



Native Title Amendment Act 2007

No. 61, 2007

An Act to amend legislation in relation to native title, and for related purposes

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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No. 61, 2007

An Act to amend legislation in relation to native title, and for related purposes

[Assented to 15 April 2007]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Native Title Amendment Act 2007*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.
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Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	15 April 2007
2. Schedules 1 and 2	The day on which this Act receives the Royal Assent.	15 April 2007
3. Schedule 3, items 1 to 4	At the same time as the provision(s) covered by table item 2.	
4. Schedule 3, item 5	Immediately before the commencement of Schedule 1 to the <i>Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006</i> .	1 July 2007
5. Schedule 4	The day on which this Act receives the Royal Assent.	15 April 2007

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments relating to representative Aboriginal/Torres Strait Islander bodies

Part 1—Amendments

Native Title Act 1993

1 Section 201A (definition of *executive officer*)

Repeal the definition, substitute:

executive officer means:

- (a) in relation to a representative body:
 - (i) a director of the representative body; or
 - (ii) any other person who is concerned in, or takes part in, the management of the representative body at a senior level; or
- (b) in relation to a body to whom funding is made available under subsection 203FE(1) or (2):
 - (i) if the body is a body corporate—a director of the body; or
 - (ii) in any case—a person who is concerned in, or takes part in, the management of the body at a senior level.

2 Section 201A (definition of *transition period*)

Repeal the definition, substitute:

transition period means the period beginning at the start of the transitional commencing day and ending at the end of 30 June 2007.

3 Section 201A

Insert:

transitional commencing day means the day on which Schedule 1 to the *Native Title Amendment Act 2007* commences.

4 Section 201A

Insert:

transitionally affected area has the meaning given by section 201C.

5 After paragraph 201B(1)(b)

Insert:

(ba) a company incorporated under the *Corporations Act 2001*; or

6 At the end of Division 1 of Part 11

Add:

201C Transitionally affected areas

- (1) Each area for which there was a representative body on the transitional commencing day is a *transitionally affected area*.
- (2) However, if that area (the *original area*) is extended under section 203AE, varied under section 203AF or reduced under section 203AG before the day on which particular action is taken, then on that day, the *transitionally affected area* is taken to be the original area as extended, varied or reduced under the relevant section.

Note: It may be necessary to identify a transitionally affected area when a number of actions are taken, such as the making of an invitation under section 203A in compliance with subsections 203AA(1) and (2), the making of an application under section 203AB for a body to be recognised as the representative body for an area, and the recognition of a body as the representative body for an area under subsection 203AD(1A).

6A Subsection 203A(1)

Repeal the subsection, substitute:

- (1) Subject to section 203AA, the Commonwealth Minister may:
 - (a) invite applications from eligible bodies, in the way determined in writing by the Commonwealth Minister, for recognition as the representative body for an area; or
 - (b) invite an eligible body, in writing, to make an application for recognition as the representative body for an area.

6B Subsection 203A(2)

After “for which”, insert “an application or”.

6C Subsection 203A(3)

After “within which”, insert “the application or”.

7 After subsection 203A(3)

Insert:

- (3A) The invitation may specify the period for which an eligible body would be recognised, if the body successfully applied for recognition. The period must be:
- (a) unless subsection (3B) applies, of no less than 2 years; and
 - (b) of no more than 6 years.
- (3B) The period specified may be of less than 2 years, but no less than 1 year, if:
- (a) the body is under external administration; or
 - (b) a person is currently appointed, under a condition imposed by the Secretary in compliance with paragraph 203CA(1)(e), to deal with funds provided under Division 4 of this Part to the body; or
 - (c) the Commonwealth Minister is of the opinion that specifying a period of that length would promote the efficient performance of the functions mentioned in subsection 203B(1).

7A Subsection 203A(4)

Omit “under subsection (1) for inviting applications”, substitute “under paragraph (1)(a) for inviting applications from eligible bodies”.

8 Section 203AA

Repeal the section, substitute:

203AA Inviting applications from representative bodies during the transition period

Commonwealth Minister to invite applications

- (1) As soon as practicable after the start of the transition period, the Commonwealth Minister must make an invitation under section 203A in respect of each transitionally affected area.

- (2) The invitation in respect of a particular transitionally affected area must only be made to the body that was, on the transitional commencing day, the representative body for the transitionally affected area, as it stood on that day.

Example: Body A is the recognised body for Area A on the transitional commencing day. Body B is the recognised body for Area B on the transitional commencing day.

The areas for which Body A and Body B are recognised are varied under section 203AF by recognising Body A as the representative body for a slice of Area B. The variation takes effect after the transitional commencing day.

Invitations are then made. At the time when that action is taken, the transitionally affected area for Body A is Area A, plus the slice of Area B for which Body A has now been recognised as the representative body (*Area A+*). The transitionally affected area for Body B is Area B, less the slice of Area B for which Body A has now been recognised as the representative body (*Area B-*).

The invitation for Area A+ is made to Body A. The invitation for Area B- is made to Body B.

Period for which the body will be recognised

- (3) The invitation must specify the period for which the body would be recognised, if an application were made. The period specified must be:
- (a) unless subsection (3A) applies, of no less than 2 years; and
 - (b) of no more than 6 years.
- (3A) The period specified may be of less than 2 years, but no less than 1 year, if:
- (a) the body is under external administration; or
 - (b) a person is currently appointed, under a condition imposed by the Secretary in compliance with paragraph 203CA(1)(e), to deal with funds provided under Division 4 of this Part to the body; or
 - (c) the Commonwealth Minister is of the opinion that specifying a period of that length would promote the efficient performance of the functions mentioned in subsection 203B(1).

Invitations need not all be made at same time

- (4) The invitations mentioned in subsection (1) need not all be made at the same time.

Further invitations during the transition period

- (5) Subject to subsection (6), no other invitation may be made under section 203A in respect of a transitionally affected area or an area wholly or partly within such an area, during the transition period.
- (6) The Commonwealth Minister may make another invitation under section 203A within the transition period in respect of a transitionally affected area, or an area wholly or partly within such an area, if the body to whom the invitation was made in compliance with subsections (1) and (2) has not applied for recognition as the representative body for the area within the relevant application period under subsection 203A(3), or such further period as the Commonwealth Minister allows.

8A Subsection 203AB(1)

Repeal the subsection, substitute:

- (1) Subject to subsection (3), an eligible body may apply to the Commonwealth Minister, in the form approved by the Commonwealth Minister, for recognition as the representative body for the area, or for one or more of the areas, in respect of which:
- (a) the body has been invited under section 203A to make an application; or
 - (b) eligible bodies have been invited under section 203A to make applications.

9 Subsection 203AB(3)

Repeal the subsection, substitute:

Invitation to existing representative bodies

- (3) If the invitation was made for a transitionally affected area in compliance with subsections 203AA(1) and (2):
- (a) only the body to whom the invitation was made may make an application; and

- (b) the invitation is taken, for the purposes of subsection (1), to have been made for the transitionally affected area as it stands on the day on which the application is made.

10 Paragraph 203AC(1A)(b)

Repeal the paragraph, substitute:

- (b) if, during the transition period, an application is made in respect of a transitionally affected area by the body to whom an invitation was made in relation to the area in compliance with subsections 203AA(1) and (2)—in any event before the end of the transition period.

11 Subsection 203AD(1)

Omit “The”, substitute “Subject to subsection (1A), the”.

12 Subsection 203AD(1)

Omit “by written instrument”, substitute “by legislative instrument”.

13 Paragraphs 203AD(1)(a) and (b)

Repeal the paragraphs.

14 After subsection 203AD(1)

Insert:

Representative bodies for transitionally affected area

- (1A) The Commonwealth Minister must, by legislative instrument, recognise, as the representative body for a transitionally affected area, a body that:
 - (a) was, on the transitional commencing day, the representative body for the transitionally affected area, as it stood on that day; and
 - (b) has, during the transition period, applied under section 203AB to be the representative body for the transitionally affected area, as it stood on the day the application was made.

Instrument recognising body not disallowable

- (1B) Section 42 of the *Legislative Instruments Act 2003* does not apply to a legislative instrument made under subsection (1A).

15 Subsection 203AD(2)

Repeal the subsection, substitute:

When recognition takes effect

- (2) The recognition of the body as a representative body takes effect:
- (a) if the body is recognised under subsection (1)—on the day specified in the instrument of recognition; or
 - (b) if the body is recognised under subsection (1A)—on 1 July 2007.

When recognition ceases to have effect

- (2A) If a body that is recognised under subsection (1) as the representative body for a transitionally affected area is to be recognised under subsection (1A) as the representative body for the area:
- (a) the body's recognition under subsection (1) ceases to have effect at the end of 30 June 2007; and
 - (b) the body's recognition under subsection (1A) ceases to have effect at the end of the day specified in the instrument of recognition.
- (2B) If a body is recognised under subsection (1), and that recognition takes effect on or after 1 July 2007, that recognition ceases to have effect at the end of the day specified in the instrument of recognition.
- (2C) In any other case, the recognition of a body ceases to have effect at the end of 30 June 2007 or, if the body's recognition is earlier withdrawn under section 203AH, at the end of the day on which the withdrawal of the recognition takes effect.

