9. Promoting Claims Resolution

Contents

Summary

9.1 This chapter considers ways in which certain procedural aspects of the native title process might be reformed. In particular, this chapter considers:

- issues relating to the production of evidence in native title proceedings and for consent determinations;
- the development of policies relating to the involvement of the Commonwealth in consent determinations;
- the development of principles guiding assessment of connection reports;
- the potential for a training and accreditation scheme for native title practitioners; and
- the native title application inquiry process.

Evidentiary issues

9.2 In a native title proceeding, claimants must provide evidence to establish the existence of native title as defined in s 223 of the *Native Title Act*.[1] As discussed in Chapter 4, this will involve claimants bringing evidence to demonstrate that they possess communal, group or individual rights and interests in relation to land or waters under traditional laws acknowledged and customs observed by them, and that, by those laws and customs they have a connection with the land or waters claimed. Chapters 5, 7 and 8 make proposals for reform of the definition of native title.

9.3 This section considers the kind of evidence that may be brought to establish the existence of native title rights and interests in litigated and consent determinations. In particular, it considers the role of expert evidence in native title proceedings.

9.4 The Federal Court assesses this evidence and makes a determination as to whether the legal requirements are satisfied or, in the case of a consent determination, makes a determination giving effect to the agreement between the parties. A determination provides the basis for recognising Aboriginal or Torres Strait Islander law, and the relationship between native title and other rights and interests, under Australian law.

Expert evidence

Question 9–1 Are current procedures for ascertaining expert evidence in native title proceedings and for connection reports, appropriate and effective? If not, what improvements might be suggested?

9.5 Evidence to establish native title under s 223 draws on a wide range of expert evidence, including evidence provided by historians, archaeologists, botanists, palaeontologists, cartographers, and anthropologists:

> The historical reality of an indigenous society in occupation of land at the time of colonisation is the starting point for present day claims for recognition of native title rights and interests. The determination of its composition, the rules by which that composition is defined, the content of its traditional laws and customs in relation to rights and interest in land and waters, the continuity and existence of that society and those laws and customs since colonisation, are all matters which can be the subject of evidence in native title proceedings. Such evidence can be given, most importantly, by members of the society themselves and also by historians, archaeologists, linguists and anthropologists.[2]

9.6 This expert evidence may have significant value to the Court.[3] Vance Hughston SC and Tina Jowett have observed that expert evidence is often of particular

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1 *Western Australia v Ward* (2000) 99 FCR 316, [114]–[117] (Beaumont and von Doussa JJ); *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [146]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [339].

2 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [951].

3 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714 (4 July 2014) [116] (North J).

importance where the collective memory of a claim group does not extend prior to the assertion of sovereignty. Therefore

> the expert evidence of anthropologists will most frequently be relied upon to overcome the inherent forensic difficulties in proving the content of pre-sovereignty laws and customs and the continuous acknowledgment and observance of those laws and customs down to the present day.[4]

9.7 However, Hughston and Jowett identify several concerns with the processes surrounding the use of expert evidence:

- concerns have at times been expressed that expert evidence is partisan or biased, possibly because experts are briefed by only one party and may have a long-standing association with a particular claim group;[5]
- there have been instances of experts giving evidence about matters extending beyond their professional expertise;[6]
- expert evidence and anthropological reports may be highly technical and difficult to understand;
- significant time may be required to take each expert through their evidence, particularly in an adversarial setting; and
- the adversarial context may not provide the best way for an expert to assist the court, nor for the court to properly assess experts' competing opinions.[7]

9.8 Expert conferences (in which experts meet to discuss and prepare a report stating their areas of agreement and disagreement) and concurrent expert evidence (in which experts present and respond to questions about their evidence together) may be beneficial in avoiding some of these concerns. Expert conferences and concurrent evidence may be particularly useful in cases where there is disagreement about, for example, claim group composition or the laws and customs of the group.

