The Parliament of the Commonwealth of Australia

Advisory Report

Courts and Tribunals Legislation Amendment (Administration) Bill 2012

House of Representatives
Standing Committee on Social Policy and Legal Affairs

February 2013
Canberra

ISBN 978-0-642-79853-4 (Printed version)

ISBN 978-0-642-79854-1 (HTML version)

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Terms of reference

On 1 November 2012 the Selection Committee of the House of Representatives referred the Courts and Tribunals Legislation Amendment (Administration) Bill 2012 for inquiry and report.

List of abbreviations and acronyms

AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ANAO	Australian National Audit Office
CEO	Chief Executive Officer
CPSU	Community and Public Sector Union
FMA Act	*Financial Management and Accountability Act 1997*
FMC	Federal Magistrates Court of Australia
FTE	Full Time Equivalent
MOU	Memorandum of Understanding
NNTT	National Native Title Tribunal
NTSCORP	Native Title Service Provider for Aboriginal Traditional Owners in New South Wales and the Australian Capital Territory
PBO	Parliamentary Budget Office
Skehill Review	*Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio*

List of recommendations

Recommendation 1

The Committee recommends the House of Representatives pass the Courts and Tribunals Legislation Amendment (Administration) Bill 2012.

Recommendation 2

The Committee recommends that the Attorney-General, in accordance with section 209(2) of the *Native Title Act 1993*, direct the Aboriginal and Torres Strait Islander Social Justice Commissioner to include in the yearly reports on the operation of the *Native Title Act 1993* consideration of the functioning of the National Native Title Tribunal, and in particular:

- the adequacy of tribunal resourcing to effectively fulfil its functions, and
- its effect on the exercise of the human rights of the Aboriginal and Torres Strait Islander peoples.

1

Courts and Tribunals Legislation Amendment (Administration) Bill 2012

1.1 The Courts and Tribunals Legislation Amendment (Administration) Bill 2012 (hereafter referred to as the Bill) was introduced into the House of Representatives on 31 October 2012.

1.2 On 1 November 2012 the House of Representatives Selection Committee referred the Bill to the House of Representatives Standing Committee on Social Policy and Legal Affairs for inquiry and report.

Scope of the Bill

1.3 The Bill will amend:

- the *Native Title Act 1993* (Native Title Act):
  - ⇒ to facilitate the transfer of the National Native Title Tribunal's (NNTT) appropriations, staff and some of its administrative functions to the Federal Court of Australia, and
  - ⇒ to reflect that the NNTT is no longer a statutory agency for the purposes of the *Financial Management and Accountability Act 1997* (FMA Act)
- the *Family Law Act 1975* and the *Federal Magistrates Act 1999* to facilitate the merger of the administrative functions of the Family Court of Australia and the Federal Magistrates Court of Australia.[1]

1.4 Introducing the Bill to the House of Representatives, the Hon Nicola Roxon MP, the then Attorney-General, advised that in addition to

1 Courts and Tribunals Legislation Amendment (Administration) Bill 2012, Explanatory Memorandum, p. 2.

implementing reforms to 'improve the effectiveness and efficiency' of the affected courts and tribunals, the Bill was part of the Government's wider courts reform package. [2]

1.5 Attorney-General Roxon highlighted an additional $38 million of funding across the forward estimates as a means of maintaining services, particularly for regional and disadvantaged parties, and suggested that the proposed amendments to administration would provide savings and better alignment and allocation of functions.[3]

Previous inquiries and consultation

1.6 The Bill implements several recommendations of the *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio*, conducted by Mr Stephen Skehill (the Skehill Review).

1.7 The recommendations contained in Chapter 6 of the Skehill Review suggest increased efficiencies through reducing duplication and improving administration between the NNTT and the Federal Court.[4]

1.8 The Skehill Review examined ways to improve the value for money for the Government in terms of the discharge of the functions of federal courts, other than the High Court of Australia, including the option to legislatively support a merger of the administration of the Family Court and the Federal Magistrates Court.[5]

1.9 On 28 November 2012 the Parliamentary Joint Committee on Human Rights tabled its Seventh Report of 2012 on Bills and other legislative instruments. The report included the Human Rights Committee's views on the Bill, and a request to the then Attorney-General, the Hon Nicola Roxon MP, to provide advice on whether the proposed changes 'could reduce the access individuals currently have to the National Native Title Tribunal'.[6]

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2 The Hon Nicola Roxon, Attorney-General, *House of Representatives Hansard*, 31 October 2012, p. 12736.