Limits on the period of recognition

- (2D) However:
- (a) if the body applied for recognition on the basis of an invitation in which the period of recognition was specified—

the period of recognition specified in the instrument of recognition must be for the period stated in the invitation; and

- (b) if the body applied for recognition on the basis of an invitation in which no period of recognition was specified—the period of recognition specified in the instrument of recognition must be:
 - (i) unless subsection (2E) applies, of no less than 2 years; and
 - (ii) of no more than 6 years.

(2E) The period specified may be of less than 2 years, but no less than 1 year, if:

- (a) the body is under external administration; or
- (b) a person is currently appointed, under a condition imposed by the Secretary in compliance with paragraph 203CA(1)(e), to deal with funds provided under Division 4 of this Part to the body; or
- (c) the Commonwealth Minister is of the opinion that specifying a period of that length would promote the efficient performance of the functions mentioned in subsection 203B(1).

16 Subsection 203AD(3)

Omit “The”, substitute “Subject to subsection (1A), the”.

17 Subsection 203AD(4)

Repeal the subsection (including the note), substitute:

- (4) The Commonwealth Minister must not, under this section, recognise a body as the representative body for an area, with effect from a particular day, if a body has already been recognised as the representative body for all or part of the area, and that recognition will still be in effect on that day.

18 Section 203AE

Repeal the section, substitute:

203AE Extension of areas

- (1) This section applies if the boundary of an area for which a body is the representative body adjoins an area for which there is no representative body.

Commonwealth Minister may extend area

- (2) The Commonwealth Minister may, by legislative instrument, extend the area for which the body is the representative body, by adding the adjoining area, if the Commonwealth Minister is satisfied that, after the extension, the body will satisfactorily perform its functions in relation to the extended area.

Extension on application by the body or on Commonwealth Minister's own initiative

- (3) The Commonwealth Minister may extend the area:
- (a) on the application, in writing, of the body; or
 - (b) on the Commonwealth Minister's own initiative.

Notice that extension of area is being considered

- (4) The Commonwealth Minister may only extend the area on his or her own initiative if, at least 60 days before deciding to extend the area, the Commonwealth Minister:
- (a) notifies the body, in writing, that the extension is being considered; and
 - (b) notifies the public in the determined way that the extension is being considered.
- (5) The notice to the body must:
- (a) identify the proposed extension; and
 - (b) state the reasons why the Minister is considering extending the area; and
 - (c) invite the body to make submissions to the Commonwealth Minister, within the period specified in the notice, about whether the area should be extended.

The period specified must not begin before the day on which the notice is given to the body, and must be a period of at least 60 days.

- (6) The notice to the public must invite the public to make submissions to the Commonwealth Minister, within the period specified in the notice, about whether the area should be extended. The period specified must not begin before the day on which notice is given to the body in accordance with subsections (4) and (5), and must be a period of at least 60 days.

Consideration of reports etc.

- (7) In deciding whether to extend the area, the Commonwealth Minister may consider the following:
- (a) any reports under section 203DF of audits or investigations of the body;
 - (b) any reports under section 193X of the *Aboriginal and Torres Strait Islander Act 2005* in relation to funding provided to the body under section 203C or 203FE of this Act;
 - (c) any notices that the Secretary of the Department has given to the Commonwealth Minister under section 203F in relation to the body.

Commonwealth Minister's consideration of other matters unaffected

- (8) Subsection (7) does not limit any other matters that the Commonwealth Minister may take into account in deciding whether to extend the area.

Consideration of submissions

- (9) In deciding whether to extend the area, the Commonwealth Minister must consider any submissions made by the body or the public within the periods referred to in subsections (5) and (6).

Notice of decision

- (10) As soon as practicable after deciding whether to extend the area, the Commonwealth Minister must notify the body, in writing, of:
- (a) the decision; and
 - (b) the reasons for the decision.

When extension takes effect

- (11) The extension of the area for which the body is the representative body takes effect on:
- (a) the day on which the instrument extending the area is made; or
 - (b) if a later day is specified in that instrument—that day.

19 Section 203AF

Repeal the section, substitute:

203AF Variation of adjoining areas

- (1) This section applies if the boundary of an area for which a body is the representative body adjoins the boundary of an area for which another body is the representative body.

Commonwealth Minister may vary areas

- (2) The Commonwealth Minister may, by legislative instrument, vary the areas for which each body is the representative body if the Commonwealth Minister is satisfied that, after the variation, the bodies will satisfactorily perform their functions in relation to their respective areas.

Variation on application by the bodies or on Commonwealth Minister's own initiative

- (3) The Commonwealth Minister may vary the areas:
- (a) on the joint application, in writing, of the bodies; or
 - (b) on the Commonwealth Minister's own initiative.

Notice that variation of areas is being considered

- (4) The Commonwealth Minister may only vary the areas on his or her own initiative if, at least 60 days before deciding to vary the areas, the Commonwealth Minister:
- (a) notifies the bodies, in writing, that the variation is being considered; and
 - (b) notifies the public in the determined way that the variation is being considered.

- (5) The notice to the bodies must:
- (a) identify the proposed variation; and
 - (b) state the reasons why the Minister is considering varying the areas; and
 - (c) invite the bodies to make submissions to the Commonwealth Minister, within the period specified in the notice, about whether the areas should be varied.

The period specified must not begin before the day on which the notice is given to the bodies, and must be a period of at least 60 days.

- (6) The notice to the public must invite the public to make submissions to the Commonwealth Minister, within the period specified in the notice, about whether the areas should be varied. The period specified must not begin before the day on which notice is given to the bodies in accordance with subsections (4) and (5), and must be a period of at least 60 days.

Consideration of reports etc.

- (7) In deciding whether to vary the areas, the Commonwealth Minister may consider the following:
- (a) any reports under section 203DF of audits or investigations of the bodies;
 - (b) any reports under section 193X of the *Aboriginal and Torres Strait Islander Act 2005* in relation to funding provided to the bodies under section 203C or 203FE of this Act;
 - (c) any notices that the Secretary of the Department has given to the Commonwealth Minister under section 203F in relation to the bodies.

Commonwealth Minister's consideration of other matters unaffected

- (8) Subsection (7) does not limit any other matters that the Commonwealth Minister may take into account in deciding whether to vary the areas.

Consideration of submissions

- (9) In deciding whether to vary the areas, the Commonwealth Minister must consider any submissions made by the bodies or the public within the periods referred to in subsections (5) and (6).

Notice of decision

- (10) As soon as practicable after deciding whether to vary the areas, the Commonwealth Minister must notify the bodies, in writing, of:
- (a) the decision; and
 - (b) the reasons for the decision.

When variation takes effect

- (11) The variation of the areas takes effect on:
- (a) the day on which the instrument varying the areas is made; or
 - (b) if a later day is specified in that instrument—that day.

20 Subsections 203AG(1) and (2)

Repeal the subsections, substitute:

Grounds for reducing the area of representative bodies

- (1) The Commonwealth Minister may, by legislative instrument, reduce the area for which a body is the representative body by excising a specified part of the area if the Commonwealth Minister is satisfied that the body is not satisfactorily performing its functions in relation to that part of the area.

Effect on remainder of areas

- (2) The Commonwealth Minister must not reduce the area unless satisfied that, after the reduction, the body will satisfactorily perform its functions in relation to the remainder of the area.

21 Subsection 203AG(3)

Omit “90 days” (wherever occurring), substitute “60 days”.

22 At the end of section 203AG

Add:

When reduction takes effect

- (8) The reduction of the area for which the body is the representative body takes effect on:
- (a) the day on which the instrument reducing the area is made; or
 - (b) if a later day is specified in that instrument—that day.

23 Subsection 203AH(1)

Omit “by written instrument”, substitute “by legislative instrument”.

24 Subsection 203AH(2)

Repeal the subsection, substitute:

Discretionary grounds for withdrawing recognition

- (2) The Commonwealth Minister may, by legislative instrument, withdraw the recognition of a body as the representative body for an area if satisfied that:
- (a) the body is not satisfactorily performing its functions; or
 - (b) there are serious or repeated irregularities in the financial affairs of the body.

25 Subsection 203AH(3)

Omit “90 days” (wherever occurring), substitute “60 days”.

26 At the end of section 203AH

Add:

- (8) The withdrawal of the recognition takes effect:
- (a) on the day on which the instrument withdrawing recognition is made; or
 - (b) if a later day is specified in that instrument—that day.

27 Subsection 203AI(1)

Repeal the subsection, substitute:

Fairness of organisational structures and administrative processes

- (1) In considering, for the purposes of making a decision under this Division in relation to a particular area, whether a body will satisfactorily perform, or is satisfactorily performing, its functions

as a representative body, the Commonwealth Minister must take into account whether, in the Commonwealth Minister's opinion, the body's organisational structures and administrative processes will operate, or are operating, in a fair manner.

28 Paragraph 203BD(a)

Omit "the body", substitute "a body".

29 Paragraph 203CA(1)(d)

Repeal the paragraph, substitute:

- (d) the giving of information relating to the expenditure of the money, including the production and publication of financial statements; and

30 Subsection 203CA(2)

Repeal the subsection.

31 Section 203D

Repeal the section.

32 Subsection 203DA(1) (second sentence)

Repeal the sentence, substitute:

It must keep those records in a way that allows them to be conveniently and properly audited in accordance with this Division.

