COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Native Title Amendment Bill 2009

THURSDAY, 16 APRIL 2009

SYDNEY

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 16 April 2009

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Farrell, Feeney, Fisher, Hanson-Young, Marshall and Trood

Substitute members: Senator Siewert to replace Senator Hanson-Young for the committee's inquiry into the provisions of the Native Title Amendment Bill 2009

Participating members: Senators Abetz, Adams, Arbib, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Ellison, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Crossin, Siewert and Trood

Terms of reference for the inquiry:

To inquire into and report on:

Native Title Amendment Bill 2009

WITNESSES

ANDERSON, Ms Louise, Native Title Registrar, Federal Court of Australia 45

KARLSSON, Ms Tiffany Louise, Principal Legal Officer, Legislation, Scrutiny and International Team, Native Title Unit, Attorney-General's Department 29

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MURPHY, Mr Jeffrey Mark William, Acting Assistant Secretary, Claims and Legislation Branch, Native Title Unit, Attorney-General's Department 29

NEATE, Mr Graeme John, President, National Native Title Tribunal 2

ROCHE, Mr Greg, Branch Manager, Portfolio Governance, Department of Families, Housing, Community Services and Indigenous Affairs 29

SODEN, Mr Warwick, Chief Executive Officer/Registrar, Federal Court of Australia 45

Committee met at 10.47 am

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate Standing Committee on Legal and Constitutional Affairs. This is the first public hearing for this committee's inquiry into the Native Title Amendment Bill 2009. The inquiry was referred to the committee by the Senate on 19 March 2009 for report by 7 May 2009. This bill seeks to amend the Native Title Act 1993 to implement institutional reform to give the Federal Court a central role in managing native title claims, including new provisions related to mediation. Amendments are also proposed to change the powers of the court, the rules of evidence, the operation of the representative body provisions of the act, and make other minor and technical amendments.

We have received four submissions for this inquiry. All have been authorised for publication and are available on the committee's website. I remind all witnesses that in giving evidence to the committee you are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to a committee. We prefer all evidence to be given in public, but of course under the Senate's resolutions witnesses have the right to be heard in private session.

[10.49 am]

NEATE, Mr Graeme John, President, National Native Title Tribunal

CHAIR—Good morning and welcome. Thank you for making the trek over to be with us today. We have your submission, which is No. 3. Do you wish to make any changes before you give us an opening statement?

Mr Neate—There was one typographical error on pages 2 and 14 of our original submission. The reference to section 86B(2) should have read section 86BA(2). The secretary of the committee was informed of this error and the committee was provided with a corrected copy of the submission, which may be the one that is before you.

CHAIR—Thank you. I now invite you to make an opening statement.

Mr Neate—The National Native Title Tribunal welcomes the committee's invitation to appear in relation to the committee's inquiry into the Native Title Amendment Bill 2009. The tribunal's written submission deals with only the proposed amendments set out in schedule 1 to the bill. The tribunal makes no submission in relation to the other parts of the bill. In this opening statement I will not cover the points made in the submission about particular amendments; rather I will outline the broader issues of concern to the tribunal about the policy and practical operation of what is proposed.

The tribunal supports a flexible native title system that encourages more negotiated settlements of native title claims. The tribunal wants the system to work better for all participants and for the broader community. The tribunal is keen to see the operation of the system improve. The tribunal submits, however, that the amendments proposed by schedule 1 to the bill are too far-reaching and might operate to impede meeting the Australian government's policy objective, as described in the Attorney-General's second reading speech on the bill, of 'achieving more negotiated native title outcomes in a more timely, effective and efficient fashion' and contributing to 'broader, more flexible and quicker negotiated settlements of native title claims'.

Broadly speaking, the tribunal is concerned that, because individual judges will have broad discretionary power about who will conduct mediation, the system or processes may become ad hoc or fragmented, less efficient and potentially more expensive to the Commonwealth. We are also concerned that there could be confusion and lack of clarity about the respective powers and functions of the court and the tribunal, especially the extent of the court's capacity to direct the tribunal to do things and possibly to allocate tribunal members to mediate particular matters and to direct how mediation is to be conducted, which raises legal and resource issues. There are issues about how mediators other than the court or the tribunal are to be identified, paid and supported administratively and with specialist geospatial, research, legal and other resources.