3 Attorney-General, *House of Representatives Hansard*, 31 October 2012, p. 12736.

4 S. Skehill, *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio*, January 2012, pp. 83-84.

5 S. Skehill, *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio*, January 2012, p. 40.

6 Parliamentary Joint Committee on Human Rights, *Seventh Report of 2012,* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/reports/index.htm> accessed 11 December 2012.

1.10 Attorney-General Roxon's response negating the concerns was tabled in the Human Rights Committee's First Report of 2013. The response reiterated that the 'amendments contained in the bill are of a minor and technical nature, impacting on the Court's and Tribunal's internal administrative practices'.[7]

Concurrent Senate inquiry

1.11 On 1 November 2012 the Senate referred the provisions of the Bill to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report. The Senate Committee issued a call for submissions by 17 December 2012 and subsequently received 10 submissions from a range of organisations across Australia.

1.12 A public hearing was conducted on 31 January 2013.The Senate Committee has indicated it will report on the Bill on 25 February 2013. Relevant documents and additional information can be accessed on the Senate Committee's website.[8]

Conduct and scope of this inquiry

1.13 In referring the Bill, the House of Representatives Selection Committee provided the three reasons for referral/principal issues for consideration. The Selection Committee asked the Social Policy and Legal Affairs Committee to consider:

- 'the means by which the proposed efficiencies will be achieved' through the passage of the Bill. The Explanatory Memorandum for the Bill states that 'the reforms that this Bill implements will achieve $4.75 million in savings each year from 2012-13 over the four-year forward estimates, for a total saving of $19 million'.[9] These savings were announced in the 2012-13 Budget measure *National Native Title Tribunal – Increased Efficiencies*.[10]

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7 Parliamentary Joint Committee on Human Rights, *First Report of 2013*, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/reports/1_2013/index.htm>, accessed 7 February 2013.

8 Senate Standing Committee on Legal and Constitutional Affairs, <http://www.aph.gov.au/senate_legalcon> accessed 28 November 2012.

9 Explanatory Memorandum, p. 4.

10 2012-13 Budget <http://www.budget.gov.au/2012-13/content/bp2/html/bp2_expense-03.htm> accessed 20 December 2012.

- possible effects on the administration of the courts
- whether the proposed amendments will improve access to justice. Improvements to access to justice are not the purpose of this Bill. However, it is important to ensure that the proposed changes do not impede access to justice.

1.14 The Committee held a public hearing on 30 November 2012.[11] A list of submissions in relation to the hearing is at Appendix A and a list of witnesses that appeared before the Committee is at Appendix B.

1.15 On several occasions, Senate and House committees have been referred concurrent inquiries. As noted above, the provisions of this Bill have been referred to the Senate Standing Committee on Legal and Constitutional Affairs.

1.16 As far as possible, this Committee has endeavoured not to duplicate those areas it anticipates the Senate will consider in detail, and not to burden stakeholders with multiple requests for submissions. Therefore, in some instances the Committee refers to the submissions received by the Senate Committee.

Structure of the report

1.17 Chapter 2 of the report examines the proposed changes to the Native Title Act, which transfers the NNTT's native title claims mediation functions and resources to the Federal Court, and consolidates the corporate services of the two agencies.

1.18 Chapter 3 of the report examines the proposed changes to the *Family Law Act 1975* and the *Federal Magistrates Act 1999*, which facilitate the merger of the administrative functions of the Family Court of Australia and the Federal Magistrates Court of Australia.

1.19 Chapter 4 of the report provides discussion on the common issues across the courts and tribunal affected, summarises the Committee's comments on the Bill and provides recommendations.

11 House of Representatives Standing Committee on Social Policy and Legal Affairs <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill courts and tribunals/hearings.htm>.

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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.

3

Schedule 2—Family Court and Federal Circuit Court

History and context

3.1 As stated in the Explanatory Memorandum, this Bill amends the *Family Law Act 1975* and the *Federal Magistrates Act 1999* to facilitate the merger of the administrative functions of the Family Court of Australia and the Federal Magistrates Court of Australia. The Explanatory Memorandum suggests that '[m]erging the administration of the courts will formalise current arrangements and will allow further improvements to the courts' administrative practices and procedures'.[1]

3.2 Further, the Explanatory Memorandum clarifies the use of nomenclature in relation to the Federal Magistrates Court and Federal Circuit Court as follows:

> The amendments contained in this Bill have been drafted on the basis of the amendments contained in the Federal Circuit Court of Australia Legislation Amendment Bill 2012, which was introduced into Parliament on 20 September 2012. That Bill changes the title of the Federal Magistrates Court of Australia to the 'Federal Circuit Court of Australia'.[2]

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1 Explanatory Memorandum, p. 3.