33 Sections 203DC and 203DD

Repeal the sections.

34 Section 203DE

Repeal the section.

35 Paragraph 203DF(2)(b)

Repeal the paragraph, substitute:

- (b) a failure to satisfactorily perform its functions.

36 Section 203DH

Before "A withdrawal", insert "(1)".

37 At the end of section 203DH

Add:

- (2) The fact that the recognition of a body as a representative body for a particular area ceases to have effect does not affect the undertaking of an inspection and audit, or investigation, under section 203DF.

38 Paragraphs 203F(a) and (b)

Repeal the paragraphs.

39 Paragraph 203F(d)

After “there may be”, insert “serious or repeated”.

40 Paragraphs 203FB(3)(b) and (7)(b)

Omit “a grant of money”, substitute “funding available”.

41 After subsection 203FC(1)

Insert:

- (1A) An instrument made under subsection (1) is not a legislative instrument.

42 Subsection 203FE(1)

Omit “for which there is no representative body”.

Note: The heading to subsection 203FE(1) is replaced by the heading “*Funding to perform functions of a representative body*”.

44 Paragraph 203FE(3)(g)

Repeal the paragraph, substitute:

- (g) the giving of information relating to the performance of the functions referred to in subsection (1) or (2), as the case requires, including the production and publication of financial statements.

45 After section 203FE

Insert:

203FEA Application of this Act to persons and bodies funded under subsection 203FE(1)

Subsection 203FE(1) body has the same obligations and powers as a representative body

- (1) A person or body to whom funding is made available under subsection 203FE(1) to perform a function in respect of a particular area has the same obligations and powers in relation to the performance of that function as a body recognised as the representative body for that area would have in relation to the performance of that function.

Third parties should treat subsection 203FE(1) bodies in the same way as representative bodies

- (2) A person (the *third party*) has the same obligations and powers, in relation to a person or body to whom funding is made available under subsection 203FE(1) to perform a function in respect of a particular area, as the third party would have in relation to a body recognised as the representative body for that area who is performing, or has performed, that function.

Effect of certain provisions on subsection 203FE(1) bodies

- (3) Without limiting subsection (1) or (2), the following provisions apply in the following ways:
- (a) subsection 24DD(2) applies as if a person or body to whom funding is made available under subsection 203FE(1) to perform all of the functions of a representative body in respect of a specified area were the representative body for the area;
 - (b) section 203BD applies as if a person or body to whom funding is made available under subsection 203FE(1) to perform the facilitation and assistance functions in respect of a particular area were the representative body for the area;
 - (c) section 203FC applies in relation to a person or body to whom funding was made available under subsection 203FE(1) to perform some or all of the functions of a representative body in respect of a particular area, but who has ceased to perform those functions in respect of that area, in the same way as it would apply in relation to a former

representative body (as defined for the purposes of that section) who had performed those functions in respect of that area;

(d) section 203FCA applies:

- (i) in relation to a person or body to whom funding is made available under subsection 203FE(1) to perform some or all of the functions of a representative body in respect of a particular area—in the same way as it applies in relation to a representative body performing those functions in respect of that area; and
- (ii) in relation to a person or body to whom funding was made available under subsection 203FE(1) to perform some or all of the functions of a representative body in respect of a particular area, but who has ceased to perform those functions in respect of that area—in the same way as it would apply in relation to a former representative body (as defined for the purposes of section 203FC) who had performed that function in respect of that area.

Inspection, audit and investigation under section 203DF not affected by funding ceasing

(4) The fact that:

- (a) the period within which funding made available under subsection 203FE(1) is to be spent has expired; or
- (b) funding under that subsection has otherwise ceased to be available;

does not affect the undertaking of an inspection and audit, or investigation, under section 203DF.

Further application may be prescribed

(5) Without limiting the other provisions of this section, the regulations may prescribe the way in which other provisions of this Act are to apply in relation to a person or body to whom funding is made available under subsection 203FE(1).

203FEB Application of this Act to persons and bodies funded under subsection 203FE(2)

Obligations and powers of persons and bodies to whom funding is made available

- (1) A person or body to whom funding is made available under subsection 203FE(2) to perform specified facilitation and assistance functions in relation to a matter has the same obligations and powers in relation to the performance of those functions in relation to that matter as a body recognised as the representative body for that area would have in relation to the performance of those functions in relation to that matter.

Obligations and powers of third parties in relation to those bodies

- (2) A person (the **third party**) has the same obligations and powers, in relation to a person or body to whom funding is made available under subsection 203FE(2) to perform specified facilitation and assistance functions in relation to a matter, as the third party would have in relation to a body recognised as the representative body for the relevant area who is performing, or has performed, those functions in relation to that matter.

Section 203BD arrangements ineffective during funding period

- (3) Subsection (4) applies if, as a result of a review under section 203FB of a refusal by a representative body for an area (the **original body**) to perform facilitation and assistance functions in relation to a matter, funding is made available to a person or body under subsection 203FE(2) to perform specified facilitation and assistance functions in relation to the matter.
- (4) Despite section 203BD, the representative body for an adjoining area cannot perform those functions in relation to that matter during the period within which the funding is to be spent, even if that body enters into an arrangement with the original body to do so.

Effect of certain other provisions on subsection 203FE(2) bodies

- (5) Without limiting subsection (1) or (2), the following provisions apply in the following ways:

- (a) section 203FC applies in relation to a person or body to whom funding was made available under subsection 203FE(2) to perform specified facilitation and assistance functions in relation to a matter, but who has ceased to perform those functions in relation to that matter, in the same way as it would apply in relation to a former representative body (as defined for the purposes of that section) who had performed those functions in relation to that matter;
- (b) section 203FCA applies:
 - (i) in relation to a person or body to whom funding is made available under subsection 203FE(2) to perform specified facilitation and assistance functions in relation to a matter—in the same way as it would apply in relation to a representative body performing those functions in relation to that matter; and
 - (ii) in relation to a person or body to whom funding was made available under subsection 203FE(2) to perform specified facilitation and assistance functions in relation to a matter, but who has ceased to perform those functions in relation to that matter—in the same way as it would apply in relation to a former representative body (as defined for the purposes of section 203FC) who had performed those functions in relation to that matter.

Inspection, audit and investigation under section 203DF not affected by funding ceasing

- (6) The fact that:
 - (a) the period within which funding made available under subsection 203FE(2) is to be spent has expired; or
 - (b) funding under that subsection has otherwise ceased to be available;

does not affect the undertaking of an inspection and audit, or investigation, under section 203DF.

Further application may be prescribed

- (7) Without limiting the other provisions of this section, the regulations may prescribe the way in which other provisions of this Act are to apply in relation to a person or body to whom funding is made available under subsection 203FE(2).

203FEC Certain provisions do not apply to persons and bodies funded under subsection 203FE(1) or (2)

- (1) Section 203C does not apply in relation to the performance of a function, or the exercise of a power in relation to the performance of a function, by a person or body if funding is made available to the person or body under subsection 203FE(1) or (2) to perform the function.
- (2) Section 203F does not apply in relation to:
 - (a) the performance of a function by a person or body; or
 - (b) serious or repeated irregularities in the financial affairs of a person or body in relation to the performance of a function by the person or body;if funding is made available to the person or body under subsection 203FE(1) or (2) to perform the function.
- (3) Section 203FB does not apply in relation to a person or body to whom funding is made available under subsection 203FE(2) to perform specified facilitation and assistance functions in relation to a matter, to the extent that the section would otherwise apply to the performance of those functions in relation to that matter by that person or body.

203FED Liability

- (1) A person to whom funding is made available under subsection 203FE(1) or (2) to perform a function is not personally liable to an action or other proceeding for damages in relation to an act done or omitted to be done in good faith by the person in connection with the performance of the function, or the exercise of the person's powers in relation to the performance of the function.
- (2) An executive officer or a member of a body to whom funding is made available under subsection 203FE(1) or (2) to perform a function is not personally liable to an action or other proceeding for damages in relation to an act done or omitted to be done in good faith by:
 - (a) the body; or
 - (b) the person in the capacity of executive officer or member of the body;

Schedule 1 Amendments relating to representative Aboriginal/Torres Strait Islander bodies

Part 1 Amendments

in connection with the performance of the function, or the exercise of powers in relation to the performance of the function.

46 Subsection 203FF(2)

Repeal the subsection.

47 Section 203FI

Omit “, 203FE and 203FG”, substitute “and 203FE”.

Legislative Instruments Act 2003

47A Subsection 54(2) (table item 26)

Omit “section 203AD, 203AE, 203AF or 203AG, subsection 203AH(1) or (2),”, substitute “subsection”.

Part 2—Application

48 Definition

In this Part:

commencing day means the day on which this Schedule commences.

49 Amendment made by item 7

The amendment made by item 7 applies to an invitation made on or after the commencing day.

50 Amendment made by item 12

The amendment made by item 12 applies to the recognition of an eligible body as a representative body for an area where the instrument of recognition is made on or after the commencing day.

51 Amendment made by item 13

The amendment made by item 13 applies to the recognition of an eligible body as a representative body for an area where that recognition takes effect on or after the commencing day.

