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Schedule 1—National Native Title Tribunal

History and context

2.1 A submission from the Registrar and Chief Executive Officer of the Federal Court of Australia (the Federal Court Registrar) outlined the historical context of the Federal Court of Australia's (the Federal Court) increased responsibilities for native title cases as follows:

- In 2009 to address concerns around slow case processing, amendments were made to the Native Title Act that gave the Federal Court 'a new and overriding responsibility for managing native title cases'.
- Amendments made in 2009 to the *Federal Court of Australia Act 1976*, confirmed 'that the Court has both responsibility and authority to actively manage cases'.
- Reforms announced as part of the 2012-13 Budget by the Hon Nicola Roxon MP, the then Attorney-General, included the transfer from the Tribunal to the Federal Court of the mediation function and associated resources, along with the Tribunals corporate functions and budget.[1]

2.2 In giving evidence, representatives of the National Native Title Tribunal (NNTT), Federal Court and the Attorney-General's Department agreed that essentially this Bill allows the finalisation of what has been an ongoing process of administrative reform.[2]

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1 Mr Warwick Soden OAM, Registrar and Chief Executive Officer of the Federal Court of Australia, *Submission 1*, p. 4.

2 Mr Kym Duggan, Attorney-General's Department, Mr Graeme Neate, President, National Native Title Tribunal, and Mr Warwick Soden, Federal Court of Australia, *Committee Hansard*, Canberra, 20 November 2012, p. 1.

2.3 The President of the NNTT confirmed that as of 1 July 2012: the tribunal no longer had a direct appropriation, with funding to support the performance of the functions of the NNTT having been transferred to the Federal Court; and 'a number of staff' had transferred from the tribunal to the Federal Court.[3]

Administrative arrangements

2.4 The Federal Court Registrar's submission identified the decisions and administrative actions taken since the 2012-13 Budget announcement, most notably: administrative agreements to ensure the smooth interim operation and transfer of resources from the NNTT to the Federal Court; the transfer of native title claim mediation to the Federal Court; the removal of NNTT's FMA Act status; accommodation changes; and a permanent MOU between the NNTT and the Federal Court agreed pending the passage of the Bill.[4]

2.5 The Federal Court Registrar's submission described the Bill as an opportunity to remove the legal risk associated with the current transitional arrangements that results in 'having a single FMA Act Chief Executive, but two Public Service Act agency heads, with potentially conflicting legal responsibilities and powers, including in relation to staff'.[5]

2.6 Both in his submission and at the hearing, the Federal Court Registrar expressed concern that if the Bill, as it relates to the Native Title Act, did not proceed in its current form, the planned reforms would not be able to be progressed. Further, he suggested this would lead to legal and administrative uncertainty.[6]

2.7 At the hearing, the Federal Court Registrar clarified the risks as those of the organisation rather than the jurisdiction of native title. Specifically, he identified risks associated with uncertainty for staff, and challenges associated with managing staff working 'under terms and conditions of employment in a hiatus'.[7]

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3 Mr Graeme Neate, President, National Native Title Tribunal, *Committee Hansard*, Canberra, 20 November 2012, p. 1.

4 Mr Soden OAM, *Submission 1*, pp. 5-6.

5 Mr Soden OAM, *Submission 1*, p. 6.

6 Mr Soden, *Submission 1*, p. 6; and Mr Soden, *Committee Hansard*, Canberra, 20 November 2012, p. 5.

7 Mr Soden, *Committee Hansard*, Canberra, 20 November 2012, p. 5.

2.8 While noting the Federal Court Registrar's concerns about extended uncertainty if the Bill did not progress, the Native Title Registrar advised that the tribunal, court and department have all been working closely over several months in the lead-up to the transition to the new administrative arrangements from 1 July 2012.

> … there has been a steering group comprising representatives of the Attorney-General's Department, the Federal Court and the tribunal, which has been managing the change of process very closely. Indeed, we have established some very clear boundaries and arrangements that make sure the impact on the tribunal's business is not significant. It has actually been an almost seamless process in so far as going into this interim period of post FMA Act changes. The arrangements are working well and I think staff are feeling quite secure and comfortable with the arrangements, so there has not been too much stress.[8]

2.9 However, in a submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into this Bill, NTSCORP expressed the view that 'Native Title Representative Bodies should have been afforded an opportunity to comment on the institutional changes before they were announced and implemented'.[9]

Case management

2.10 The Explanatory Memorandum for the Bill states that it 'amends the Native Title Act to continue to improve the operation of the native title system by enabling the NNTT and the Federal Court to work together in a more coordinated and efficient manner and to achieve better outcomes'. One of the key efficiency measures identified in the 2012-13 Budget was to transfer the claims mediation functions from the NNTT to the Federal Court.[10]

2.11 In giving evidence, the Attorney-General's Department reinforced the Government's concern regarding the length of time taken for a number of Indigenous people in the native title system to 'get recognition of their actual rights and interests'. The department noted that these delays did not accord with the objectives of the legislation, and that in the worst case

8 Ms Stephanie Fryer-Smith, Native Title Registrar, National Native Title Tribunal, *Committee Hansard*, Canberra, 20 November 2012, p. 5.