9.9 The Federal Court noted that it has, in particular claims, facilitated case management conferences

> at which the experts for the Applicant and State confer to identify the issues likely to be most contentious prior to the commencement of anthropological field work. The aim of these conferences is for the parties' experts to discuss their knowledge of the relevant anthropological literature and related or neighbouring claims so that scarce research resources may be appropriately focused on areas of particular interest to the State, minimising the need for follow up research and reports.[8]

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4 Vance Hughston and Tina Jowett, 'In the Native Title "Hot Tub": Expert Conferences and Concurrent Expert Evidence in Native Title' (2014) 6 *Land, Rights, Laws: Issues of Native Title* 1.

5 Hughston and Jowett refer to *Jango v Northern Territory* (2006) 152 FCR 150, [315]–[338].

6 Hughston and Jowett refer to *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 7)* (2003) 130 FCR 424, [41]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [459]–[468].

7 Hughston and Jowett, above n 4, 1–2.

8 Federal Court of Australia, *Submission 40*.

9.10 The Federal Court also noted that it has

> made orders that the experts confer under the supervision of a Registrar of the Court to identify those matters and issues about which their opinions are in agreement and those where they differ. These conferences have usually taken place in the absence of the parties' lawyers and have been remarkably successful in narrowing connection issues, often resulting in agreement between the experts on all matters.[9]

9.11 The *Federal Court Rules 2011* (Cth) provide the Federal Court with the power to make a range of directions relating to expert evidence,[10] including, for example, that the experts:

- confer, either before or after writing their expert reports;[11]
- produce to the Court a document identifying where their opinions agree or differ;[12]
- provide their evidence one after another;[13]
- be sworn at the same time and that the cross-examination and re-examination be conducted by putting to each expert in turn each question relevant to one subject or issue at a time, until the cross-examination or re-examination is completed;[14] or
- be cross-examined and re-examined in any particular manner or sequence.[15]

9.12 As noted in Chapter 3, there is a lack of experts and anthropologists with expertise in native title matters. This was also noted by several stakeholders.[16]

9.13 The ALRC seeks stakeholder views on whether the use of expert conferences and concurrent expert evidence are beneficial in native title proceedings, and, if so, whether any reforms to the law or legal frameworks are needed. The ALRC is also interested in other procedures that may lead to more effective use of expert evidence.

Archiving evidence

Question 9–2 What procedures, if any, are required to deal appropriately with the archival material being generated through the native title connection process?

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9 Ibid.
10 *Federal Court Rules 2011* (Cth) r 5.04(3).
11 Ibid r 23.15(a).
12 Ibid r 23.15(b).
13 Ibid r 23.15(f).
14 Ibid r 23.15(g).
15 Ibid r 23.15(i).
16 Federal Court of Australia, *Submission 40*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.

9.14 The evidence used in native title proceedings provides information about the laws, customs, histories and cultures of Aboriginal and Torres Strait Islanders peoples. The evidence may therefore hold significant value to persons outside proceedings, whether for the public, as contributing to a stronger understanding of Aboriginal and Torres Strait Islanders peoples and their history.

9.15 However, this information is generally not available to persons outside proceedings. As noted by Dr Paul Burke, this information 'remains inaccessible … because it has been initiated within the legal context of native title and remains confidential'.[17] Just Us Lawyers noted the value of archival information, and suggested that 'archival information should be digitised, indexed and made searchable and available to claimants' legal representatives'.[18]

9.16 The ALRC seeks stakeholder comments on whether and, if so, how the material generated through the native title connection process should be dealt with, given that some of the information will, for example, be culturally sensitive or refer to person and family matters. For example, a publicly accessible database of key archival material may be of value, subject to appropriate consideration of cultural sensitivity and privacy.