52 Amendment made by item 18

The amendment made by item 18 applies to an extension of the area for which a body is the representative body where the instrument extending the area is made on or after the commencing day.

53 Amendment made by item 19

The amendment made by item 19 applies to a variation of areas where the instrument varying the areas is made on or after the commencing day.

54 Amendments made by items 20, 21 and 22

The amendments made by items 20, 21 and 22 apply to a reduction of the area for which a body is the representative body where the instrument reducing the area is made on or after the commencing day.

55 Amendment made by item 23

The amendment made by item 23 applies to the withdrawal of the recognition of a body as the representative body for an area where the instrument withdrawing the recognition of the body is made on or after the commencing day.

56 Amendments made by items 24, 25 and 26

The amendments made by items 24, 25 and 26 apply to the withdrawal of the recognition of a body as the representative body for an area where the instrument withdrawing the recognition of the body is made on or after the commencing day.

57 Amendment made by item 27

The amendment made by item 27 applies to the recognition of a body as the representative body for an area, the extension, variation or reduction of the area in respect of which a body is recognised, and the withdrawal of the recognition of a body, where the relevant instrument is made on or after the commencing day.

58 Amendment made by item 29

The amendment made by item 29 applies in relation to funds provided to a representative body under Division 4 of Part 11 of the *Native Title Act 1993* on or after the commencing day.

59 Amendments made by items 33 and 34

The amendments made by items 33 and 34 apply in relation to financial years beginning on or after 1 July 2006.

60 Amendments made by items 42 and 43

The amendments made by items 42 and 43 apply to funding made available to a person or body on or after the commencing day.

61 Amendment made by item 44

The amendment made by item 44 applies to funds provided to a person or body under section 203FE of the *Native Title Act 1993* on or after the commencing day.

62 Amendment made by item 45

The amendment made by item 45 applies to funding made available to a person or body under section 203FE of the *Native Title Act 1993* on or after the commencing day.

Schedule 2—Claims resolution review

Part 1—Amendments

Native Title Act 1993

1 After subsection 64(1A)

Insert:

Amendments taken to have been made in certain cases

- (1B) An application is taken to have been amended to reduce the area of land or waters covered by the application if an order is made under section 87A by the Federal Court. The area of land or waters is reduced by the area in relation to which the order is made.
- (1C) Subsection (1B) does not, by implication, limit the amendment of applications in any other way.

2 After section 66B

Insert:

66C Registrar's role in relation to certain applications relating to future acts

- (1) If:
- (a) an application is of the kind mentioned in paragraph 94C(1)(a); and
 - (b) paragraph 94C(1)(b) is satisfied in relation to the application; and
 - (c) paragraph 94C(1)(c) is satisfied in relation to the applicant; and
 - (d) paragraph 94C(1)(d) is satisfied in relation to the relevant future act;
- the Registrar may advise the Registrar of the Federal Court of those facts.
- (2) The Registrar may seek advice from the relevant governmental officials in the Commonwealth or in a State or Territory as to:

- (a) whether all or part of an area specified in a future act notice is included in the area covered by an application; and
 - (b) whether paragraph 94C(1)(d) is satisfied for each future act identified in a future act notice;
- and may advise the Registrar of the Federal Court accordingly.

(3) In this section:

future act notice has the same meaning as in section 94C.

3 Subparagraph 84(3)(a)(i)

Omit “paragraph 66(3)(a)”, substitute “any of subparagraphs 66(3)(a)(i) to (vi)”.

4 Subparagraph 84(3)(a)(iii)

Omit “interests”, substitute “interest, in relation to land or waters,”.

5 At the end of subsection 84(5)

Add “and it is in the interests of justice to do so”.

6 Section 86

Before “Subject to”, insert “(1)”.

7 At the end of section 86

Add:

- (2) Subject to subsection 82(1), the Federal Court:
 - (a) must consider whether to receive into evidence the transcript of evidence from a native title application inquiry; and
 - (b) may draw any conclusions of fact from that transcript that it thinks proper; and
 - (c) may adopt any recommendation, finding, decision or determination of the NNTT in relation to the inquiry.

8 Subsection 86A(1)

After “purpose of mediation”, insert “by the NNTT”.

9 Subsection 86A(2)

After “purpose of mediation”, insert “by the NNTT”.

10 Subsection 86B(1)

Omit “subsection (2)”, substitute “subsection (3)”.

11 Subsection 86B(1)

After “that there be no mediation”, insert “by the NNTT”.

12 Subsection 86B(2)

Repeal the subsection.

13 Subsection 86B(3)

Omit “, upon application under subsection (2) or if it is considering making an order of its own motion,”, substitute “, either on the application of a party or of its own motion,”.

14 Subsection 86B(3)

After “that there be no mediation”, insert “by the NNTT”.

15 Paragraph 86B(3)(a)

After “any mediation”, insert “(whether or not by the NNTT)”.

16 Paragraph 86B(3)(b)

After “to reach agreement”, insert “in the course of mediation by the NNTT”.

17 Subsection 86B(4)

After “that there be no mediation”, insert “by the NNTT”.

18 After paragraph 86B(4)(e)

Insert:

(ea) any submission made by the NNTT under subsection 86BA(1);

19 At the end of section 86B

Add:

(6) If the Court refers the whole or a part of a proceeding for mediation under subsection (1) or (5), then, unless the mediation ceases because an order is made under section 86C:

- (a) no aspect of the proceeding is to be referred for mediation under the *Federal Court of Australia Act 1976*; and
- (b) no order is to be made by the Federal Court requiring the parties to attend before a Registrar of the Federal Court for a conference with a view to satisfying the Registrar that all reasonable steps to achieve a negotiated outcome of the proceeding have been taken.

20 After section 86B

Insert:

86BA Right of appearance

- (1) The NNTT has the right to appear before the Federal Court at a hearing to determine whether to make an order under subsection 86B(3) that there be no mediation by the NNTT in relation to the whole or a part of a proceeding.
- (2) The NNTT has the right to appear before the Court at a hearing that relates to any matter that is currently before the NNTT for mediation for the purpose of assisting the Court in relation to a proceeding.
- (3) To avoid doubt, subsection 136A(4) applies to the NNTT when it exercises its right to appear before the Court.
- (4) Subsection 136A(5) does not prevent a member of the NNTT who presides over a conference under that subsection in relation to a proceeding from representing the NNTT when it exercises its right to appear before the Court.
- (5) This section does not give the NNTT the right to become a party to proceedings mentioned in subsection (1) or (2).

21 Subsection 86C(1)

After “order that mediation”, insert “by the NNTT”.

22 Paragraph 86C(1)(a)

After “any further mediation”, insert “(whether or not by the NNTT)”.

23 Paragraph 86C(1)(b)

After “to reach agreement”, insert “in the course of mediation by the NNTT”.

24 Subsection 86C(2)

After “the start of mediation”, insert “by the NNTT”.

25 Subsection 86C(2)

Omit “that mediation”, substitute “that the mediation”.

26 Subsection 86C(3)

After “an order that mediation”, insert “by the NNTT”.

27 Subsection 86C(4)

After “that the mediation”, insert “by the NNTT”.

28 Subsection 86C(5)

Omit all the words after “take into account”, substitute “any report or work plan provided to the Court under subsection 136G(2), (2A), (3), (3A) or (3B)”.

29 Subsection 86D(1)

After “at any time during mediation”, insert “by the NNTT”.

30 At the end of subsection 86D(2)

Add “by the NNTT”.

31 At the end of section 86D

Add:

Directions to attend or produce documents for the purposes of mediation

- (3) If a report is given to the Court under subsection 136G(3B), the Court may make orders in similar terms to the directions that are the subject of the report.

Note: Under subsection 136G(3B), the presiding member at a mediation conference may make a report to the Court if the presiding member has given a direction to a party to appear at the conference, or produce documents, and that direction has not been complied with.

32 Section 86E

Before “The”, insert “(1)”.

33 At the end of section 86E

Add:

- (2) The Federal Court may request the NNTT to provide either or both of the following so as to assist the Court in progressing proceedings in a State, Territory or other region of Australia:
- (a) a report on the progress of all mediations conducted by the NNTT in relation to areas within the State, Territory or region (a *regional mediation progress report*);
 - (b) a work plan setting out the priority given to each mediation being conducted by the NNTT in relation to areas within the State, Territory or region (a *regional work plan*).

The Court may specify when the report or plan is to be provided.

34 After paragraph 87(1)(c)

Insert:

- and (d) the Court is satisfied that an order in, or consistent with, those terms cannot be made under section 87A;

35 At the end of Division 1C of Part 4

Add:

87A Power of Federal Court to make determination for part of an area

Application

- (1) This section applies if:
- (a) there is a proceeding in relation to an application for a determination of native title; and
 - (b) at any stage of the proceeding after the end of the period specified in the notice given under section 66, agreement is reached on a proposed determination of native title in relation to an area (the *determination area*) included in the area covered by the application; and
 - (c) all of the following persons are parties to the agreement:
 - (i) the applicant;

- (ii) each registered native title claimant in relation to any part of the determination area who is a party to the proceeding at the time the agreement is made;
 - (iv) each representative Aboriginal/Torres Strait Islander body for any part of the determination area who is a party to the proceeding at the time the agreement is made;
 - (v) each person who holds a proprietary interest, in relation to any part of the determination area, at the time the agreement is made, that is registered in a public register of interests in relation to land or waters maintained by the Commonwealth, a State or Territory and who is a party to the proceeding at the time the agreement is made;
 - (vi) each person who claims to hold native title in relation to land or waters in the determination area and who is a party to the proceeding at the time the agreement is made;
 - (vii) the Commonwealth Minister, if the Commonwealth Minister is a party to the proceeding at the time the agreement is made or has intervened in the proceeding at any time before the agreement is made;
 - (viii) if any part of the determination area is within the jurisdictional limits of a State or Territory, the State or Territory Minister for the State or Territory if the State or Territory Minister is a party to the proceeding at the time the agreement is made;
 - (ix) any local government body for any part of the determination area who is a party to the proceeding at the time the agreement is made; and
- (d) the terms of the proposed determination are in writing and signed by or on behalf of each of those parties.