2 Explanatory Memorandum, p. 3.

3.3 Since November 2008, the Chief Executive Officer of the Family Court has had the additional role as acting Chief Executive Officer of the Federal Magistrates Court.[3] In giving evidence, the Chief Executive Officer (CEO) explained that at the time, facing budget constraints, the two jurisdictional heads thought it would be sensible to agree to this arrangement. [4]

3.4 The CEO advised that from January 2009, wherever possible, the administration was then progressively collapsed into one, providing a similar service but at a reduced cost.[5]

Savings

3.5 According to the CEO, to date, around $7.8 million has been saved by removing duplicate management structures and making changes to service delivery, including in the following areas: issue of family reports; marshal's duties; and corporate services such as property, finance and human resources staff. The CEO indicated that the consolidation of administration has meant savings in accommodation whereby staff are now located in 'an ordinary building' in Canberra.[6]

> There were some significant savings—as I said, $7.8 million, of which $1.5 million was returned to the courts for operating expenses in the Federal Magistrates Court. Overall we returned $6.3 million to government in merging administrations.[7]

3.6 While achieving significant savings over the last four years, the CEO highlighted the costs of operating as a single administration without a legislative basis. He estimated annual costs of duplicate financial and other government reporting to be 'about half a million dollars'.[8]

3.7 However, the CEO stressed his view that there are no further savings that could be taken from the agency. Instead, he considers any money saved

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3 The submission of the Hon Diana Bryant AO, Chief Justice, Family Court of Australia to Senate Legal and Constitutional Affairs Committee, Courts and Tribunals Legislation Amendment (Administration) Bill 2012, noted that the Acting CEO of the Federal Magistrates Court commenced in that position on 25 November 2008, not 2009 as stated in paragraph 12 of the Explanatory Memorandum to the Bill.

4 Mr Richard Foster, Chief Executive Officer, Family Court of Australia and acting Chief Executive Officer, Federal Magistrates Court, *Committee Hansard*, Canberra, 20 November 2012, p. 8.

5 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 8.

6 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 8.

7 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 8.

8 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 8.

through removing duplicate reporting needs to be returned to 'family reports and other things'.[9]

3.8 Responding to the CEO's concerns, the Attorney-General's Department confirmed that 'the savings noted in the Explanatory Memorandum relate only to the incorporation of the NNTT into the Federal Court'.[10]

Staffing—changes and organisational structure

3.9 When considering the structural changes that have already occurred, the CEO advised that 'it has been extremely effective'. He proposed that in terms of the view of the courts, their priority concern is availability of resources, rather than the administrative structures.[11]

3.10 Although from a broad perspective this may be the case, there were more specific issues raised relating to the overall structure of the agency, and the inconsistency in the basis of employment for the principal registrars of each court.[12]

> Whilst the principal registrar of the family court is an employee under the Public Service Act and is responsible to me for the Public Service Act and Financial Management Act et cetera, he or she is responsible to the Chief Justice. The [Federal Magistrates Court] does not have that. They think—and I agree with them, and so does the Chief Justice—that they need that requirement. They need their principal registrar to be separate from the agency—employed by the agency, but directly responsible to the court, so they are seen as an officer of the court.[13]

3.11 Responding to the CEO's comments by way of submission, the Attorney-General's Department concluded that no further action be taken on the basis that:

- the Bill is being progressed to clarify and formalise the administrative arrangements of the Family Court and the Federal Magistrates Court, and does not touch on judicial or quasi-judicial functions of the courts;
- it is important that the amendments contained in this Bill are implemented as soon as possible to allow the commencement of

9 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 11.

10 Ms Susan Punster, Acting Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Canberra, 20 November 2012, p. 11.

11 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 8.

12 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 10.