The amendments suggest a likely fragmentation of the current regional approach to planning and case management. The amendments fail to acknowledge that the tribunal offers a range of mediation services including specialised flexible multidisciplinary agreement-making teams that are created according to the particular requirements of individual claims and can call on a range

of geospatial, research and legal resources. The reasons for those concerns are discussed in this written submission.

The proposed amendments in schedule 1 have the potential to marginalise or remove the tribunal from the mediation of native title applications. The tribunal has considerable experience, expertise and commitment to offer the native title system and it is important that these attributes be fully utilised in the future. Whether or not the Australian government intends the marginalisation or removal of the tribunal from mediation of applications, the legislation would allow that to occur, with a range of potentially adverse and expensive effects on an inherently challenging native title system, which in large part is funded by the Commonwealth.

The current scheme clearly identifies the respective roles of the court and the tribunal. When both institutions work in a coordinated and cooperative manner, timely and effective native title and related outcomes—that is, broader settlements—are achieved. The tribunal considers that the current scheme for the mediation of native title claims should be retained and its operation improved. There is evidence that the current scheme produces positive outcomes. For example, there is only one native title claim, as I understand it, in trial before the Federal Court at present—the Torres Strait regional sea claim. Two other applications are on appeal to the full court. All the determinations made in 2008 and this year that native title exists were made by consent of the parties. Those determinations were in Queensland, Western Australia and South Australia and some were over extensive areas.

Much will depend on how the scheme, if enacted in the form set out in the bill, is administered by individual judges of the court. In the absence of a consistent coordinated national approach by the court to the management of native title applications, the concerns summarised earlier and outlined in more detail in this submission may well be realised. The tribunal accepts, of course, that the Australian government decides its policy in relation to native title and develops legislation to give effect to its policy. The tribunal will work to the best of its ability to implement whatever changes the parliament makes, as it has done in relation to numerous amendments to the act over the past 15 years.

To that end, the tribunal is in discussions with representatives of the Federal Court about the implementation of the proposed scheme. The tribunal will continue to work closely with the court to administer that scheme. However, it should be clearly understood that even in these circumstances claims can take years to resolve, particularly if there is a broader settlement of claims, which may include, for example, land grants under state or territory legislation and joint management of conservation reserves. It should also be understood that there are numerous factors that delay the resolution of claims, most of which will not be met by the proposed amendments to the act, and which require a broader reappraisal of the operation and structure of the native title system, including behavioural changes. I look forward to the questions of the committee.

Senator TROOD—Thanks for appearing today, Mr Neate. I wanted to gain from you some insight as to the discussions that you have had with the minister about these proposals for change. They clearly affect the tribunal. Have you had discussions with the minister about it?

Mr Neate—I was advised of the announcement of the proposed changes immediately prior to them—the day before. Subsequent to that announcement, the tribunal made a written submission

in response to the government's discussion paper, which was published in December last year and to which responses were requested by February this year. I subsequently met with the Attorney in the company of my registrar and some of his advisers. On 23 March this year—that is, after the amendments were introduced into the parliament—the Attorney met with members of the tribunal, me and the registrar at our regular members meeting. We discussed with him his aspirations for the scheme and some of our concerns as outlined in the submission.

Senator TROOD—You had some discussions prior to the announcement of the amendments but you were advised of them, what, a moment before or—

Mr Neate—To be clear, the Attorney rang me the day before the announcement and advised me of it.

Senator TROOD—I see.

Senator SIEWERT—To be clear, which announcement?

Mr Neate—The announcement in October. I think that it was 17 October, when the policy was announced. We had not had discussions about it. The Attorney—

Senator TROOD—So you had not had discussions with the Attorney about the amendments that are in this bill?

Mr Neate—No, not prior to the announcement of the policy.

Senator TROOD—So there was not any consultations with you as the president of the tribunal about these?

Mr Neate—No.

Senator TROOD—I see. It strikes me as curious, Mr Neate, that you, as the president of the tribunal and the person perhaps most intimately knowledgeable on the matter, were not consulted by the Attorney about the changes. Did you have extensive discussions, perhaps, with the Attorney's department about the proposed amendments?

Mr Neate—When the Attorney rang me to advise me of the proposal, he said that officers of the department would ring me subsequently to give me more detail about it. But this was really by advising me of what was about to be announced.