Proposed determination may be filed with the Court

- (2) A party to the agreement may file a copy of the terms of the proposed determination of native title with the Federal Court.

Certain parties to the proceeding to be given notice

- (3) The Registrar of the Federal Court must give notice to the other parties to the proceeding that the proposed determination of native title has been filed with the Court.

Order may be made

- (4) The Court may make an order in, or consistent with, the proposed determination of native title without holding a hearing, or if a hearing has started, without completing the hearing, if the Court considers that:
- (a) an order in, or consistent with, the proposed determination would be within its power; and
 - (b) it would be appropriate to do so.

Note: As the Court's order involves making a determination of native title, the order needs to comply with section 94A (which deals with the requirements of native title determination orders).

- (5) In considering whether to make an order in, or consistent with, the proposed determination of native title, the Court must take into account any objections made by the other parties to the proceeding.

36 At the end of Division 3 of Part 4

Add:

94B Order relating to an application that has been referred to NNTT for mediation

If an application under section 61 is referred to the NNTT for mediation under section 86B, the Federal Court must take into account:

- (a) any report relating to the mediation that is provided to the Court under subsection 136G(1), (2) or (3); and
- (b) any regional mediation progress report and any regional work plan that is provided to the Court under subsection 136G(2A) or (3A) that covers a State, Territory or region that includes the area covered by the application;

when it decides whether to make an order relating to the application.

94C Order dismissing an application relating to a future act

- (1) Subject to subsections (2) and (3), the Federal Court must, on the application of a party or on its own motion, dismiss an application made by a person under section 61 if:
- (a) the application is for a determination of native title in relation to an area; and
 - (b) the application is made during the period of 3 months after the notification day specified in a future act notice given in relation to land or waters wholly or partly within the area; and
 - (c) the person becomes a registered native title claimant before the end of 4 months after the notification day specified in the future act notice; and
 - (d) one of the following subparagraphs is satisfied in relation to each future act identified in the future act notice:
 - (i) subsection 32(2) (which applies if no objection is made after the giving of a notice that the act attracts the expedited procedure) allows the act to be done;
 - (ii) a determination is made under subsection 32(4) that the act is an act attracting the expedited procedure;
 - (iii) native title parties have lodged one or more objections in relation to the act under subsection 32(3), but all such objections are withdrawn under subsection 32(6);
 - (iv) an agreement of the kind mentioned in paragraph 31(1)(b) is made;
 - (v) a determination is made under section 36A or 38 that the act may be done, or may be done subject to conditions being complied with;
 - (vi) a determination is made under section 36A or 38 that the act must not be done;
 - (vii) a determination that the act may be done, or may be done subject to conditions being complied with or must not be done, is declared to be overruled in accordance with section 42;
 - (viii) a circumstance or action mentioned in subparagraphs (i) to (vii) exists, occurs or is taken, under any alternative provisions that are equivalent to the provisions mentioned in subparagraphs (i) to (vii); and
 - (e) either:

- (i) 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
 - (ii) 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.
- (2) The Court must not dismiss the application without first ensuring that the person is given a reasonable opportunity to present his or her case about why the application should not be dismissed.
- (3) The Court must not dismiss the application if there are compelling reasons not to do so. However, the fact that:
 - (a) a subsequent future act notice has been given that specifies all or part of an area that is included in the area covered by the application; and
 - (b) paragraph (1)(d) is not satisfied in relation to each future act identified in the subsequent future act notice;is not, of itself, a compelling reason.
- (4) To avoid doubt, the Court's dismissal of an application under this section does not affect any rights, liabilities or obligations of a person under:
 - (a) an agreement of the kind mentioned in paragraph 31(1)(b); or
 - (b) a determination made under subsection 32(4) or section 36A, 38 or 42; or
 - (c) an agreement made in accordance with, or a determination made under, any alternative provisions that are equivalent to the provisions mentioned in paragraphs (a) and (b).
- (5) To avoid doubt, this section does not affect the Court's power to dismiss an application under the *Federal Court of Australia Act 1976*.
- (6) In this section:
alternative provisions means provisions provided for by a law of a State or Territory in respect of which the Commonwealth Minister has made a determination under paragraph 43(1)(b).

future act notice means:

- (a) a notice of a future act given under section 29; and
- (b) a notice of a future act given under alternative provisions.

37 At the end of subsection 108(1A)

Add “or 4AA”.

38 Paragraph 108(1B)(a)

Repeal the paragraph, substitute:

- (a) providing assistance, mediating or conducting a review in accordance with any provision of this Act; and

39 Paragraph 123(1)(b)

Repeal the paragraph, substitute:

- (b) the persons who are to:
 - (i) conduct mediation in a particular proceeding; or
 - (ii) provide assistance in making or negotiating agreements under this Act; or
 - (iii) conduct a review under this Act;

40 After paragraph 123(1)(c)

Insert:

- (ca) the persons who are to appear on behalf of the Tribunal under section 86BA;

41 Section 131A

Omit “assistance or mediation” (wherever occurring), substitute “assistance, mediation or review”.

42 Section 131B

Omit “assistance or mediation” (wherever occurring), substitute “assistance, mediation or review”.

43 Subsection 133(1)

Omit “of the management of the administrative affairs of the Tribunal”, substitute “that relates to the Tribunal’s activities”.

44 After subsection 133(2)

Insert:

- (2A) The report may include particulars of any failure to act in good faith and the reasons why the conduct was not in good faith, as allowed by section 136GB.

45 Before subsection 136B(1)

Insert:

Requiring parties to attend conferences

- (1A) The presiding member may direct a party to attend at a conference.

46 At the end of section 136B

Add:

Mediation in good faith

- (4) Each party and each person representing a party must act in good faith in relation to the conduct of the mediation.

47 After section 136C

Insert:

136CA Producing documents

The presiding member may, for the purposes of a conference, direct a party to produce a document to the presiding member on or before a day specified in the direction, if the presiding member considers that:

- (a) the document is in the possession, custody or control of the party; and
- (b) the production of the document may assist the parties to reach agreement on any matters mentioned in subsection 86A(1) or (2).

48 After section 136D

Insert:

136DA Referral of questions about whether a party should be dismissed

Referral of questions to Federal Court

- (1) Subject to subsections (2) and (3), if the presiding member considers that a party to a proceeding does not have a relevant interest in the proceeding, he or she may refer to the Federal Court the question of whether the party should cease to be a party to the proceeding.
- (2) For the purposes of the determination by the Court of that question, subsection 136A(4) does not apply to the extent that words spoken or acts done at a conference under that section relate to that question.

Presiding member not a consultant

- (3) If the presiding member is not a consultant engaged under subsection 131A(1), the question may only be referred to the Court under subsection (1) of this section:
 - (a) on the initiative of the presiding member; or
 - (b) at the request of a party, if the presiding member agrees.

Presiding member a consultant

- (4) If the presiding member is a consultant engaged under subsection 131A(1), the question may only be referred to the Court under subsection (1) of this section:
 - (a) on the initiative of the presiding member, if a presidential member agrees; or
 - (b) at the request of a party, if both the presiding member and a presidential member agree.

Mediation may continue

- (5) If a question has been referred to the Court under this section, the presiding member may continue mediation if he or she considers that it is appropriate.

Meaning of relevant interest

- (6) In this section, a person has a **relevant interest** in a proceeding if the person's interests may be affected by a determination in the proceeding.

49 Subsection 136G(2)

Omit "section 86E", substitute "subsection 86E(1)".

Note: The heading to subsection 136G(2) is replaced by the heading "*Report requested under subsection 86E(1)*".

50 After subsection 136G(2)

Insert:

Report requested under subsection 86E(2)

- (2A) The NNTT must provide a regional mediation progress report or a regional work plan to the Federal Court if requested to do so under subsection 86E(2).

51 After subsection 136G(3)

Insert:

Regional mediation progress reports and regional work plans

- (3A) The NNTT may provide either or both of the following to the Federal Court if the President considers that it would assist the Court in progressing proceedings in a State, Territory or other region of Australia:
- (a) a report on the progress of all mediations conducted by the NNTT in relation to areas within the State, Territory or region (a **regional mediation progress report**);
 - (b) a work plan setting out the priority given to each mediation being conducted by the NNTT in relation to areas within the State, Territory or region (a **regional work plan**).