13 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 10.

the new arrangements at the beginning of the 2013-14 financial year, to ensure certainty for the courts' administration and to allow future savings; and

- consideration of a Principal Registrar position for the Federal Magistrates Court would involve a number of complexities and would require significant consultation with the courts, and any proposed changes to arrangements would most appropriate be the subject matter of a separate Bill.[14]

3.12 In a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Courts and Tribunals Legislation Amendment (Administration) Bill 2012, the Chief Justice, Family Court of Australia also raised concerns in relation to:

- nomenclature and definitions, for example the use of Chief Judge and possible inference of hierarchy in relation to other courts
- differences in certain existing terms and conditions of employment of the CEO of the family Court under the Family Law Act as compared with the existing terms and conditions of employment of the CEO of the Federal Magistrates Court under the Federal Magistrates Act, not acknowledged or addressed by the Explanatory Memorandum, and
- transitional provisions, specifically in relation to the acting arrangements of the CEO.[15]

3.13 In terms of change management and transitioning staff, the CEO acknowledged initial cultural differences and the inevitability of issues around this. However, he advised that these have been largely resolved by setting up management structures to deal with issues as they arose, including three key decision-making areas to discuss matters such as resourcing:

- policy advisory committees for each of the jurisdictional heads
- a combined management advisory group, and
- Family Law Courts Advisory Group—a forum to discuss resourcing issues where agreement has not been reached at a different level, consisting of the Chief Justice, the Chief Federal Magistrate, the CEO and a representative from the Attorney-General's Department.[16]

14 Attorney-General's Department, *Submission 2*, p.4.

15 The Hon Diana Bryant AO, Chief Justice, Family Court of Australia, *Senate Legal and Constitutional Affairs Committee Submission 1*, pp. 2-9.

16 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 9.

3.14 The CEO added that above these committees there is a heads of jurisdictional committee. He advised that this committee includes the two chief justices, the Chief Federal Magistrate, the CEOs of the courts and the Attorney-General's Department; and discusses issues across all the courts in the Commonwealth system.[17]

3.15 From a staff perspective, the CEO indicated that the Community and Public Service Union (CPSU) was involved 'from the very beginning'. He explained that the change process was iterative, taking place over a period of time and with union support.[18]

3.16 Despite these positive reports, in a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Courts and Tribunals Legislation Amendment (Administration) Bill 2012, the CPSU raised concerns that the courts remain chronically understaffed and underfunded, with resultant impacts on services and excessive stress for the remaining staff.[19]

3.17 Noting the total FTE is around 600, the CEO advised that the amalgamation did result in a reduction of about 50 staff through both attrition and voluntary redundancies. While acknowledging that not everyone was happy, the CEO surmised that: [20]

> … at the end of the day, I think we have a much better structure. We reduced the senior executive service by two or three people as well. We eliminated some of the senior management. The Family Court had an area manager and the Federal Magistrates Court had an area manager. It was the ridiculous situation where you would have two or three people from the two different courts meeting with the one group because they represented different interests … it is a structure that suits the courts. It retains their independence.[21]

3.18 The CEO refuted conjecture that services had been cut. While acknowledging that there have been budget issues, he considered that the supplementation in the order of $30 million over the next four years helped with retention of services, particularly those in rural and regional areas.[22]

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17 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 9.

18 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 9.

19 Community and Public Sector Union, *Senate Legal and Constitutional Affairs Committee Submission 2*, pp. 1-2.

20 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 8.

21 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 9.

22 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 9.

3.19 Using the example of the Federal Magistrates Court where sickness and vacancies have resulted in disposal rates dropping off—meaning waiting lists are growing—the CEO highlighted the benefits of being able to manage the system as whole and move resources around from one registry to another to meet demand or address delays.[23]

Committee comment

3.20 From the evidence heard, the Committee was satisfied that the integration of the administration of the Family Court of Australia and the Federal Magistrates Court of Australia has been largely successful. As mentioned at the hearing, this view seems to be supported by Legal Aid.[24]

3.21 However, the Committee does note the ongoing budget pressures and the potential for these to impact on staff and ultimately clients. The Committee concurs with the CEO that any savings made through further streamlining should stay within the administrative body.

3.22 In regard to the issue raised in relation to the position of principal registrar, the Committee accepts assurances from the Attorney-General's Department that these are being addressed through other channels. Likewise, the Committee anticipates that the Senate Legal and Constitutional Affairs Committee will examine the more technical aspects raised by the Chief Justice of the Family Court.

23 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 10.

24 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, p. 9.