Consent determinations

9.17 Once a native title application has been made and the parties determined, the Federal Court refers the application to mediation between the parties.[19] The purpose of mediation is to assist the parties to reach agreement on matters including whether native title exists in the area claimed, who holds the native title, and the nature and extent of the native title rights and interests and of any other interests in the area.[20]

9.18 Where mediation results in an agreement between the parties, the Court may make a determination consistent with, or giving effect to, the terms of that agreement (a 'consent determination').[21]

9.19 The diversity of sources of evidence reveals the complexity and difficulties in proving the elements of native title. Preparation for the hearing of an application for a determination of native title requires extensive collection of factual material including affidavit evidence by native title claimants. For consent determinations, claims typically require 'connection reports' as part of developing 'agreed facts' between the parties. The amount of documentary material accompanying a claimant application varies from claim to claim. Whether the matter is ultimately resolved by a consent determination or litigation, there will typically be voluminous documentation provided to the Court and parties as the Court's management of the case proceeds.

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17 P Burke, *Submission 33*.

18 Just Us Lawyers, *Submission 2*. See also AIATSIS, *Submission 36*.

19 *Native Title Act 1993* (Cth) s 86B. However, the Court must order that there be no mediation if it considers that it would be unnecessary; that there is no likelihood that the parties will reach agreement; or the applicant has not provided sufficient detail about certain matters: Ibid s 86B(3).

20 *Native Title Act 1993* (Cth) s 86A.

21 Ibid ss 87, 87A.

9.20 For example, Cape York Land Council submitted it is

> confident that most Cape York claim groups are able to meet current connection and authorisation requirements, but the time and expense required to do so means that the claim process continues to be lengthy and that means that other groups have to wait for long periods for their areas to be progressed.[22]

Concurrence

Question 9–3 What processes, if any, should be introduced to encourage concurrence in the sequence between the bringing of evidence to establish connection and tenure searches conducted by governments?

9.21 Native title proceedings require the applicant to provide detailed factual evidence relating to connection and claim group membership. Compiling such evidence typically will require significant resources and the extensive use of experts, such as anthropologists. The amount of factual material required, as well as the sequence in which it is provided, may lead to inefficiencies in native title proceedings. For example, a complete connection report may be required before a state or territory respondent prepares a tenure analysis.[23] The preparation of a connection report or a tenure analysis may be a laborious, time-consuming and costly process.[24] Some costs might be reduced if, for example, a tenure analysis was made available at an early stage.[25]

Best practice principles

Question 9–4 Should the Australian Government develop a connection policy setting out the Commonwealth's responsibilities and interests in relation to consent determinations?

Question 9–5 Should the Australian Government, in consultation with state and territory governments and Aboriginal and Torres Strait Islander representative bodies, develop nationally-consistent, best practice principles to guide the assessment of connection in respect of consent determinations?

9.22 A clear and transparent Commonwealth policy position on its responsibilities and interests with respect to connection as a party to consent determinations may assist in the resolution of claims.

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22 Cape York Land Council, *Submission 7*.

23 See Ch 3.

24 South Australian Government, *Submission 34*; Western Australian Government, *Submission 20*; Department of Justice, Victoria, *Submission 15*.

25 Graeme Neate, 'Resolving Native Title Issues: Travelling on Train Tracks or Roaming the Range?' (Paper Presented at Native Title and Cultural Heritage Conference, Brisbane, 26 October 2009).

9.23 Practically, such a document may guide the Commonwealth's involvement in developing the 'agreed statement of facts' for consent determinations pursuant to ss 87 and 87A of the *Native Title Act*.

9.24 A Commonwealth policy should be consistent with the object of the Act to recognise and protect native title and reflect international best practice.[26]

9.25 For a consent determination, variations exist from jurisdiction to jurisdiction in terms of what evidence the state or territory requires in order to pursue a consent determination. North Queensland Land Council noted that

> some States and Territories have not published connection guidelines and the observation is made that it may be difficult to determine the exact requirements of their connection policy. Some States do not require connection reports as such. There is no requirement in the [Act] to develop connection guidelines.[27]