Report to inform Court of failure to comply with a direction

- (3B) If a direction made by the presiding member under subsection 136B(1A) or section 136CA has not been complied with, the presiding member may provide a written report to the Federal Court setting out:

- (a) the details of the direction; and
- (b) the reasons for giving the direction.

52 At the end of Division 4A of Part 6

Add:

136GA Reports about breaches of the requirement to act in good faith

Reports to government

- (1) If the presiding member considers that a party mentioned in column 1 of the following table in relation to an item, or a person representing such a party, did not act or is not acting in good faith in relation to the conduct of a mediation, the presiding member may report that failure to the person mentioned in column 2 of the table in relation to the item:

Reports about persons who do or did not act in good faith		
Item	If the party is or a person represents ...	then, the presiding member may report the failure to act in good faith to ...
1	the Commonwealth	the Commonwealth Minister
2	a State or Territory	the State Minister or the Territory Minister for the State or Territory
3	a party that is provided with funds by the Attorney-General under section 183	the Attorney-General
4	a representative body that is provided with funds by the Secretary of the Department under section 203C	the Secretary of the Department
5	a person or body performing functions of a representative body that is provided with funds by the Secretary of the Department under section 203FE	the Secretary of the Department

Reports to legal professional bodies

- (2) If the presiding member considers that a legal practitioner did not act or is not acting in good faith in relation to the conduct of a mediation, the presiding member may report that failure to the relevant State or Territory legal professional body that issued the legal practitioner with a practising certificate.
- (3) For the purposes of a report made under subsection (2), subsection 136A(4) does not apply to the extent that words spoken or acts done at a conference under that section relate to the failure mentioned under subsection (2).

Reports to the Federal Court

- (4) If the presiding member considers that a party, or the party's representative, did not act or is not acting in good faith in relation to the conduct of a mediation, the presiding member may, despite subsection 136A(4), report that failure to the Federal Court (whether or not a report is also provided as mentioned in subsection (1) or (2)).

What a report must include

- (5) A report must include:
 - (a) the details of the failure to act in good faith; and
 - (b) the context in which the conduct took place.

Copy of report to be provided to the person to whom it relates

- (6) At the time that a report is provided as mentioned in subsection (1), (2) or (4), a copy of the report must also be provided to the person to whom it relates.

Presiding member not a consultant

- (7) If the presiding member is not a consultant engaged under subsection 131A(1), a report may only be provided under this section on the initiative of the presiding member.

Presiding member a consultant

- (8) If the presiding member is a consultant engaged under subsection 131A(1), a report may only be provided under this section on the initiative of the presiding member, if a presidential member agrees.

Mediation may continue

- (9) If a report is provided under this section, the presiding member may continue mediation if he or she considers that it is appropriate.

136GB Public reporting about breaches of the requirement to act in good faith

- (1) If the presiding member considers that a Government party, or that party's representative, did not act or is not acting in good faith in relation to the conduct of a mediation, the annual report may include particulars of that failure and the reasons why the presiding member considers that the conduct was not in good faith.
- (2) If it is proposed to make an inclusion in the annual report, the presiding member must inform the Government party, or that party's representative, before doing so.

53 After Division 4A of Part 6

Insert:

Division 4AA—Review on whether there are native title rights and interests

136GC Review on whether there are native title rights and interests

President may refer issue for review

- (1) The President may refer for review by the Tribunal the issue of whether a native title claim group who is a party in a proceeding holds native title rights and interests, as defined in subsection 223(1), in relation land or waters within the area that is the subject of the proceeding.

Referral on recommendation of presiding member

- (2) The issue may only be referred if:
- (a) the issue arises in the course of mediation by the Tribunal in the proceeding; and
 - (b) the member presiding at a conference held under section 136A in relation to the proceeding recommends that the review be conducted.

Recommendation by presiding member

- (3) The presiding member may only make the recommendation if the presiding member considers, after consultation with the parties to the proceeding, that a review of the issue would assist the parties to reach agreement on any of the matters mentioned in subsection 86A(1).

Member must conduct review

- (4) A review must be conducted by a member of the Tribunal.

Assistance for member conducting review

- (5) The member conducting a review may be assisted by another member of the Tribunal or by a member of the staff of the Tribunal.

Parties may give documents and information

- (6) A party in the proceeding may give documents or information to the member conducting the review for the purposes of the review. A party who gives documents or information is a **participating party**.

Statements at review are without prejudice

- (7) In a proceeding before the Court, unless the participating parties otherwise agree, evidence may not be given, and statements may not be made, concerning any word spoken or act done in the course of the review.

Member not to take further part in relation to a proceeding

- (8) Unless the participating parties otherwise agree, a member who presides over, or assists in, the conduct of a review may not, in any other capacity, take any further part in the proceeding.

Mediation may continue

- (9) If an issue has been referred for review under subsection (1), the presiding member may continue mediation if he or she considers that it is appropriate.

If mediation ceases, review must cease

- (10) If mediation ceases by order of the Federal Court under section 86C, the review must cease.

Consultants

- (11) If a consultant is engaged under subsection 131A(1) to conduct the mediation in relation to the proceeding, this Division applies as if the consultant were a member of the Tribunal.
- (12) If a consultant is engaged under subsection 131A(1) to conduct a review under this Division, this Division applies in relation to that review as if the consultant were a member of the Tribunal.

136GD Member conducting a review may prohibit disclosure of information

Power of member conducting the review

- (1) The member conducting the review may direct that:
- (a) any information given, or statements made, in the course of the review; or
 - (b) the contents of any document produced in the course of the review;
- must not be disclosed, or must not be disclosed except in such manner, and to such persons, as the member specifies.

Applications etc.

- (2) The member conducting the review may make the direction on his or her own initiative or on an application by a participating party.

Member conducting the review may disclose if participating parties agree

- (3) If the participating parties agree, the member conducting the review may, despite the direction, disclose things of the kind mentioned in paragraph (1)(a) or (b).

136GE Reports

Report after review concludes

- (1) The member conducting the review must, as soon as practicable after the review is concluded, provide a written report setting out the findings of the review to:
- (a) the presiding member in the mediation; and
 - (b) the participating parties.

However, the findings of the review are not binding on any of the participating parties.

Report may be given to Federal Court and other parties

- (2) The member conducting the review may provide a copy of the report to:
- (a) the Federal Court; and
 - (b) other parties in the proceeding.

Report to assist mediation

- (3) The member conducting the review may provide a written report to the presiding member in the mediation, setting out the progress of the review, if the member conducting the review considers that providing the report would assist in progressing the mediation.

54 Division 4B of Part 6 (heading)

Repeal the heading, substitute:

Division 4B—How assistance, mediation or review is to be provided

55 At the end of subsection 136H(1)

Add:

; or (c) any review under Division 4AA is to be conducted.

Note: The heading to section 136H is altered by omitting “**assistance or mediation**” and substituting “**assistance, mediation or review**”.

56 Subsection 136H(2)

After “Division 4A”, insert “, Division 4AA”.

57 After Subdivision A of Division 5 of Part 6

Insert:

Subdivision AA—Native title application inquiries

138A Application

This Subdivision applies if:

- (a) the Federal Court has referred the whole or a part of a proceeding to the Tribunal for mediation under section 86B; and
- (b) the proceeding, or the part of the proceeding, raises a matter or an issue relevant to the determination of native title under section 225.

138B Native title application inquiries

- (1) The President may:
 - (a) on his or her own initiative; or
 - (b) at the request of a party to a proceeding; or
 - (c) 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 section 225.
- (2) The President may only direct that such an inquiry be held if:
 - (a) he or she is satisfied that resolution of the matter or issue concerned would be likely to:

- (i) lead to agreement on findings of fact; or
 - (ii) lead to action that would resolve or amend the application to which the proceeding relates; or
 - (iii) lead to something being done in relation to the application to which the proceeding relates; and
- (b) the applicant in relation to any application that is affected by the proposed inquiry agrees to participate in the inquiry.
- (3) A request that an inquiry be held may be made before the Court refers the whole or a part of the proceeding to the Tribunal for mediation.

138C Tribunal to hold inquiry

- (1) The Tribunal must hold an inquiry into a matter or an issue relevant to the determination of native title under section 225 (a *native title application inquiry*), if directed by the President to do so.
- (2) Unless the parties otherwise agree, a member who conducts, or assists at, an inquiry may not, in any other capacity, take any further part in the proceeding.

138D Notice to be given to certain persons before inquiry is held

- (1) Before directing that an inquiry be held, the President must give written notice to the following persons:
- (a) the Commonwealth Minister;
 - (b) the relevant State Minister or Territory Minister;
 - (c) the Chief Justice of the Federal Court;
 - (d) the representative body, or a person or body performing functions of a representative body, for the area concerned;
 - (e) the applicant in relation to any application that is affected by the inquiry;
 - (f) any other person who is a party to the proceeding that relates to the application.
- (2) The notice must:
- (a) state that the Tribunal intends to hold an inquiry; and
 - (b) set out the matters or issues that the inquiry will examine; and

- (c) set out the effect of subsection (3) of this section and subsection 141(5).
- (3) An inquiry must not begin before the end of 7 days after the day on which notice was given, and if notice is given to different persons on different days, the later or latest of those days.