4

General issues

Review

4.1 This Bill provides legislative amendments to complete the implementation of the Skehill Review reforms, and formalises administrative structures that have developed over the last few years.[1]

4.2 In responding to the Committee's interest in the evaluation of the ramifications of the initiatives and whether a further review had been considered, the Federal Court Registrar indicated that a review of the implementation of the merger of administration after 18 months of operation would be prudent. However, he also stressed the importance of determining the scope prior to commencing any review.[2]

4.3 When the question of a review was put to the CEO of the Family Court and Federal Magistrates Court, he advised that a review of the effectiveness of the legislation could be done any time as the changes are largely embedded. As mentioned in evidence given by the CEO, the amalgamation has taken place; the legislation will 'tidy up some loose ends'. However, he did suggest that there were some 'concerns in the court about how the agency was set up', specifically in relation to the decision to amend the Family Law Act rather than as a separate agency under its own Act.[3]

4.4 The Australian National Audit Office (ANAO) *Audit Work Program July 2011* included a 'potential audit' titled 'Management of the Family Court of Australia, the Federal Court of Australia and the Federal Magistrates

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1 Attorney-General, *House of Representatives Hansard*, 31 October 2012, pp. 12736-38.

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

3 Mr Foster, *Committee Hansard*, Canberra, 20 November 2012, pp. 9-10.

Court'. However, the *ANAO Audit Work Program July 2012* no longer indicates a possible audit of the courts.[4]

4.5 An extensive program of reform has taken place within the courts and tribunals over the last few years, with changes in structure and amalgamation of many administrative services, along with ongoing budget constraints. The Skehill Review provided a thorough analysis of the current state of play, as well as a range of options for potential improvements. The Bill will allow the finalisation of aspects of the reform and a number of arrangements that have been in place for quite some time.

4.6 With this in mind, the Committee considers that it may be timely for the ANAO, as the peak review body for the Australian Public Service, to undertake a performance audit, similar to that suggested in the *ANAO Audit Work Program 2011*.[5]

Independence

4.7 While the Committee heard that all parties are working together effectively and readily negotiating the use of shared resources, it also acknowledges concerns that a change in circumstance or staff may render less harmonious outcomes. The Committee is not convinced that there are adequate safeguards to ensure the continuing independence of each court and the tribunal.

4.8 Certainly one method is the use of sub-programs, outlined in the Skehill Review as follows:

> … the Portfolio Budget Statements could provide individual "sub-program" splits of the combined total amounts, providing an "order-of-significance" indication of the amounts which the Government and the Parliament expected would likely be spent on each of the individual Courts.[6]

4.9 This method was suggested in a submission by the National Native Title Council to the Senate Legal and Constitutional Affairs Committee inquiry

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4 See <http://www.anao.gov.au/About-Us/Audit-Work-Program>.

5 Section 8 (1) of the *Public Accounts and Audit Act 1951* provides that the duties of the committee include: to determine the audit priorities of the Parliament and to advise the Auditor-General of those priorities.

6 S. Skehill, *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio*, January 2012, pp. 40-41 and pp. 81-82.

into this Bill as a method of ensuring the integrity of the funding for the NNTT.[7]

4.10 The Committee acknowledges that in terms of reporting to Parliament, FMA Act agencies are required to produce annual reports in accordance with the requirements endorsed by the Joint Committee of Public Accounts and Audit. Once tabled in Parliament, these reports stand referred to the allocated parliamentary House and Senate Committees. These Committees are able to inquire into any matters raised in annual reports.

4.11 Further, FMA Act agencies are all subject to the Senate Estimates process whereby Senate Committees examine the proposed expenditure contained in agency appropriation bills and then directly question public servants in regard to any matter of concern.

4.12 Both annual reports and the Senate Estimates process provide for parliamentary review of Australian Government agency operations and expenditure. However, in the case of the National Native Title Tribunal, the Committee did consider that additional safeguards would protect the tribunal's ability to meet its broader mandate as prescribed under the Native Title Act.

4.13 In terms of additional oversight, the Committee notes that the Aboriginal and Torres Strait Islander Social Justice Commissioner is required to 'prepare and submit a report to the Commonwealth Minister' (currently the Attorney-General) each year on the operation of the Native Title Act and its effect on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander people.[8]

4.14 In the *Native Title Report 2012* the Commissioner notes that he will 'closely monitor the effects of these reforms'.[9]

4.15 With the extensive operational changes, explicit reporting on the operational outcomes, particularly the adequacy of the tribunal's resources to fulfil its functions, would be a prudent addition to future Native Title Reports. It is the view of the Committee that the Attorney-General should request such reporting, as provided for under section 209(2) of the Native Title Act.

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7 National Native Title Council, *Senate Legal and Constitutional Affairs Committee Submission 4*, p. 5.

