the NTA to deal with the following claims as follows:</p> <ul style="list-style-type: none"> ▪ Where a new claimant application does not satisfy all of the conditions of the relevant part of the registration test in s190B of the NTA (conditions about the merits of the claim), the Federal Court must order that the claim be dismissed unless the court is satisfied that: <ul style="list-style-type: none"> – the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period; – there are good prospects of a negotiated outcome; or <ul style="list-style-type: none"> – there are other reasons why the application should not be dismissed. 	Accepted.	NTA ss190F(5), (6)	<p>Where the claim has not been accept for registration because:</p> <ul style="list-style-type: none"> ▪ it does not satisfy all of the merit conditions for registration in s190B; or ▪ it is not possible to determine whether all of the conditions in s190B have been satisfied because of a failure to satisfy the procedural conditions in s190C, and the court is satisfied certain avenues of reconsideration and review of the decision have been exhausted without the registration of the claim, the court <i>may</i> dismiss



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<ul style="list-style-type: none"> ▪ In deciding whether an application should not be dismissed, the court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material. ▪ One year after the proposed amendments to the NTA commence to operate, the Native Title Registrar must apply the registration test to: <ul style="list-style-type: none"> – all claimant applications that are not on the Register of Native Title Claims; and – claimant applications that did not have to undergo the registration test. <p>The registration test should be re-applied (or applied as the case may be) to determine whether each application would satisfy all of the conditions of the relevant part of the registration test in s190B of the NTA (conditions about the merits of the claim). If an application would not satisfy all those conditions, the Native Title Registrar must inform the applicant of the reasons why the application would not satisfy the conditions and invite the applicant to amend the application or provide additional information within a nominated period. If the application is not amended or the additional information is not provided, the Native Title Registrar must report to the Federal Court about the</p>			<p>the application in which the claim was made if:</p> <ul style="list-style-type: none"> ▪ the court is satisfied the application has not been amended since consideration by the registrar and is not likely to be amended in a way that would lead to a different outcome once considered by the registrar; and ▪ in the opinion of the court, there is no other reason why the application in issue should not be dismissed.



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>current status of the application and the reasons why it is not registered. Where the court receives such a report from the Native Title Registrar, the court must order that the claim be dismissed unless the court is satisfied that:</p> <ul style="list-style-type: none"> ▪ the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period; ▪ there are good prospects of a negotiated outcome; or ▪ there are other reasons why the application should not be dismissed. <p>In deciding whether an application should not be dismissed, the court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material.</p>			
<p>17. Referral to Federal Court That the tribunal and parties are encouraged to make greater use of the provisions of the NTA and of the Federal Court Rules (such as Order 29 Rule 2) to refer particular issues of fact and law to the court for determination.</p>	Accepted.		



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>18. Third party respondents</p> <p>The tribunal should refer to the Federal Court for determination of the question of whether a party should be removed if it considers that a party does not have a relevant interest. Such referral should be dealt with by a Federal Court registrar under judge-delegated powers.</p>	Accepted.	NTA s136DA	If the tribunal considers that a party to a proceeding does not have a relevant interest in the proceeding it may refer to the Federal Court the question of whether the party should cease to be a party to the proceeding.
<p>19. Industry bodies</p> <p>That consideration be given to amending the 'party' provisions of the NTA (s84) to allow an industry body to intervene in a representative capacity if one or more of its members is or was otherwise entitled to be a party and wishes the industry body to represent him, her or them. This should be subject to the court's discretion to refuse permission to intervene as appropriate, to allow intervention on terms, and to later remove the industry body if relevant circumstances change.</p>	Accepted.		
<p>20. Interests of third parties</p> <p>That consideration be given to limiting the right of participation of a third party (that is, a non-government respondent party) to issues that are relevant to its interests and the way in which they may be affected by the determination sought.</p>	Accepted.	NTA s84(3)(a)	



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>21. Gathering evidence That the court and other relevant participants be encouraged to give greater priority to the holding of limited evidence and preservation hearings, coupled with contemporaneous dispute resolution.</p>	<p>Accepted to the extent it is consistent with the Government response to Recommendation 1. While limited evidence and preservation hearings can be conducted by the court while a matter is in mediation before the tribunal, the court should not engage in mediation in relation to the preservation hearing while the claim remains before the tribunal. The court should also consult with the tribunal on the timing of such hearings, to avoid disruption to the tribunal mediation.</p>		
<p>22. Section 137 inquiries That s137 of the NTA not be amended.</p>	<p>Accepted.</p>	<p>No change</p>	



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p>23. Federal Court power to request tribunal inquiries</p> <p>That the NTA be amended to empower the Chief Justice to request that the tribunal hold an inquiry of the kind outlined in Recommendation 3, subject to the president's consideration of the availability of resources and the likely workload of the proposed inquiry.</p>	Accepted.	NTA s138B(1)(c)	The president of the tribunal may at the request of the Chief Justice of the Federal Court direct the tribunal to hold an inquiry in relation to a matter or an issue relevant to the determination of native title under s225.
<p>24. Federal Court</p> <p>That the court be encouraged to adopt a practice note setting out the court's preferred method for managing native title claims to ensure all parties have a shared understanding of the process.</p>	Accepted.		Federal Court has adopted a practice note.