138E Relationship to mediation and reviews on whether there are native title rights and interests

Mediation may continue

- (1) Subject to subsection 138F(1), if an inquiry is held, the presiding member may continue mediation if he or she considers that it is appropriate.

Reviews on whether there are native title rights and interests cannot be held

- (2) If an inquiry is held in relation to an area, the Tribunal may not conduct a review under subsection 136GC(1) in relation to that area at the same time.

Note: Subsection 136GC(1) allows the President to refer for review the issue of whether a native title claim group who is a party in a proceeding holds native title rights and interests in relation land or waters within the area that is the subject of the proceeding.

138F Cessation of inquiry

- (1) An inquiry in relation to a proceeding must cease if the Federal Court makes an order under section 86C that mediation cease in relation to the whole of the proceeding.
- (2) If the Federal Court makes an order under section 86C that mediation cease in relation to a part of the proceeding, an inquiry must cease if the inquiry relates to that part of the proceeding.
- (3) The President may direct that an inquiry cease if a party to the inquiry no longer agrees to participate in the inquiry.

138G Inquiries may cover more than one proceeding

An inquiry may relate to more than one proceeding if section 138A is satisfied in relation to each proceeding, and this Division applies

in relation to the inquiry as if each proceeding were a separate inquiry.

58 At the end of section 141

Add:

Native title application inquiry

- (5) The parties to a native title application inquiry are:
- (a) the applicant in relation to any application that is affected by the inquiry; and
 - (b) the relevant State Minister or Territory Minister, if he or she notifies the Tribunal, in writing, that he or she wishes to be a party; and
 - (c) the Commonwealth Minister, if he or she notifies the Tribunal, in writing, that he or she wishes to be a party; and
 - (d) with leave of the Tribunal, any other person who notifies the Tribunal, in writing, that the person wishes to be a party to the inquiry.

59 Section 142

After “154”, insert “, 154A”.

60 Section 152

Omit “section 154”, substitute “sections 154 and 154A”.

61 At the end of section 154

Add:

Application to a native title application inquiry

- (5) This section does not apply to a hearing held in the course of a native title application inquiry.

62 After section 154

Insert:

154A Exception—hearings to be held in private if held during course of a native title application inquiry

Private hearings

- (1) Subject to subsection (3), if a hearing is held in the course of a native title application inquiry, the hearing must be held in private.
- (2) The Tribunal may, on its own initiative or on the application of a party, if it is satisfied that it is appropriate to do so, give directions as to the persons who may be present at the hearing.

Public hearings

- (3) The Tribunal may, on its own initiative or on the application of a party, if it is satisfied that it is appropriate to do so and the consent of the parties has been obtained, direct that a hearing, or part of a hearing, be held in public.

Participation by telephone etc.

- (4) If a direction is made under subsection (3) and a person participates by a means allowed under section 153, the Tribunal must take such steps as are reasonably necessary to ensure the public nature of the hearing is preserved.

Concerns of Aboriginal peoples or Torres Strait Islanders

- (5) In making a direction under subsection (3), the Tribunal must have due regard to the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.

63 Section 155

Omit “section 154”, substitute “sections 154 and 154A”.

64 At the end of section 156

Add:

Application to a native title application inquiry

- (7) Subsection (2) does not apply in relation to a native title application inquiry.

65 After section 163

Insert:

163A Reports after native title application inquiries

Tribunal to make report

- (1) After holding a native title application inquiry, the Tribunal must make a report about the matters or issues covered by the inquiry.

Report may contain recommendations

- (2) The Tribunal may make recommendations in the report. However, any such recommendations are not binding between any of the parties to the inquiry.

Tribunal must state findings of fact

- (3) The Tribunal must state in the report any findings of fact upon which it is based.

66 Section 164

Before “Determinations”, insert “(1)”.

67 At the end of section 164

Add:

- (2) If a determination and report relates to a native title application inquiry, the Tribunal must also give a copy of the determination and report to Federal Court.

68 Subsection 176(1)

After “136F”, insert “, 136GD”.

69 Paragraph 190(3)(a)

Repeal the paragraph, substitute:

- (a) if the claim is accepted for registration under section 190A, or if the claim is accepted for registration under section 190A and because subsection 190A(1A) applies the Registrar need not consider the claim made in the amended application—amend the Register to reflect the amendment; or

70 Subsection 190A(1) (note)

Omit “In the case of”, substitute “Unless subsection (1A) applies, in the case of”.

71 After subsection 190A(1)

Insert:

Exception for certain amended claims

(1A) Despite subsection (1), if:

- (a) the Registrar is given a copy of an amended application under subsection 64(4) that amends a claim; and
- (b) the application was amended because an order was made under section 87A by the Federal Court; and
- (c) the Registrar has already considered the claim, as it stood before the application was amended;

the Registrar need not consider the claim made in the amended application.

72 After subsection 190D(1A)

Insert:

Statements of reasons must specify whether section 190B satisfied

(1B) The statement of reasons for the decision must include a statement on:

- (a) whether, in the opinion of the Registrar, the claim for registration satisfies all of the conditions in section 190B; and
- (b) whether, in the opinion of the Registrar, it is not possible to determine whether the claim for registration satisfies all of the conditions in section 190B because of a failure to satisfy section 190C.

73 At the end of section 190D

Add:

Where all avenues for review of Registrar’s decision exhausted

(6) Subsection (7) applies in a case where:

- (a) the Registrar does not accept the claim for registration either because, in the opinion of the Registrar:

- (i) it does not satisfy all of the conditions in section 190B;
or
 - (ii) it is not possible to determine whether all of the conditions in section 190B have been satisfied because of a failure to satisfy section 190C; and
- (b) the Court is satisfied that the avenues for:
- (i) the review under this section of the Registrar's decision;
and
 - (ii) the review of orders made in the determination of an application under this section; and
 - (iii) the review of the Registrar's decision under any other law;
- have all been exhausted without the registration of the claim.
- (7) The Court may, either on the application of a party or on its own motion, dismiss the application in which the claim was made (the *application in issue*) if:
- (a) the Court is satisfied that the application in issue 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
 - (b) in the opinion of the Court, there is no other reason why the application in issue should not be dismissed.

74 Section 222

Insert:

native title application inquiry

253

75 Section 253

Insert:

native title application inquiry has the meaning given by section 138C.

Part 2—Application and transitional provisions

76 Definitions

In this Part:

commencing day means the day on which this Schedule commences.

77 Application—item 2

The amendment made by item 2 of this Schedule applies to an application under section 61 of the *Native Title Act 1993*, regardless of whether it is made before or after the commencing day.

78 Application—items 3 to 5

The amendments made by items 3 to 5 of this Schedule apply in relation to a proceeding that commences on or after the commencing day.

79 Application of changes to Division 1B of Part 4 of the *Native Title Act 1993*

The amendments made by items 8 to 17, 19 and 21 to 30 of this Schedule apply in relation to a proceeding that commences on or after the commencing day.

80 Transitional provisions relating to those changes

- (1) This item applies to a proceeding in relation to an application under section 61 of the *Native Title Act 1993* that is made but not determined before the commencing day.
- (2) If the proceeding, or a part of the proceeding, is to be referred for mediation on or after the commencing day, section 86B of the *Native Title Act 1993*, as amended by items 8 to 17 and 19 of this Schedule, must be complied with.
- (3) If:
 - (a) before the commencing day, the Federal Court referred the whole or a part of the proceeding to the NNTT for mediation under section 86B of the *Native Title Act 1993*; and
 - (b) the mediation by the NNTT has not ceased before the commencing day; and

- (c) before the commencing day, the Federal Court has also referred the whole or that part of the proceeding for mediation under the *Federal Court Act 1976*; and
 - (d) that mediation has not ceased before the commencing day; the Federal Court must, within 6 months after the commencing day, either order that:
 - (e) the mediation by the NNTT is to cease in relation to the proceeding, or that part of the proceeding; or
 - (f) the mediation under the *Federal Court Act 1976* is to cease in relation to the proceeding, or that part of the proceeding.
- (4) The Federal Court has jurisdiction to make an order under subitem (3).
- (5) The amendments made by items 21 to 30 of this Schedule, apply in relation to the proceeding, or a part of the proceeding, if:
 - (a) the proceeding, or the part of the proceeding, has been referred for mediation under section 86B of the *Native Title Act 1993* (whether before or after the commencing day); and
 - (b) no order has been made under section 86C of the *Native Title Act 1993* before the commencing day that the mediation is to cease; and
 - (c) no order is made under subitem (3) on or after the commencing day that the mediation is to cease.

81 Application—items 18 and 20

The amendments made by items 18 and 20 of this Schedule apply in relation to a proceeding, regardless of whether it commences before or after the commencing day.

82 Application—item 35

The amendment made by item 35 of this Schedule applies to an application under section 61 of the *Native Title Act 1993*, regardless of whether it is made before or after the commencing day.

83 Application—item 36

- (1) Section 94B of the *Native Title Act 1993*, inserted by item 36 of this Schedule, applies in relation to a report that is provided to the Federal Court on or after the commencing day.

- (2) Section 94C of the *Native Title Act 1993*, inserted by item 36 of this Schedule, applies to an application under section 61 of the *Native Title Act 1993*, regardless of whether it is made before or after the commencing day.

84 Application—item 44

The amendment made by item 44 of this Schedule applies in relation to an annual report that is prepared on or after the commencing day.

