

proponents require or prefer' and that this is causing difficulties for both native title holders and proponents.

The Committee recommends;

- more financial resources be made available to native title representative bodies for the negotiation of ILUAs ( on top of the 'additional funding' provided in the 2001-2002 budget),
- the Guidelines for Provision of Financial Assistance be reviewed to ensure non-native title parties are receiving adequate assistance to facilitate their participation in the negotiation of ILUAs, and
- prescribed bodies corporate receive adequate funding to perform their statutory functions and that they receive appropriate training to meet their statutory duties. This training to include directors' duties, accounting procedures and land management.

The Committee also makes a number of recommendations proposing minor changes to the operation of the National Native Title Tribunal.

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### **Developments in Commonwealth agency coordination\***

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The *Native Title Act 1993* and the 1998 amendments provide a framework for dealing with native title that encourages the use of consensus-based mediation and agreement, rather than litigation.

The rules and administrative practices designed to achieve this outcome are continuing to evolve in response to a variety of factors, all of which present particular challenges. These include:

- a developing body of law that is both new and very complex,
- difficult legal issues that arise from some of the unique features of the legislation and its judicial interpretation,
- the distinctive characteristics of native title proceedings and mediation,
- the changing behaviour of governments as they adapt policy, practices and legislation to take account of native title, and
- the practical difficulties of drawing together the myriad of parties involved in achieving mutually acceptable native title outcomes.

Many parties play a role in the native title system - native title holders, governments at all levels, various respondent parties and the groups and agencies interacting with them. This paper focuses on developments aimed at building stronger interaction between key Commonwealth agencies involved in the native title system. These developments will improve the service to those who rely on that system to resolve native title issues.

## **The Commonwealth native title system**

At the Commonwealth level, as at others, the native title system operates through a complex framework of relationships, programs and processes. In part, this arises from the fact that under the Act, both the Commonwealth Attorney-General and the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs have a number of responsibilities.

**“Complexity arises from the diverse range and nature of the Commonwealth’s interests.”**

Complexity also arises from the diverse range and nature of the Commonwealth’s interests. As with governments at the State and Territory level, the Commonwealth is, albeit in a more limited way, a land and sea manager, administrator and holder of other interests and thus a respondent to native title determination and compensation applications. Through its constitutional capacity to legislate in relation to native title matters, it has policy responsibility for the overall legislative and policy framework under which native title is managed in Australia. The Commonwealth also funds the main elements – the Federal Court, the NNTT, representative

bodies through ATSIC. It also funds a number of programs, including financial assistance for respondents, and for States and Territories (for native title compensation and the costs of tribunals undertaking native title functions). In common with other governments, it must also ensure that its future acts are done in accordance with the provisions of the Act.

The range of functions carried on by what could be described as the ‘Commonwealth native title system’ include:

- the Federal Court’s managing of native title and compensation applications and the NNTT mediation processes,
- the NNTT’s mediation, arbitration and assistance role,
- the Native Title Registrar’s exercise of a number of statutory powers,
- ATSIC’s funding of representative bodies, and
- the Attorney-General’s Department’s central role in advising the Attorney-General on Commonwealth native title litigation and native title policy, and administration of the legal assistance program for respondent parties and financial assistance to the States and Territories.

The 1998 amendments necessitated the management of a range of transitional tasks. These included the transfer of the management of hundreds of applications from the NNTT to the Federal Court, the re-testing by the Native Title Registrar of hundreds of claims under the new registration test and the re-recognition of representative bodies.

By mid-2000, much of this transitional work had been completed. A Steering Committee was established, chaired by the Attorney-General’s Department and membership of which included the Departments of the Prime Minister and Cabinet, Finance and Administration and Reconciliation and Aboriginal and Torres Strait Islander Affairs, as well as the Federal Court and the NNTT. It reviewed resource usage during this transitional period and the future workloads and resource requirements of these bodies.

The inter-relationship between all parts of the system and potentially conflicting resource demands were noted, as was the potential for improvements in the operation of the native title system through the existence of effective consultative and information sharing processes between the key implementing Commonwealth bodies.

As a result of the review, additional funding of \$86m over 4 years was provided for in the 2001-2002 Budget to the Commonwealth native title system, to strengthen its operational capacity and to facilitate speedier resolution of native title applications. Spending on the Federal Court native title program, the NNTT, the native title program in ATSIC and legal assistance for respondents will be \$115m in 2001-02.

The interdependence of the various parts of the native title system identified by the Steering Committee necessitates that each agency adopt a broader perspective to enable the whole system to respond flexibly to the demands placed on it. Agencies will stand to gain most benefit from sharing information when:

**“Commonwealth agencies need to interact with each other regularly to identify the demands and stresses in the system.”**

- they know what information to share and what are the best consultative mechanisms to use;
- they are willing to maximise cooperation and coordination between their respective activities; and
- they take steps to modify their own behaviour in the light of what other key parties do and intend to do.