9 NTSCORP, *Senate Legal and Constitutional Affairs Committee Submission 10*, p. 2.

10 Explanatory Memorandum, p. 2.

scenarios people passed away while waiting for the opportunity to have their rights recognised.[11]

Native title claims

2.12 It has now been over 20 years since the Mabo decision. Expanding on this at the hearing, the President of the NNTT provided a brief history of native title claims over the years, noting that as at 26 November 2012, there were 211 determinations of native title on the National Native Title Register, with 166 determinations that native title did exist.

> The number of claims in the system peaked around 1998 and, over a period, was trending downwards. But in more recent years a lot of new claims have come into the system. For example, in the previous financial year—2011-12—63 new claims were lodged and 65 claims were disposed of … In the previous year, I think, there was a net increase of 13, because 60-odd came in and 47 went out, … The fact is: new claims are still being made. We are not dealing with a fixed total which diminishes over time.[12]

2.13 A point of concern raised by the President was the length of time that the some claims have been in the system:

> … about half of the claims in the system have been there for 10 years or more, and some of the claims that have been resolved recently, including the Wik claim, the final element of which was determined recently, were lodged back in 1994. So, whilst as an arithmetic average it can be said that it takes somewhere between six and seven years to resolve a claim, some are resolved within a year or so and some go 10, 12, 13 or 14 years.[13]

2.14 The Attorney-General's Department contended—concurring with the submission from the Federal Court Registrar[14]— that the reforms progressed by the Government from 2009, which saw the Federal Court play a greater role in relation to the determination of claims, brought about an increase in determinations.[15]

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11 Mr Duggan, Attorney-General's Department, *Committee Hansard*, Canberra, 20 November 2012, p. 3.

12 Mr Neate, *Committee Hansard*, Canberra, 20 November 2012, pp. 1-2.

13 Mr Neate, *Committee Hansard*, Canberra, 20 November 2012, pp. 2-3.

14 Mr Warwick Soden OAM, *Submission 1*, p. 4.

15 Mr Duggan, *Committee Hansard*, Canberra, 20 November 2012, p. 2.

2.15 However, as pointed out by the President, it is difficult to determine exact causality with both the tribunal and court playing a role in what is often a process running over many years.[16]

2.16 Similarly, NTSCORP, in its submission to the Senate Legal and Constitutional Affairs Committee inquiry into this Bill, suggested that:

> … the outcomes achieved by the [Federal Court] in the last 12 months have been the culmination of many years of focussed assistance by the NNTT and in many cases, as a result of the stage of the matters.[17]

2.17 NTSCORP's submission also raised concerns regarding the Federal Court's expertise and resources, and particularly understanding of cultural sensitivities:

> NTSCORP is concerned that the [Federal Court] is focused on resolving native title determination applications as quickly as possible without due regard for the way in which Traditional Owners negotiate settlements with respondent parties, particularly the State government … [Indigenous Land Use Agreement] negotiations in NSW must be conducted in a culturally sensitive manner that allows Traditional Owners time to properly consider and negotiate a comprehensive settlement package.[18]

2.18 Reflecting on her former years with the NNTT, but speaking in her current capacity as an anthropologist, Dr Edmunds also cautioned against focusing on a 'speedy resolution' at the expense of developing the important relationships with stakeholders and producing thorough and peer-reviewed connection reports. Dr Edmunds explained both the relationships and the reports need to be strong enough to 'survive a determination of native title'.[19]

2.19 The Federal Court Registrar refuted any implication that the court approaches cases with 'time is of the essence' as the main criterion. Instead he suggested that:

> The power that the court has to make orders for things to be done and the overarching view of the judge about what ought to be done in the case is not paramount … But there are areas that we think we can successfully push and have successfully pushed and

16 Mr Neate, *Committee Hansard*, Canberra, 20 November 2012, p. 2.

17 NTSCORP, *Senate Legal and Constitutional Affairs Committee Submission 10*, p. 2.

18 NTSCORP, *Senate Legal and Constitutional Affairs Committee Submission 10*, p. 2.

19 Dr Mary Edmunds, Anthropological Consultant, Visiting Fellow, Research School of Humanities and the Arts, Australian National University, *Committee Hansard*, Canberra, 20 November 2012, p. 4.