Senator TROOD—Did they? Did the officers subsequently—

Mr Neate—Yes.

Senator TROOD—How much time elapsed before they—

Mr Neate—It was later that day—that is, the day before the announcement. That is from memory.

Senator TROOD—But prior to that you had not had any substantive consultations with the Attorney or the Attorney's department about these changes?

Mr Neate—No.

Senator TROOD—I see. Is it fair to say that it took you by surprise?

Mr Neate—Yes.

Senator TROOD—Okay. Perhaps we can take that up with the Attorney, or his department anyway, a bit later in the day. These changes proposed some substantial amendments. And it not long after the bill was already amended. That is true, isn't it? It was two years ago.

Mr Neate—Yes. The Native Title Act was amended by two amending bills, both of which took effect in 2007.

Senator TROOD—What has been the impact of those bills on the work of the tribunal and on the resolution of native title claims?

Mr Neate—Those bills expanded some of the powers of the tribunal and more clearly differentiated the respective functions of the court and the tribunal. Various things happened immediately in response to those amendments, many of which are procedural but have had an effect on the conduct of mediation. The former Attorney-General published quite detailed tribunal mediation guidelines, which the tribunal has made available to parties appearing before us in mediation. I issued a whole range of procedural directions covering the effect of the amendments, including procedural direction No. 9 which gave my members and staff very clear directions about resolving what we saw as the key issues holding up claims—namely, the resolution of 10 issues; making sure there was a proper program for the preparation, analysis, presentation and mediation of connection material; programs for reducing the number of respondent parties to claims to only those with a relevant interest; and the resolution of disputed overlapping claims.

We implemented a detailed national case-flow management scheme to identify which matters were in substantive mediation and which matters needed more resources and perhaps capacity-building to move them to a point where they could be substantively mediated. We enhanced our regional planning program. It was already in operation, but we are now able to work more closely with the court and, in particular, the Commonwealth government departments, the funding agencies—FaHCSIA and the Attorney-General's Department—as a basis for using the power, under the act, of providing the court with regional mediation progress reports and regional mediation work plans, which we have been providing regularly to the courts in various states and regions. We have exercised our power to appear before the court and to assist the court in making appropriate programming orders and so on, and indeed to make appropriate orders to the tribunal about the conduct of mediation in relation to those claims.

The registrar of the tribunal performed the statutory requirements of re-registration testing many of the claims that had failed the registration test previously or had not been registration tested. Where claims failed the merit provisions of the act, that was reported to the court and the court subsequently struck out, I think, in excess of 20 of those claims. So the list has been

reduced to that extent as a direct result of the amendments. We have also published two national reports. Building on our extensive national overview, we have published national reports on the state of the native title system. If it will assist members of the committee, I have copies of the latest one with the latest statistics and a review of the past year.

In substantive terms, as I mentioned in my opening statement, there have been a number of determinations of native title in the past few years. I have not checked 2007 but in 2008 and 2009 all determinations that native title exists have been made by consent. The concerns which the tribunal expressed in our submission around the 2007 amendments about the cost and delay of litigation were certainly well founded at that time. But the trend now is that matters are settled. As far as I am aware, the only matter that is currently being heard, as I mentioned in the opening statement, is the Torres Strait regional sea claim. In the last week or two the court has set down the Jabiru town-site matter for hearing later this year, but that is essentially on extinguishment issues, as I understand it. So, basically, matters are being settled by consent.

Senator TROOD—So the amendments that came in a couple of years ago have provided the tribunal with the capacity to be able to do some things that it was not previously able to do. From what you have said, you seem to have taken advantage of those amendments to facilitate the work that you have responsibility for. Has anything emerged as a result of those amendments or the work of the tribunal which you think this bill is going to address? In other words, have some particular issues or problems emerged which, in your view as the president of the tribunal, require attention?

Mr Neate—Senator, if I understand your question, the system is not perfect, but the sorts of issues that arise in the end will not either necessarily be addressed or be addressed at all by procedural changes; that is between the court and the tribunal. There are real issues about, for example, the appropriate preparation and presentation of connection material to establish whether people have native title or not. Now, there is a prior question as to whether connection material actually needs to be prepared in each case, and that is a matter that the Attorney has raised on occasions and with which I have publicly expressed agreement, and whether a more interest based approach should be taken to the mediation of many matters by the key participants—something else which the tribunal has identified and supported.