8 *Native Title Act 1993* section 209

9 Australian Human Rights Commission, *Native Title Report 2012*, p. 38.

Efficiencies

4.16 The 2012-13 Budget indicated that the Government would 'achieve savings of $19.0 million over four years through efficiencies in the operation of the native title system'.[10]

4.17 One of the reasons given for referral of this Bill was for the Committee to consider the means by which the proposed efficiencies would be achieved. The Committee heard evidence related to the operations of each of the affected bodies and has reported findings within this report.

4.18 However, on this occasion, the Committee would like to take the opportunity to remind members that the Parliamentary Budget Office (PBO) is the most appropriate body to provide advice on the potential financial implications of a Bill, including whether proposed efficiencies are realistically achievable. It is not the role of this Committee, nor an efficient use of the Committee's time, to be the conduit between the PBO and members.

4.19 The Committee continues to support opportunities to scrutinise Bills, with these comments aimed only at improving the process of referral and opportunities for all committees to add value to Bill scrutiny.

Committee conclusion

4.20 Overall, the Committee notes that this Bill is predominantly finalising and providing the legislative authority for a number of arrangements either already in place or well-advanced. While the Committee has made a number of comments, none are intended to preclude the passing of the Bill. Rather, these are matters for future consideration and/or action.

4.21 However, the Committee reiterates its view that a performance audit undertaken by the ANAO at an appropriate point in time would provide reassurance that the anticipated benefits in terms of efficiency and effectiveness of the affected courts and tribunal have been achieved.

4.22 On this basis, the Committee has written to the Chair of the Joint Committee of Public Accounts and Audit, to suggest that such a request be included in advice to the Auditor-General regarding the audit priorities of Parliament.

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10 *2012-13 Budget, Budget Paper No.2*, Expense measures, Attorney-General's Department <http://www.budget.gov.au/2012-13/content/bp2/html/bp2_expense-03.htm> viewed 17 December 2012.

4.23 In terms of ensuring independence of each of the affected courts and tribunal, the Committee is satisfied that agency annual reporting and Senate Estimates processes will continue to provide ex-ante and ex-post financial scrutiny.

4.24 Nevertheless, to ensure safeguards for the resourcing of the National Native Title Tribunal, the Committee recommends that consideration of the adequacy of the services provided by the National Native Title Tribunal is explicitly included in the yearly report of the Aboriginal and Torres Strait Islander Social Justice Commissioner.

Recommendation 1

4.25 **The Committee recommends the House of Representatives pass the Courts and Tribunals Legislation Amendment (Administration) Bill 2012.**

Recommendation 2

4.26 **The Committee recommends that the Attorney-General, in accordance with section 209(2) of the *Native Title Act 1993*, direct the Aboriginal and Torres Strait Islander Social Justice Commissioner to include in the yearly reports on the operation of the *Native Title Act 1993* consideration of the functioning of the National Native Title Tribunal, and in particular:**

- **the adequacy of tribunal resourcing to effectively fulfil its functions, and**
- **its effect on the exercise of the human rights of the Aboriginal and Torres Strait Islander peoples.**

Graham Perrett MP
Chair

A

Appendix A—List of submissions

1. Mr Warwick Soden OAM, Registrar and Chief Executive Officer of the Federal Court of Australia
2. Attorney-General's Department
3. Parliamentary Joint Committee on Human Rights

B

Appendix B—List of witnesses

Friday, 30 November 2012—Canberra

Attorney-General's Department

Mr Kym Duggan, First Assistant Secretary, Social Inclusion Division

Ms Susan Prunster, Acting Assistant Secretary, Federal Courts Branch

Mr Imran Church, Senior Legal Officer, Federal Courts Branch

Ms Margaret Meibusch, Principal Legal Officer, Federal Courts Branch

Mr Alan Wu, Legal Officer, Native Title Unit

Australian National University

Dr Mary Edmunds, Anthropological Consultant, Visiting Fellow, Research School of Humanities and the Arts

Federal Court of Australia

Mr Warwick Soden, Principal Registrar

Ms Louise Anderson, Deputy Registrar, Native Title Services

Family Court of Australia

Mr Richard Foster, Chief Executive Officer

Ms Kristen Murray, Senior Legal Research Adviser to the Hon. Chief Justice Bryant

National Native Title Tribunal

Mr Graham Neate, President

Ms Stephanie Fryer-Smith, Native Title Registrar