9.26 In recent years, there has been a departure from the large-scale documentation provided to support a consent determination, which typically may be similar in extent to that filed in litigation.[28] A number of submissions to the Inquiry highlighted the conciliatory nature of parties' relationships in negotiating native title matters. For example, South Australian Native Title Services stated that 'we have established positive relationships with successive State Governments and other respondent parties to resolve native title through negotiation and consent'.[29] The Northern Territory Government submission detailed the cooperative approach taken to developing processes to streamline the resolution of pastoral estate claims.[30]

9.27 However, concerns have been raised that the 'current method of assessing connection has simply relocated an adversarial evidentiary process from the Federal Court to State and Territory Governments'.[31] Justice Barker, writing extra-curially, has commented that there is a danger that assessment of connection by state and territory respondents can 'tend to become ritualistic, formulaic, cumbersome and bureaucratic'.[32]

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26 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007). See also Principle 4: Consistency with international law in Ch 1.

27 North Queensland Land Council, *Submission 17*.

28 For example, in the Northern Territory: Northern Territory Government, *Submission 31*.

29 South Australian Native Title Services, *Submission 10*.

30 Northern Territory Government, *Submission 31*.

31 Rita Farrell, John Catlin and Toni Bauman, 'Getting Outcomes Sooner: Report on a Native Title Connection Workshop' (National Native Title Tribunal and AIATSIS, 2007) 8. For an alternative perspective, see Stephen Wright, 'The Legal Framework for Connection Reports' (Paper Presented at National Native Title Conference, Coffs Harbour, 1–3 June 2005).

32 Justice Michael Barker, 'Innovation and Management of Native Title Claims: What Have the Last 20 Years Taught Us?' (Paper Presented at National Native Title Conference, Alice Springs, 3–5 June 2013) 2013 [17].

9.28 Connection guidelines shape assumptions about appropriate evidence and standards. Queensland South Native Title Services highlighted the perceived problem for the applicant:

> It has to be said our clients go to considerable lengths, and a lot of resources are expended on their behalf, to prepare connection material evidencing their native title for delivery to the State … The problem as it appears to us is that a client's connection material has been prepared on the basis, amongst other things, of meeting Connection Guidelines prepared and required by the State for the purposes of reaching a negotiated agreement on native title. That in and of itself is problematic as it raises questions about the extent to which the connection material is implicitly shaped by assumptions within the Connection Guidelines about appropriate evidence and what standard of connection will be acceptable as indicative of connections between the claim group and the land.[33]

9.29 However, the Queensland Government does not support a 'substantive revision of the connection requirements' given 'the high rate of resolution of native title claims in Queensland over the last five years notwithstanding the existing connection requirements'.[34]

9.30 Queensland South Native Title Services identified a lack of transparency as a concern:

> The State's assessment of the test requirements is not a transparent process with an option of being contested, for example, their standard for what is an acceptable or requisite level of acknowledgement of traditional laws and observance of traditional customs has never been clearly articulated ... in the absence of clarity and the possibility of failing to reach agreement on the issues, matters will have to resort to formal litigation.[35]

9.31 The Northern Territory Government submitted that legislative change is not necessary because significant reform has been achieved through 'principles of negotiation agreed between the Territory, the native title party through the representative bodies, and stakeholders.'[36]

9.32 Nationally consistent principles may not be appropriate given the specific state and territory interests, and the diverse nature and content of native title around Australia. However, it may be useful to develop or collate existing best practice principles which may be advanced in all jurisdictions with respect to consent determinations.

9.33 For example, the Australian Government may choose to include relevant best practice principles for native title consent determinations in the *Legal Services*

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33 Queensland South Native Title Services, *Submission 24*.
34 Queensland Government Department of Natural Resources and Mines, *Submission 28*.
35 Queensland South Native Title Services, *Submission 24*.
36 Northern Territory Government, *Submission 31*.