If I can give just one example in relation to that matter. When we were preparing our National Case Flow Management Scheme around the time of the 2007 amendments, we did a survey of claims currently in the system. From our analysis it appeared that just under 20 per cent of the claims then in the system had had connection material of some sort prepared—not necessarily adequate for the purpose but prepared at all—and, in respect of another six per cent of the claims, it was decided that connection material was not necessary. That meant that in about 75 per cent of the claims there was no connection material prepared, but the claims were in the system. Now, unless that material is necessary for the resolution of the claim and is being prepared to an adequate standard, those claims are not going to progress towards a negotiated outcome, which is the preference of the tribunal, the government, the court and, presumably, the parties. And that in turn depends in large respect on available resources.

I note a recent newspaper article where one representative body has been advertising for anthropologists to assist in a major regional project. If good people sign up for that, it means there will be fewer people available in the country. And one of the judges in Queensland directed

some lawyers, I think last year, in some matters to put in affidavits saying how quickly claims could proceed if they had unlimited resources, because they were not proceeding quickly enough. I saw one of those affidavits, where the lawyer said: 'I've made inquiries; I just can't get anthropologists available to do the work. If I had all the money in the world'—and I am paraphrasing here—'it would not move things along.'

Senator TROOD—But your point is that the speed with which claims are resolved and the means by which they are resolved are less matters of the kinds of procedures that are already in place of prior to these amendments than the need for the challenges of evidence and connection, which has always been a problem for native title. Is that a fair summary?

Mr Neate—Yes. That is a fair summary.

Senator TROOD—Okay. This bill seems to provide the Federal Court with a greater degree of or overall control over the native title process. Is that a fair summary?

Mr Neate—The government's stated objective, as I understand it, is to give the court a more central role. I suppose my analysis, for what it is worth, would be that since the 1998 amendments to the act the court has had that central role—and quite properly for constitutional reasons, as outlined briefly in summary in our submission. Prior to 1998, all native title applications were lodged with the tribunal and did not go to the court unless they could not be settled. For constitutional reasons, the act was amended in 1998 so that all matters at all times were matters before the court. The court holds directions hearings, it refers matters to us and it either requests reports from us or receives reports from us about the progress of mediation. The court sometimes makes quite detailed orders about what it wants to happen in mediation in terms of us developing timetables with the parties and then reporting to the court on progress against those timetables. We can request orders from the court to hurry people along or, indeed, request that the court direct that mediation cease. So, in my view, the court has, and has had since 1998, a central role in the conduct of the proceedings.

The amendments made in 2007 made it clear that, for so long as an application was with the tribunal for mediation, the court was not to mediate it, and that was to avoid the perception and on occasions the reality that matters could be in mediation before two bodies at the same time. But, that issue aside—which clearly identified the respective roles of the court and the tribunal at a particular time—I would say the court has and actively plays a central role in the conduct of these matters.

Senator TROOD—These amendments seem to give the court an enhanced centrality in the position, at least in relation to the capacity to deal with members of the tribunal. For example, it seems as though it gives the court the capacity to direct matters to individual members of the tribunal, apparently without consultation with you. Is that correct?

Mr Neate—Perhaps I will make two responses to that. Firstly, the main, substantive change that is proposed, as I understand it, is to give the court the capacity to choose who mediates. That is, the court could do it itself, it could refer matters to the tribunal for mediation or it could refer matters for mediation to some other appropriate person or body. So the court is directing who mediates, and in that sense its capacity to control the proceedings is enhanced in terms of who

conducts the mediation, including whether the court does it itself. Beyond that, in respect of the mediation claims, I am not sure that the court's power is greatly enhanced.

As to the more specific point you have raised, it just is not clear to us the extent to which the court may be able to choose who from the tribunal mediates. The court can have regard to the skills and so on of people within a body—and I presume we fall within the category of 'a body'—who might mediate. It is not clear to me whether a judge might want to express a preference, for example, or even direct that the matter go to the tribunal for mediation by a particular member. I just do not know, and we will have to see how that works, but if that is the case—and arguably it is open in the way the bill is drafted—that could pose some real difficulties for me in the administration of the tribunal.