These considerations are reflected in the steps that the Commonwealth is taking to build better coordination and cooperation in the system.

### **The Commonwealth Native Title Coordination Committee**

The review of the native title system demonstrated the value of having appropriate arrangements for key Commonwealth agencies to interact with each other regularly to identify the demands and stresses in the system. It was therefore decided to retain the Committee as a standing Coordination Committee to keep performance and funding levels under review and to undertake an evaluation in the 2003-04 Budget context.

The major focus of the Committee's work is to improve cooperation, consultation, information sharing and resource use across the system at the Commonwealth level. The new Committee's purpose is to facilitate better operation of the system and assist each agency to perform its native title responsibilities to the best possible standard. The Committee has established a Working Group to report on means of:

- facilitating communication between Commonwealth agencies on shared interests,
- enhancing the system's capacity to identify and deal with obstacles to efficient and effective performance,
- improving the ability of Commonwealth agencies to consult on emerging trends and changes within the system that are likely to impact on priorities, workload and resource allocation, and

- enabling Commonwealth agencies to generate better performance information for monitoring and evaluating their activities.

The Working Group is identifying:

- any gaps or impediments that reduce effective interaction and exchange between agencies and with the parties they assist and for whom they provide services, and
- options for improving consultation and information-sharing processes at the Commonwealth level.

Although it is still early days, the Committee is proving very productive. It is hoped that information provided by users of the system through the NNTT, the Federal Court user groups and ATSIC about perceived impediments in the native title system can be shared and form a basis for any necessary remedial action.

### **Broader interaction**

A number of fora exist where other key parties can raise issues that reflect their concerns about how well the system is working. Key Commonwealth agencies consult bilaterally on a state-wide basis and nationally as part of normal operations. At the State and Territory level, officials responsible for native title policy meet together regularly to exchange views and information. The Native Title Division of the Attorney-General's Department has been invited to participate in those meetings when appropriate.

The Attorney-General's Department also convenes a Native Title Consultative Committee which presently draws representatives from several peak industry bodies - the Minerals Council of Australia, the National Farmers' Federation, the Australian Seafood Industry Council and the Australian Local Government Association. The NNTT and ATSIC also participate. The 2000 review identified potential value in extending membership of the Consultative Committee to include other participants, such as the Federal Court and State and Territory governments.

**"A number of fora exist where key parties can raise issues that reflect their concerns about how well the system is working."**

The Commonwealth Native Title Coordination Committee in turn provides the Federal Court, the NNTT, ATSIC and the Attorney-General's Department with a multilateral forum to bring back the views of the parties they deal with as part of their respective responsibilities. It will help ensure that each agency looks more closely at the mechanisms it uses to maintain stakeholder involvement.

Let me now turn to the Commonwealth's own involvement in native title matters, which is coordinated through the Native Title Division of the Attorney-General's Department.

Key objectives of the Commonwealth's approach in relation to future acts are to:

- ensure the minimum impact of any proposed Commonwealth acts on native title, and
- encourage solutions that are negotiated on a consensual basis and result in fair outcomes for all parties.

The Commonwealth seeks to resolve issues relating to development on areas subject to native title by consensus-based means, such as Indigenous Land Use Agreements (ILUAs). Several ILUAs are currently being negotiated.

This approach is consistent with the intentions of the Act. It is recognised that agreements are complex to negotiate and lack of familiarity and understanding about native title processes means that Commonwealth negotiators need guidance to achieve optimum outcomes for all parties. The Commonwealth Government has approved principles to guide Commonwealth agencies in the negotiation of ILUAs, and more detailed guidelines are currently being developed.

The Native Title Division also coordinates Commonwealth involvement in native title cases where the Commonwealth has specific interests. This work extends to over 200 native title applications. Fewer than 20 are programmed for trial before the Federal Court for and many have been referred to the NNTT for mediation.

It is pleasing to see, however, that more and more native title applications are being resolved by negotiations leading to Federal Court consent determinations, often combined with ILUAs to deal with the future relationships between the parties. The Commonwealth expects to see its involvement in this area continue to grow as outstanding issues are clarified by the courts.

### **Conclusion**

The Commonwealth is responding to the challenge of ensuring that its own agencies are well coordinated, given their role in facilitating resolution of native title issues.

The work of the Commonwealth's Native Title Coordination Committee and the Native Title Consultative Committee will help the native title system to work better. The links forged by the Native Title Division with Commonwealth agencies dealing with native title as part of future act processes will ensure that development is occurring in accordance with the Parliament's intentions.

The native title system will continue to evolve and it will be important to keep these arrangements under regular review to identify emerging trends and opportunities. Commonwealth agencies must be able to respond flexibly to new challenges if lasting outcomes are to be achieved in native title. The best outcomes will facilitate productive ongoing relationships and sustainable development of benefit to indigenous groups and the general community.

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