CHAPTER 2

KEY ISSUES

2.1 Submitters and witnesses were generally supportive of the amendments proposed by the Bill.

Schedule 1 of the Bill – National Native Title Tribunal amendments

2.2 Schedule 1 of the Bill sets out the proposed changes to the National Native Title Tribunal (NNTT). The amendments proposed in Schedule 1 were announced in the 2012–13 Federal Budget and are designed to:

- transfer the NNTT's native title claims mediation functions and resources to the Federal Court; and
- consolidate the corporate service areas of the two agencies.[1]

2.3 The transfer of the NNTT's native title claims mediation functions build on previous reforms, introduced in 2009, that were made to:

- give the Federal Court greater control of native title mediation; and
- refocus the NNTT on its 'future act'[2] functions and registration role.[3]

2.4 Mr Warwick Soden, Registrar and Chief Executive Officer of the Federal Court of Australia, advised that the changes 'will formally transfer all of the staff of the tribunal to the Federal Court' and that the 'merging of the corporate function' will enable efficiencies.[4]

Providing certainty

2.5 A representative of the Attorney-General's Department (Department) explained that the amendments set out in Schedule 1 of the Bill 'remove legal risk and provide clarity for agencies and stakeholders':

> Schedule 1 of the bill finalises the implementation of the native title institutional reforms which commenced with amendments to the Financial Management and Accountability Regulations 1997 from 1 July last year. It folds the tribunal into the Federal Court statutory agency and makes consequential amendments to the governance, financial and annual reporting frameworks of the consolidated entity. The amendments remove legal risk and provide clarity for agencies and stakeholders. These

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1 Explanatory Memorandum (EM), p. 2.

2 'Future act' is a defined term in section 223 of the *Native Title Act 1993*.

3 EM, p. 3.

4 *Committee Hansard*, 31 January 2013, p. 8.

> amendments will not only generate savings but also result in a better alignment and allocation of functions and a clearer focus on increasing the rate of claims resolution. These legislative amendments are supported by administrative arrangements such as a memorandum of understanding agreed between the agencies that will enable the tribunal to continue to perform its functions in a way that is consistent with its status as an independent statutory authority. The Native Title Registrar will continue to exercise powers relating to the day-to-day management of the administrative affairs of the tribunal and determining staffing arrangements within an agreed budget. In this way, the day-to-day operation of the tribunal will remain largely unchanged.[5]

2.6 In its submission to the inquiry, the Federal Court of Australia suggested that if the Bill was not passed in its current form, 'legal and administrative uncertainty' may result.[6]

Cost savings

2.7 It is expected that the proposed changes will result in cost savings of $4.75 million per year from 2012-13 – a total of $19 million over the four year forward estimates.[7] The Skehill Review recommended that any administrative savings from reform of the NNTT be reinvested into 'native title mediation, reallocated to other priorities in the native title system or harvested to the Budget'.[8] The Explanatory Memorandum (EM) to the Bill states that the cost savings achieved through the amendments will be reinvested in the *Stronger Futures in the Northern Territory* initiative.[9]

2.8 Mr Soden explained that the $19 million over four years 'is coming from the savings achieved with the reduced number of people as a result of the merger of the corporate functions'.[10]

2.9 The Deputy Registrar of the Federal Court, Ms Louise Anderson, further advised the committee:

> …there have been 23 redundancies in the National Native Title Tribunal, which have contributed to those savings…And there were other savings in respect of the court taking over–for example, the corporate functions. So there is one system for managing human resource[s]–applications for leave

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5 Dr Albin Smrdel, Attorney-General's Department (AGD), *Committee Hansard*, 31 January 2012, p. 10.

6 *Submission 9*, p. 7.

7 EM, p. 4.

8 Australian Government, *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio, Report to the Australian Government*, January 2012, p. 83.

9 EM, p. 4.

10 *Committee Hansard*, 31 January 2013, p. 8.

> et cetera. There were consequential savings from that, but predominantly it was from staff.[11]

Support for Schedule 1 of the Bill

2.10 In respect of the proposals set out in Schedule 1 of the Bill, the Australian Institute of Aboriginal and Torres Strait Islander Studies offered 'broad support' for the amendments which bring into effect reforms to the operation of the NNTT and the Federal Court announced in June 2012.[12]

2.11 The National Native Title Council (Native Title Council) also informed the committee that it regards the amendments as administrative and that the changes will not affect the ability of the NNTT to carry out its functions:

> …[the changes] do not intentionally impede the NNTT from properly carrying out its administrative functions…The proposed amendments to the [Native Title Act] seem to be coherent with the legislated objective of the NNTT, particularly in furtherance of the NNTT's economic efficiency.[13]