Directions 2005 (Cth). Schedule 1 of the *Legal Services Directions 2005* (Cth) contains the Commonwealth's obligation to act as a model litigant.[37]

9.34 There are *Guidelines for Best Practice* which were developed by the Joint Working Group on Indigenous Land Settlements for Flexible and Sustainable Agreement Making which may serve as a platform for reform.[38] These Guidelines were designed to provide practical guidance for government parties to achieve 'flexible, broad and efficient resolutions of native title', particularly with respect to broader land settlements.[39] The Guidelines emphasise early negotiation, cultural awareness and sensitivity and adherence to model litigant principles including good faith negotiations such as not relying on technical defences unless it would result in prejudice, not taking advantage of a claimant who lacks resources and demonstrating leadership to influence the behaviour of other parties.[40]

9.35 The ALRC invites comment on these questions relating to the promotion of consent determinations.

Certification and training of the legal profession

Question 9–6 Should a system for the training and certification of legal professionals who act in native title matters be developed, in consultation with relevant organisations such as the Law Council of Australia and Aboriginal and Torres Strait Islander representative bodies?

9.36 A training and certification scheme for practitioners working in native title may have several benefits. Deloitte Access Economics noted that accreditation was one of a number of options for improving the level of service provided:

> A stronger form of regulation would be to operate a registration system for which native title practitioners require accreditation. Accreditation could be based on a simple test of competencies or qualifications in areas of law or relevant experience. Again, the registration could be voluntary, providing additional information to the market, or mandatory.[41]

37 *Legal Services Directions 2005* (Cth) sch 1, app B. Model Litigant Rules include (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation; (aa) making an early assessment of: (i) the Commonwealth's prospects of success in legal proceedings that may be brought against the Commonwealth …; (d) endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate.

38 Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice: Flexible and Sustainable Agreement Making*, August 2009.

39 Ibid 4.

40 Ibid 12.

41 Deloitte Access Economics, 'Review of the Roles and Functions of Native Title Organisations' (Australian Government, March 2014) 39.

9.37 Certification may help to ensure that practitioners meet certain standards or requirements. This may reduce a problem, noted by AIATSIS, of applicants accessing legal representatives

> who carry none of the additional obligations that currently vest in officers of the NTRBs/NTSPs. These obligations exist in order to assist, consult with and have regard to the interests of RNTBCs, native title holders and persons who may hold native title and they also extend to requiring the NTRB to identify persons who may hold native title.[42]

9.38 David Ritter and Merrilee Garnett have also suggested that there are 'strong arguments for the development of an accreditation system for native title lawyers. At the very least we consider that there should be a specific code of ethics for native title lawyers'.[43]

9.39 The ALRC is seeking comments on the possible costs or benefits of a legal training and certification scheme for native title practitioners, as well as the form that such a scheme might take.

Native title application inquiries

9.40 In this section, the ALRC poses several questions regarding the power to conduct a native title application inquiry under the *Native Title Act*. Under ss 138A–138G of the *Native Title Act* the Court may direct the National Native Title Tribunal (the Tribunal) to hold an inquiry into matters or issues relevant to a determination of native title. The outcomes of the inquiry are non-binding, but may provide guidance to the parties or the Court.

9.41 The inquiry process may be beneficial in native title proceedings. However, the process appears to have been rarely used. The questions in this chapter seek stakeholder views on possible reforms to ss 138A–138G that may increase the use of inquiries.

Overview of the inquiry process

9.42 Sections 138A–138G of the *Native Title Act* make provisions for the Tribunal to conduct a native title application inquiry.[44] These sections apply where the Federal Court has referred proceedings to mediation under s 86B,[45] and the proceedings raise a matter or an issue relevant to the determination of native title under s 225, including:

- the persons or groups of persons holding native title rights;
- the nature and extent of native title rights and interests in relation to the determination area;

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42 AIATSIS, *Submission 36*.

43 David Ritter and Merrilee Garnett, 'Building the Perfect Beast: Native Title Lawyers and the Practise of Native Title Lawyering' (1999) 1 *Land, Rights, Laws: Issues of Native Title* 8.

44 Native title application inquiries are distinct from other types of inquiries that may be conducted by the Tribunal, including special inquiries under s 137 of the *Native Title Act*. This chapter is concerned only with native title application inquiries.

45 *Native Title Act 1993* (Cth) s 138A.