Under section 123 of the act, the president directs which members mediate which matters and what other forms of assistance are provided. Of course, we are focusing in these amendments on the mediation of claims, but the tribunal mediates and arbitrates in respect of future acts and provides Indigenous land use agreement assistance and so on. So members are used for a whole range of work. If it were the case that the court was able to, in effect, select which members did what, that would limit the exercise of my discretionary power as to which members were allocated to matters but also limit who could do other work.

If, for example—and I am extrapolating from this point—certain members became flavour of the month, if I can use that expression, with the court, then that would mean they could not be used on other matters where their skills might be as well if not better suited. I am in the position at the moment with a membership of nine where the options for redeploying people are perhaps more limited than they have been in the past.

Senator TROOD—I see. So you can see the force of the argument that the court might appoint the tribunal, as such, as a mediator and leave the determination of which of your members undertakes that responsibility, but you are concerned about the possibility that the court might, as it were, be able to reach into the tribunal, identify particular individuals and give them particular responsibilities, without consultation with you.

Mr Neate—In the former circumstance, where the court simply refers the matter to the tribunal, that would be, if I can put it this way, the status quo. I would allocate members appropriately. Indeed, as part of the regional allocation of matters now, it is fairly clear which members are likely to take particular matters. But, depending on the stage which an application has reached in mediation, I can supplement that member or indeed replace that member as the need arises. So I have a deal of flexibility, which has proved very useful in recent times, in being able to supplement or replace a member with other members in particular circumstances where I have that flexibility. I would be concerned, for reasons of practice, apart from any legal niceties, if the court were able to reach in and, in effect, nominate which member was to do what.

Senator TROOD—It would seem to undermine your authority as the president.

Mr Neate—It would certainly fly in the face of the operation of section 123 of the act, yes.

Senator TROOD—It would also seem to be inconsistent with the Attorney's declared view that there should be a high degree of flexibility in the system to make it work more effectively.

But maybe I misunderstand the Attorney's intent there. One of the significant reforms proposed here is that these mediators be appointed by the court. What do you understand that to be? Who are these mediators? What do you understand their qualifications to be and, most importantly, who is going to pay for their activities? Do you have any sense of that?

Mr Neate—On the last part of your question, that is an issue we have raised squarely in our submission. Really, this is not a matter that one would expect the legislation to deal with, but it is a practical matter. We are heading into the next four-year budget cycle. The government did a lot of work last year on how the native title system will be resourced, all of which proceeded before the announcement of these amendments. So I am not sure where the resources are coming from. I am assuming that if the court were to engage people other than its own officers or the tribunal then the resources would come from the court.

As to the qualifications of people, the bill seems to leave it fairly broad so that the court can look at the relevant qualifications of people to carry out the tasks that the court wants undertaken. I think there are a range of practical issues here. One is that the court will be able to refer part or the whole of a matter to a person or body for mediation. It may be that the matter itself is then broken up into segments—somebody deals with a particular issue and somebody else deals with another issue. Who those people will be from time to time will certainly be a matter for an individual judge to decide. One of our concerns is that when matters are referred to us generally, we can develop a regional strategy obviously in conjunction with the court directed by court orders and so on which have regard to the respective resources of the parties and can put some sort of system in place. The tribunal have within our specialist staff people with geospatial skills, research skills, legal skills and so on that we can put together in an agreement-making team to manage each stage of an application. Our concern is that if these matters are hived off to individuals or bodies particularly for particular segments some of that overall coordination of a particular claim and then the coordination of that claim with a broader region may be disrupted and indeed there may be duplication or fragmentation of services, which in the end could become more expensive to the Commonwealth rather than less so. I am speculating here. We have yet to see how the legislation would work.

Senator TROOD—I put it to you that these are concerns that you have brought before us because the bill is not clear on these matters. The declared intention of the legislation might not have the consequences that are hoped for, given the absence of certain provisions in the bill. At the very least, there are some things that need to be clarified. You are raising some concerns; you are not necessarily saying that the objectives are not good ones, but there is lack of clarity on how they are going to be achieved.