Engaging staff

2.12 The Native Title Council did however raise a concern that the transfer of certain administrative responsibilities, particularly in relation to engaging staff and consultants, from the NNTT President to the Registrar of the Federal Court, could result in the engagement of staff and consultants without the requisite cultural knowledge and experience.[14]

2.13 Mr Soden responded to these concerns:

> Prior to 2009, then and now, the court has been and still is very fortunate in acquiring and retaining people with a deep understanding of the native title jurisdiction and related issues. There are native title specialists engaged by the court across the country and there are judges with special responsibility for managing the native title cases in their state. These people work very closely together managing workload and individual cases.[15]

2.14 Mr Soden sought to assure the committee that the concerns raised by the Native Title Council would not be realised:

> I mention these issues as I note some continuing concerns in the submissions received by the committee. Those concerns include the suggestion that, by there being a transfer of financial and other administrative responsibilities from the tribunal to the court, and to me in

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11 *Committee Hansard*, 31 January 2013, p. 8.

12 *Submission 7*, p. 1.

13 *Submission 4*, p. 1.

14 *Submission 4*, pp 2-3.

15 *Committee Hansard*, 31 January 2013, p. 7.

> particular, there might be an adverse impact on the role of the tribunal in their future act and registration responsibilities. I assure the committee that is not going to happen.[16]

2.15 A departmental officer also responded to the concerns raised by the Native Title Council in respect of engaging staff:

> [W]e do not consider that the bill will change the current practice of the tribunal at all in this regard. We think what the Native Title Council has raised is, with the greatest of respect, a misreading of the bill. We think that the decisions to engage consultants in this regard will operate, because of the delegations that will be provided from the Registrar of the Federal Court to the Native Title Registrar, pretty much the way they do now. Indeed, as Mr Soden has indicated to you previously in his presentation, even if there were matters where there were consultants required to be appointed by the Federal Court, the Federal Court is clearly aware of the sensitivities that are required in those appointments so the government does not believe, with the greatest of respect, that there is a significant issue here.[17]

Schedule 2 of the Bill – Family Court and Federal Magistrates Court amendments

2.16 Schedule 2 sets out the proposed changes to the Family Court and the Federal Magistrates Court. A departmental representative explained that the changes are necessary to support arrangements that have been operating since 2009:

> Schedule 2 of the bill amends the *Family Law Act 1975* and the *Federal Magistrates Act 1999* to ensure that these [A]cts are compatible with the courts operating under shared administration with a single chief executive officer. The Family Court and the Federal Magistrates Court have been operating under shared administration, including a single chief executive officer, since 2009.[18]

2.17 The officer further informed the committee that the joint administrative arrangements, operating since 2009, were found by the Skehill Report to have been a 'genuine success' and that it was on that basis that the Skehill Report recommended that the 'shared administration arrangements be formalised'.[19]

2.18 The Department noted that the Bill, which formalises these arrangements, does not affect the jurisdiction of either court and will provide legislative certainty:

> The Family Court and the Federal Magistrates Court will be prescribed as a single agency for the purposes of the *Financial Management and Accountability Act 1997*, with a single chief executive officer. The bill does

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16 *Committee Hansard*, 31 January 2013, p. 7.

17 Mr Kym Duggan, AGD, *Committee Hansard*, 31 January 2013, p. 11.

18 Dr Albin Smrdel, AGD, *Committee Hansard*, 31 January 2013, p. 10.

19 Dr Albin Smrdel, AGD, *Committee Hansard*, 31 January 2013, p. 10.

> not affect the jurisdiction of either court or the judicial work of either court and does not address broader issues of court structure. Formalising the courts' shared administration arrangements will provide the courts with certainty and will allow them to work towards further efficiencies and improved administration into the future.[20]

Support for Schedule 2 of the Bill

2.19 The Chief Justice of the Family Court of Australia, the Hon. Diana Bryant AO (Chief Justice), expressed general support for the intent of the Bill 'to facilitate the merger of the administrative functions of those two courts'.[21]

Definitions

2.20 The Chief Justice did however raise particular concerns in respect of the nomenclature and definitions of 'Chief Judge' and 'Chief Judge of the Federal Circuit Court of Australia'.[22]

2.21 The Chief Justice's primary concern related to an inconsistency between the *Family Law Act 1975* and the *Federal Court of Australia Act 1976* and the fact that the reference in the Bill to the head of the Family Court as the 'Chief Judge' does not accurately reflect that the Family Court is the superior court of record.[23]

2.22 In response to these matters, a representative from the Department advised the committee that the Chief Justice's suggestions were under consideration:

> [T]his bill was purely about implementing the Skehill reforms. So the concerns raised by the Chief Justice are now with government to consider. I think it was just a matter of this not being seen as the legislative vehicle to make that particular change.[24]

2.23 The officer further explained that the Chief Justice's concerns are best addressed separately given the timeframes involved:

> It is a separate issue…to the Skehill matter…it probably arises more out of the renaming of the Federal Magistrates Court to the Federal Circuit Court, with the Chief Federal Magistrate to be renamed as a chief judge. But the Family Court is the superior court and, whilst it does not say it in every provision, it still makes it clear that the Chief Judge of the Family Court is to be known as the Chief Justice of the Family Court…We see 1 July as a

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20 Dr Albin Smrdel, AGD, *Committee Hansard*, 31 January 2013, p. 10.

21 *Submission 1*, p. 1.

22 *Submission 1*, p. 2.

23 *Submission 1*, p. 2.

24 Dr Albin Smrdel, AGD, *Committee Hansard*, 31 January 2013, p. 12.

> fairly critical date for the implementation of this particular bill, so we need to work through all the changes and choose another vehicle[.][25]

Concerns raised by the Law Council of Australia

2.24 The Law Council of Australia (Law Council) raised concerns about Schedule 2 of the Bill in relation to the 'policy decision by the Government to maintain two separate Courts exercising family law jurisdiction'.[26] The Law Council expressed the view that this approach is 'fundamentally flawed'.[27]

2.25 The Department responded to this assertion, advising the committee that the government has decided that it is not appropriate to address this particular issue in the Bill, but that it is willing to consider the matter further:

> It was government policy to have the Family Court and the Federal Magistrates Court restructured so the Federal Magistrates Court would be folded into the Family Court and a separate Federal Magistrates Court exercising general law jurisdiction would still be in existence. Ultimately the government decided not to proceed with the restructure. The restructure involved two elements. There was the element of the desirability of having a one-stop shop for family law applicants to access the Family Court and to reduce confusion. It was also about efficiencies, savings and reducing the duplication of work. Mr Skehill was satisfied and recommended it to the government. The government was satisfied that in relation to the efficiencies side of things there was no need to move to a single court and that the shared arrangements was a genuine success…
>
> The Attorney also indicated that, as part of that, the announcement would provide the courts necessary certainty, but the government will also look at the issue of providing greater certainty for applicants as well. That is a key initiative. That is not part of this bill. This bill is purely about implementing the Skehill recommendations, but it is certainly something the [then] Attorney has announced that she is going to look at and it is work that is in progress.[28]

Ensuring cooperation

2.26 The Law Council also raised concerns that the new arrangements are dependent on cooperative personal and professional relationships of the incumbents, which cannot always be guaranteed. Additionally, having only a single Chief Executive Officer reporting to two heads of the different jurisdictions may cause conflicts and inconsistency.[29]

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25 Dr Albin Smrdel, AGD, *Committee Hansard*, 31 January 2013, p. 13.

26 *Submission 5*, p. 2.

27 *Submission 5*, p. 2.

28 Dr Albin Smrdel, AGD, *Committee Hansard*, 31 January 2013, p. 12.

29 *Submission 5*, pp 2-4.

2.27 In response to these assertions, a departmental representative informed the committee:

> The government acknowledges the close working relationship between Chief Justice Bryant and Chief Federal Magistrate Pascoe. But it is also…the government's expectation that the heads of jurisdiction would be able to work together cooperatively notwithstanding who the respective Chief Justice and—with the Federal Circuit Court legislation to come into effect in coming months—Chief Judge of the Federal Circuit Court are. As part of the Skehill recommendations, as well as his recommending that this bill be legislated to have the shared administration arrangements formalised between the Family Court and the Federal Magistrates Court, there was a recommendation for the heads of jurisdiction to come together as a consultative committee. That was really from a proposal brought forward by the heads of jurisdiction from the Federal Court, the Family Court and the Federal Magistrates Court, recognising the need to work whole-of-system and to work collegiately in a challenging fiscal environment.[30]

Committee comment

2.28 The committee acknowledges that the amendments set out in the Bill merely formalise administrative arrangements that have been operating since 2009. The committee notes that the Skehill Review considered these arrangements and recommended that they be formalised. The Bill achieves that outcome.

2.29 The committee takes the view that passage of the Bill will provide certainty for both agencies and stakeholders. The committee endorses the amendments set out in the Bill and considers they will achieve the stated purpose of enabling the agencies to implement savings, and to operate more efficiently and effectively into the future.

Recommendation 1

2.30 The committee recommends that the Bill be passed.

Senator Trish Crossin

Chair

30 Dr Albin Smrdel, AGD, *Committee Hansard*, 31 January 2013, p. 11.