- the nature and extent of any other interests in relation to the determination area; and
- the relationship between native title and other rights and interests.

9.43 A direction for an inquiry may be made on the Court's own motion, at the request of a party to the proceedings, or at the request of the person conducting the mediation.[46] The Court may only make a direction for an inquiry if:

- the Court is satisfied that resolution of the matter would be likely to lead to: an agreement on findings of facts; action that would resolve or amend the application to which the proceeding relates; or something being done in relation to the application to which the proceeding relates;[47] and
- the applicant agrees to participate in the inquiry.[48]

9.44 An inquiry may cover more than one proceeding[49] and more than one matter.[50] The parties to an inquiry include the applicant, the relevant state or territory Minister, the Commonwealth Minister and, with the leave of the Tribunal, any other person who notifies the Tribunal in writing that they wish to participate.[51]

9.45 Following an inquiry, the Tribunal must make a report, stating any findings of fact.[52] The Tribunal may make recommendations in the report, but these recommendations do not bind the parties.[53] However, the Federal Court must consider whether to receive into evidence the transcript of evidence from a native title application inquiry, may draw any conclusions of fact that it thinks proper, and may adopt any recommendation, finding, decision or determination of the Tribunal in relation to the inquiry.[54]

Question 9–7 Would increased use of native title application inquiries be beneficial and appropriate?

9.46 Native title application inquiries appear to offer a number of benefits. The inquiry process 'can be harnessed to collect and assess evidence and arrive at conclusions capable of being fed into the mediation process and is also capable of being received and adopted by the Court'.[55] Inquiries could be used, for example, in disputes relating to connection, authorisation or joinder. The use of the inquiry power

46 Ibid s 138B(1).
47 Ibid s 138B(2)(a).
48 Ibid s 138B(2)(b).
49 Ibid s 138G.
50 Ibid s 140.
51 Ibid s 141(5). The state, territory and Commonwealth Ministers may elect not to participate.
52 Ibid s 163A.
53 Ibid.
54 Ibid s 86(2).
55 Chief Justice Robert French, 'Lifting the Burden of Native Title: Some Modest Proposals for Improvement' (2009) 93 *Australian Law Reform Commission Reform Journal* 10.

in appropriate circumstances is in keeping with 'the importance placed by the Act on mediation as the primary means of resolving native title applications'.[56]

9.47 Despite the potential of the inquiry process, it has, to date, been underused. The ALRC is aware of only one example of the process being used. The ALRC is therefore seeking views on whether increased use of inquiries would be beneficial, and if so, what measures may lead to increased use of the process. To this end, the ALRC asks several questions about possible reforms which may increase the use of the process.

Requirement for an applicant to agree to an inquiry

Question 9–8 Section 138B(2)(b) of the *Native Title Act* requires that the applicant in relation to any application that is affected by a proposed native title application inquiry must agree to participate in the inquiry. Should the requirement for the applicant to agree to participate be removed?

9.48 The Court may only direct the Tribunal to hold an inquiry if the applicant agrees to participate in the inquiry.[57] Consideration might be given to the removal of this requirement.

9.49 The requirement that the applicant agree to the inquiry reflects the intent that the inquiry process be voluntary. The Explanatory Memorandum to the Native Title Amendment Bill 2006 (Cth) noted that:

> The native title application inquiry process is entirely voluntary. However, the applicant or applicants in an affected application are required … to be a party to the inquiry. Therefore, it is important that the applicants' consent be obtained prior to conducting an inquiry. Furthermore, it is unlikely a native title application inquiry would have an effective outcome if the applicant does not participate in the inquiry process.[58]

9.50 The Federal Court's power to refer proceedings to alternative dispute resolution (ADR) does not require the consent of the parties, except in the case of referrals to arbitration (which may result in a binding decision).[59] The native title mediation process itself does not require the agreement of the applicant (or any other party).[60] Given that these ADR processes are useful despite not requiring the consent of parties, the inquiry process might have value even without the agreement of the applicant.