Mr Neate—I trust I made it clear in my opening statement that the tribunal is not concerned about the objectives—reaching more flexible, quicker and better outcomes. What we are saying is that those outcomes can be and have been achieved under the scheme as it is and that, if the behaviours of parties were adjusted in some cases and people resourced appropriately to do jobs and there was a really systematic way of dealing with claims, the system could be improved in the current scheme to produce the very sorts of flexible outcomes that the government, the parties, the tribunal and perhaps the court aspire to.

Senator TROOD—I have one more question. Overall, what has the record of the tribunal been in settling these native title claims compared to the court?

Mr Neate—That is perhaps an invidious comparison to have to draw and in a sense not comparing like with like. The tribunal has had the principal conduct of these matters in mediation in recent years. I know that in the court submission to this committee the court gives some examples of where it has conducted alternative dispute resolution apparently successfully, and I do not take issue with that. To take a broader look at these matters, where the court has been closely case managing matters, including matters which have come out of mediation before the tribunal and not referred to the tribunal as most of the matters in the Northern Territory are, the court has experienced the frustration of people not complying with court orders and court programs that the tribunal has experienced over some years. Similarly, there was a recent written decision from one of the judges in relation to a Queensland matter—and I can give you the citation if you wish—where the judge recites years of failure to comply with court orders and in effect says, 'I'm finding it difficult to know what to do to move this matter along.'

In saying that, I am not being critical of individual judges or of the court generally. What I am saying is that there are matters within the system that make claims very difficult to resolve and move along, and, even where the court is case managing matters very closely, as I would imagine it would under the amendments, they are not necessarily moving at any greater pace than they might under a joint mediation

Senator TROOD—It is not obvious that the court is having any more success in achieving these outcomes than the tribunal has been where these questions of evidence are in debate.

Mr Neate—Again, without saying we are comparing exactly like to like, the judges are expressing that they find considerable frustration in some areas moving matters along even when they are closely case managing the cases, in particular where the tribunal no longer has a role to play.

Senator SIEWERT—I will pick up where Senator Trood left off and look at the number of cases you currently have on your books. You give some examples of where mediation has resolved some cases, but how many cases do you have on your books and on average how long does it take to settle a case?

Mr Neate—I will attempt to answer your question immediately but I will do so by reference to the tribunal's recently published national report, which includes figures as at 31 December last year. That means they are a few months out of date, but for these purposes I do not think it will make much difference. An analysis of the 145 applications which were the subject of registered determinations between 1 January 1994, which is when the act commenced, and 31 December last year shows that the average time span for determining an application by consent was five years and 11 months; the average time span for obtaining a litigated outcome was six years and 11 months; and the average time span for obtaining an unopposed determination—and they are usually non-claimant applications in New South Wales—was 12 months.

Of the 477 claimant applications which were current at 31 December last year, 99 had been filed in the five-year period 2004 to 2008; 247, or 52 per cent, had been filed in the five-year period 1999 to 2003; and 131, or 27 per cent, had been filed before 1999.

CHAIR—Before you go on, Mr Neate, I have brought with me your *Talking Native Title* newsletter which was issued in March this year. That says that there are now about 473 native title claimant applications in the system. You quoted 477; this says 473.

Mr Neate—Yes.

CHAIR—Just for the record, is this correct? It does say that the tribunal predicts that, based on the national rates averaged, all the claimant applications will not be resolved until about 2035.

Mr Neate—Senator, that was our estimate a year or two ago. I do not think anything has occurred dramatically that would change that but can I say a couple of things in relation to that figure. Firstly—

CHAIR—It was your estimate a couple of years ago, but you reprinted it in your March newsletter, just last month.

Mr Neate—Yes, and I am saying that that has not been significantly revised because there have not been dramatic changes since. I am saying a number of things. Firstly, there has been a steady decline in the number of matters in the list—and, in fact, the figure I got yesterday was 472. The total number of claims in the system is dropping over time. Some of those are being struck out or withdrawn, others are being determined by a determination that native title exists and new claims are coming in. That projection was also based on the assumption that a number of claims would be made in the years ahead, not simply that there is a fixed figure that reduces over time.

The other thing I would say about the figure is that it is the figure nationally and that in some parts of the country claims are being resolved much more quickly. For example, on current progress all the claims in South Australia north of Port Augusta are likely to be resolved within, say, the next five years. That will leave a large region with all the claims sorted out. In the Torres Strait pretty much all the land-based claims were resolved quite some years ago. Once the Torres Strait sea claim is resolved, essentially that region will have had native title resolved.