> have asked some hard questions: 'Why is it taking so long?' and 'Have you thought about this alternative?'[20]

2.20 In relation to the mediation function, the Federal Court Registrar suggested that the 'special difference' between the NNTT and the Federal Court is, in the case of the latter, the opportunity to for people to work closely with the judge:

> … it is a combination of a case management process, direction by the judges and a focusing of the issues where appropriate. One of our people can mediate particular issues or mediate in the broader sense under the umbrella of the judge managing the case. [21]

Access to courts

2.21 An area of concern raised by a number of parties was access for individuals to courts and tribunals, and whether more could be done in this area.[22] The Attorney-General's Department advised that in regard to the current reforms it had not received feedback indicating 'any particularly significant negative impact to users of the NNTT or the Federal Court services'.[23]

2.22 However, after examining the Bill, the Parliamentary Joint Committee of Human Rights requested that the Attorney-General provide further information as to whether the Bill could potentially impede access to justice.

2.23 Likewise, in a submission to the Senate Legal and Constitutional Affairs Committee, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) queried the proposed amendments to section 203BK of the Bill requiring payment by native title representative bodies for assistance by the court or tribunal with performing dispute resolution services. AIATSIS was concerned that these 'already underfunded bodies' may be further limited in their capacity to fulfil their statutory functions.[24]

2.24 Dr Edmunds raised similar concerns at the hearing, noting that in the past while payment may have been prescribed, in practice charges were not applied to requests for assistance with mediation.[25]

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20 Mr Soden, *Committee Hansard*, Canberra, 20 November 2012, p. 5.

21 Mr Soden, *Committee Hansard*, Canberra, 20 November 2012, p. 3.

22 Joint Committee on Human Rights, *Submission 3*; Australian Institute of Aboriginal and Torres Strait Islander Studies, *Senate Legal and Constitutional Affairs Committee Submission 7*; and Dr Edmonds, *Committee Hansard*, Canberra, 20 November 2012, p. 7.

23 Mr Duggan, *Committee Hansard*, Canberra, 20 November 2012, p. 1.

24 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Senate Legal and Constitutional Affairs Committee Submission 7*, p. 2.

25 Dr Edmunds, *Committee Hansard*, Canberra, 20 November 2012, p. 7.

2.25 In response to suggestions that section 203BK required clarification, the Attorney-General's Department advised that there is currently a steering committee comprised of members of the court, tribunal and department reviewing a range of additional services and functions that the NNTT has undertaken. The group is expected to report to Government, providing suggested priorities and options for maximising resources and services within the constrained fiscal environment.[26]

Transition of expertise

2.26 With the mediation-related responsibilities having been transferred to the Federal Court, the Committee wanted to confirm that the court had the resources for case management, research and support to expedite claims, along with the ability to carry out on-the-ground mediation in remote communities.

2.27 Responding, the Federal Court Registrar proposed that the changes taking place align with the Skehill Review's stated position that resources should be consolidated in the place that has the responsibility.[27]

2.28 In reflecting on his many years with the NNTT, the President expressed hope that these new arrangements would build on the lessons learned, guidance developed and experience of the tribunal.[28]

2.29 In support of the President's comments, the Federal Court Registrar explained that in addition to a number of tribunal staff having moved to the court, remaining tribunal members are regularly used 'to do mediations for the court', and noted that the court has itself done on-country mediations.[29]

Committee comment

2.30 The Committee was pleased to hear that a close working relationship has been developed and sustained by the department, court and tribunal. It appears that planning and implementation are well-underway in terms of facilitating the transfer of the NNTT's appropriations, staff and some of its administrative functions to the Federal Court.

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26 Mr Duggan, *Committee Hansard*, Canberra, 20 November 2012, p. 7.

27 Mr Soden, *Committee Hansard*, Canberra, 20 November 2012, p. 6.

28 Mr Neate, *Committee Hansard*, Canberra, 20 November 2012, p. 6.

29 Mr Soden, *Committee Hansard*, Canberra, 20 November 2012, p. 6.

2.31 However, more may need to be done to reassure all stakeholders that the Federal Court has the skills and capacity to ensure work in relation to native title gets the priority it deserves. While making no judgement on the actual capability of the Federal Court, the Committee suggests more may need to be done to communicate with all stakeholders to ensure continued confidence in the native title system.