9.51 This proposal would not affect s 141(5) of the Act, which provides that the applicant is a party to an inquiry. An applicant may find benefit in the inquiry despite initial reluctance. It has been noted of mediation that 'some persons who do not agree

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56 *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474 (30 March 2007) [36].
57 *Native Title Act 1993* (Cth) s 138B(2).
58 Explanatory Memorandum, Native Title Amendment Bill 2006 (Cth) [4.278].
59 *Federal Court of Australia Act 1976* (Cth) s 53A(1A).
60 The Court is required to refer an application to mediation unless the Court considers that mediation is unnecessary, that there is no likelihood of the mediation being successful, or that the applicant has provided insufficient information in their application: *Native Title Act 1993* (Cth) s 86B(3).

to mediate, or who express a reluctance to do so, nevertheless participate in the process often leading to a successful resolution of the dispute'.[61] The same may be true of parties to the inquiry process.

Evidence gathering powers of the Tribunal

Question 9–9 In a native title application inquiry, should the National Native Title Tribunal have the power to summon a person to appear before it?

9.52 Under s 156(2) of the Act, the Tribunal has the power to summon a person to give evidence or produce documents. However, under s 156(7) of the Act, this power does not apply in respect of a native title application inquiry.

9.53 The powers of the Tribunal could be strengthened by repealing s 156(7), so that the Tribunal would be empowered to summon a person to give evidence or produce documents in a native title application inquiry, as it is in other types of inquiries.

9.54 The reason for the introduction of s 156(7) into the Act is given in the Explanatory Memorandum to the Native Title Amendment Bill 2006 (Cth):

> Native title application inquiries are intended to be an entirely voluntary process which parties to proceedings may avail themselves of in order to facilitate resolution of the claim. Persons who agree to voluntarily participate may not be compelled to give evidence.[62]

9.55 Empowering the Tribunal to summon a person to give evidence or produce documents would alter the voluntary nature of the inquiry process. If s 156(7) of the Act was repealed, and the Tribunal summoned a person to give evidence or produce documents, a failure of that person to attend the Tribunal or to produce the required documents would be an offence under ss 171 and 174 of the Act, respectively. However, the desirability of retaining an entirely voluntary inquiry process may need to be balanced against any benefits of strengthening the Tribunal's powers.

Application for inquiry orders by non-parties

Question 9–10 Should potential claimants, who are not parties to proceedings, be able to request the Court to direct the National Native Title Tribunal to hold a native title application inquiry? If so, how could this occur?

9.56 A direction for an inquiry may only be made on the Court's own motion, at the request of a party, or at the request of the person conducting the mediation.[63] Other persons who are not parties to proceedings are unable to request a direction for an

61 James Spigelman, 'Mediation and the Court' (2001) 39 *Law Society of NSW Journal* 63, 65.
62 Explanatory Memorandum, Native Title Amendment Bill 2006 (Cth) 4.308.
63 *Native Title Act 1993* (Cth) s 138B(1).

inquiry. In particular, non-parties who are potential claimants are not able to request an inquiry.

9.57 However, potential claimants who are not parties to proceedings may nevertheless have significant interests in claim areas. One way for potential claimants to represent their interests in native title proceedings is through joining proceedings as a respondent.[64] However, an application for joinder by a potential claimant, and the introduction of an additional respondent in proceedings, may result in delays and increase costs for all parties.

9.58 In some cases—for example, where there is a dispute about claim group membership—it may be appropriate to allow potential claimants to seek a direction for an inquiry. This would provide potential claimants with an alternative to a formal application for joinder as a respondent in proceedings.

Other reforms of the inquiry process

Question 9–11 What other reforms, if any, would lead to increased use of the native title application inquiry process?

9.59 In addition to the specific questions above, the ALRC is interested in stakeholder views on the inquiry process. In particular, the ALRC is interested in whether or not the inquiry process would be useful to parties to proceedings, and what, if any, barriers there are to the use of the inquiry process.

64 See Ch 11.