85 Application—item 48

The amendment made by item 48 of this Schedule applies to an application under section 61 of the *Native Title Act 1993*, regardless of whether it is made before or after the commencing day.

86 Application—item 52

A report may only be made under section 136GA or 136GB of the *Native Title Act 1993*, as inserted by item 52 of this Schedule, if the failure to act in good faith occurs on or after the commencing day.

87 Application—items 57 to 65

The amendments made by items 57 to 65 of this Schedule apply to an application under section 61 of the *Native Title Act 1993* that is referred, whether before or after the commencing day, to the National Native Title Tribunal for mediation under section 86B of that Act.

88 Application—item 73

The amendment made by item 73 applies to a native title determination application that a native title claim group has authorised to be made and that is made on or after the commencing day.

89 Transitionals—applications made after 1998 amendments

- (1) This item applies to a native title determination application that a native title claim group has authorised to be made if:
- (a) the application was made before the commencing day, but on or after the day on which Schedule 2 to the *Native Title Amendment Act 1998* commenced; and
 - (b) the claim made in the application or, if the application is amended, the application as amended, is not on the Register of Native Title Claims on the commencing day.

- (2) The Registrar must:
- (a) reconsider the claim under section 190A or, if the claim has not already been considered under that section, consider the claim under that section; and
 - (b) use his or her best endeavours to finish doing so by the end of one year after the commencing day.

If the Registrar does not do so by that time, the Registrar must reconsider or consider (as the case requires) the claim under that section as soon as reasonably practicable afterwards.

- (3) If, either before the Registrar begins to reconsider, or consider, the claim in accordance with subitem (2), or while the Registrar is doing so, a notice is given in relation to an act affecting any land or waters covered by the application:
- (a) under section 29; or
 - (b) under a corresponding provision of a law of a State or Territory covered by a determination under subsection 43(1);

the Registrar must use his or her best endeavours to finish considering the claim under section 190A by the end of 4 months after the notice is given. If the Registrar does not do so by that time, the Registrar must reconsider, or consider, the claim under that section as soon as reasonably practicable afterwards.

- (4) In reconsidering, or considering, a claim in accordance with subitems (2) or (3), the Registrar must:
- (a) in addition to having regard to information in accordance with subsection 190A(3), also have regard to any information provided by the applicant after the application was made; and
 - (b) apply section 190A as if the conditions in sections 190B and 190C requiring that the application:
 - (i) contain or be accompanied by certain information or other things; or
 - (ii) be certified or have other things done in relation to it; also allowed the information or other things to be provided, or the certification or other things to be done, by the applicant or another person after the application is made; and
 - (c) for the purposes of paragraphs (a) and (b) of this subitem, advise the applicant that the Registrar is reconsidering, or considering, the claim, and allow the applicant a reasonable opportunity to provide any further information or other

things, or to have any things done, in relation to the application.

- (5) If the claim does not satisfy all of the conditions in sections 190B and 190C:
- (a) the Registrar must give written notice as required by subsection 190D(1); and
 - (b) the other provisions of section 190A to 190D, including subsections (6) and (7) of section 190D as amended by item 73, apply as if the notice given under paragraph (a) were given under subsection 190D(1); and
 - (c) after the Registrar has complied with subitems (2) to (4) and this subitem (in so far as they are applicable), the Registrar is taken to have complied with section 190A.

90 Transitionals—applications made before 1998 amendments

- (1) This item applies to a native title determination application made by a person or persons claiming to hold native title if:
- (a) the application was made before the day on which Schedule 2 to the *Native Title Amendment Act 1998* commenced; and
 - (b) either:
 - (i) the claim was not considered by the Registrar under item 11 of Schedule 5 to that Act; or
 - (ii) the claim was considered by the Registrar under that item but not accepted for registration; and
 - (c) the claim is not one that, because it was amended on or after the day on which Schedule 2 to the *Native Title Amendment Act 1998* commenced:
 - (i) was considered under section 190A of the *Native Title Act 1993*; and
 - (ii) is on the Register of Native Title Claims on the day on which this Schedule commences.
- (2) The Registrar must:
- (a) consider the claim under section 190A, or if the claim has already been considered under that section, reconsider the claim under that section; and
 - (b) use his or her best endeavours to finish doing so by the end of one year after the commencing day.

If the Registrar does not do so by that time, the Registrar must consider, or reconsider, the claim under that section as soon as reasonably practicable afterwards.

- (3) If, either before the Registrar begins to consider, or reconsider, the claim in accordance with subitem (2), or while the Registrar is doing so, a notice is given in relation to an act affecting any land or waters covered by the application:
- (a) under section 29; or
 - (b) under a corresponding provision of a law of a State or Territory covered by a determination under subsection 43(1);
- the Registrar must use his or her best endeavours to finish considering, or reconsidering, the claim under section 190A by the end of 4 months after the notice is given. If the Registrar does not do so by that time, the Registrar must consider, or reconsider, the claim under that section as soon as reasonably practicable afterwards.
- (4) In considering, or reconsidering, a claim in accordance with subitems (2) or (3), the Registrar must:
- (a) in addition to having regard to information in accordance with subsection 190A(3), also have regard to any information provided by the applicant after the application was made; and
 - (b) apply section 190A as if the conditions in sections 190B and 190C requiring that the application:
 - (i) contain or be accompanied by certain information or other things; or
 - (ii) be certified or have other things done in relation to it; also allowed the information or other things to be provided, or the certification or other things to be done, by the applicant or another person after the application is made; and
 - (c) for the purposes of paragraphs (a) and (b) of this subitem, advise the applicant that the Registrar is considering, or reconsidering, the claim, and allow the applicant a reasonable opportunity to provide any further information or other things, or to have any things done, in relation to the application.
- (5) If the claim does not satisfy all of the conditions in sections 190B and 190C:
- (a) the Registrar must give written notice as required by subsection 190D(1); and

- (b) the other provisions of sections 190A to 190D, including subsections (6) and (7) of section 190D as amended by item 73, apply as if the notice given under paragraph (a) were given under subsection 190D(1); and
- (c) after the Registrar has complied with subitems (2) to (4) and this subitem (in so far as they are applicable), the Registrar is taken to have complied with section 190A.

Schedule 3—Amendments relating to prescribed bodies corporate

Native Title Act 1993

1 Subparagraph 24MD(6B)(c)(ii)

Before “native title body corporate”, insert “registered”.

2 Paragraph 58(e)

Repeal the paragraph, substitute:

- (e) if it does not hold the native title on trust—to enter into agreements in relation to the native title that are binding on the common law holders, provided the agreements have been made in accordance with processes set out in the regulations;

3 After section 59

Insert:

59A Prescribed bodies corporate for subsequent determinations of native title

- (1) If a prescribed body corporate holds native title rights and interests in trust for some common law holders, the Federal Court may determine under section 56 that the prescribed body corporate is to hold native title rights and interests in trust for other common law holders, so long as all of the common law holders mentioned consent to the determination.
- (2) If a prescribed body corporate is an agent prescribed body corporate for some common law holders, the Federal Court may determine under paragraph 57(2)(b) that the prescribed body corporate is to be the agent prescribed body corporate for other common law holders, so long all of the common law holders mentioned consent to the determination.
- (3) For the purposes of subsections (1) and (2), the regulations may prescribe the ways in which the consent of the common law holders may be obtained, and if the regulations do so, the common law holders must obtain the consent in that way.

4 Section 253

Insert:

agent prescribed body corporate, in relation to native title rights and interests, means:

- (a) a prescribed body corporate that is determined under section 57 in relation to the native title; or
- (b) a prescribed body corporate that, under regulations made for the purposes of subsection 56(4), is to perform the functions referred to in subsection 57(3) in relation to the native title; or
- (c) a prescribed body corporate that replaces, under regulations made for the purposes of section 60:
 - (i) a prescribed body corporate referred to in paragraph (a) or (b); or
 - (ii) a prescribed body corporate that is an agent prescribed body corporate in relation to the native title because of an earlier application of this paragraph.

5 Section 253 (definition of *agent prescribed body corporate*)

Repeal the definition.

Schedule 4—Funding under section 183 of the Native Title Act 1993

Native Title Act 1993

1 After subsection 183(2)

Insert:

- (2A) A person who is, or intends to become, a grantee party in relation to a future act to which Subdivision P of Division 3 of Part 2 applies may apply to the Attorney-General for the provision of assistance under this section in relation to:
- (a) the development of a standard form of agreement to facilitate negotiation in good faith as mentioned in paragraph 31(1)(b);
or
 - (b) the development of a standard form of agreement which, if agreed by a grantee party in relation to a future act to which the Subdivision applies, would make it more likely that the Government party doing the act would consider it an act attracting the expedited procedure; or
 - (c) a review of an existing standard form of agreement mentioned in paragraph (a) or (b), with a view to improving the standard form.

Note: Subdivision P of Division 3 of Part 2 deals with the right to negotiate.

2 Application

The amendment made by item 1 of this Schedule applies to the development of a standard form of agreement, or the review of an existing standard form of agreement, that occurs on or after the day on which this Schedule commences.

*[Minister's second reading speech made in—
House of Representatives on 7 December 2006
Senate on 26 February 2007]*

(200/06)