The rate of disposition varies from region to region and state to state for a whole range of local reasons. The figure we were projecting was based on the total figure of claims currently in the system and expected to come into the system over the next few years nationally, but there will be substantial regions of the country where native title will be sorted out in the next few years.

Senator SIEWERT—I suppose the point is that there are a large number of claims still in the system—

Mr Neate—Yes.

Senator SIEWERT—and that many people see the current system as being too slow, ineffective and, most importantly, not delivering outcomes for TOs. If you have concerns with these amendments, what things should be done to address them? I think there is general agreement that the current system should not continue in the way it is progressing because it is too slow and not delivering. What should be done?

Mr Neate—One thing I think would be useful to do—and we are doing this in matters that are in active mediation—is sit down with the parties early on in the process and say to applicants in particular, 'What are you hoping to achieve out of the process?' If they want to achieve a determination of native title then one would proceed down a particular track, and that could include preparing connection material and so on. If people, in light of experience and good advice, say that what they want is actually something other than that—they want a say in how a national park is managed and so on—then we talk about that.

Senator SIEWERT—My understanding of these amendments is that this process would enable that, or have I misunderstood it?

Mr Neate—It could—

Senator SIEWERT—I understood that that was able to be done under this process.

Mr Neate—It will be able to be done under this process, but my point is that it is able to be done and is being done under the present process.

Senator SIEWERT—But the point is that the process is not working. It is really slow. We have just agreed that there are a lot of applicants, it is too slow and it is not delivering.

Mr Neate—It is slow, but it is delivering.

Senator SIEWERT—I think a lot of people would disagree with you on that.

Mr Neate—Perhaps the claimant groups who have been successful would not.

Senator SIEWERT—And there are a whole lot who are still in the system who would most definitely say it is too slow and it is not delivering.

Mr Neate—Indeed. As I said earlier, many of those groups are groups for whom insufficient or no connection research has been done. Some state governments are saying, 'Until you have done your connection material, we do not want to sit down and talk to you.' You do not get to first base until that work is done. Whether the new system will expedite that remains to be seen. There are a whole range of reasons why that material has not yet been prepared. I made the point earlier that it may not be necessary to have that material if what the applicants want and what the state governments particularly are willing to talk about is something other than a native title outcome. I have certainly been encouraging people to talk about that in the current mediations as well.

All I am saying is that the changes are not necessary to encourage that discussion. The amendments may encourage that discussion, but they are not necessary to do so because those sorts of discussions occur now. We would all like to see quicker outcomes and some of the expense and delay which is incurred by particular requirements of some parties removed so we can get to the real issues sooner. I have no problem at all with that policy objective.

Senator SIEWERT—You raised the issue earlier about people not complying with orders et cetera. The amendments, as I understand them, also allow the court to take action if parties are not acting in good faith. How often do you come across parties not acting in good faith?

Mr Neate—The 2007 amendments introduced the good faith provisions, so they are there now.

Senator SIEWERT—But this allows the court to—

Mr Neate—If I may explain: we have the capacity to report to the court—or, indeed, the funding agencies—if people are not behaving in good faith. We have not had to do that. The mere existence of that capacity and a few chats outside mediations has meant that people understand that those provisions do have some teeth and we have not had to make those reports. People's behaviour has been modified because those provisions are currently there. I do not understand that the amendments to the act will make any difference on that point, except that mediators generally will be able to report to the court absence of good faith. Well, at the moment, we are the mediators and we have had that capacity and we have not had to exercise it because people have come into line. Indeed, the mediation guidelines that the previous Attorney-General published made that clear.

Senator SIEWERT—You have raised issues around the court being able to appoint people in the tribunal, outside your authority. Could that issue be overcome by requiring the court to liaise with you, with the tribunal, before appointing someone?

Mr Neate—If the amendment allows the court to reach in and nominate a particular member, then I would certainly prefer it if the court did consult with me first. If the amendment is not read by the court in that way and the court simply appoints the matter to the tribunal on the basis that I will appoint a suitably qualified member, then the issue does not arise. I am just saying that the provision of the act is a bit ambiguous on that point, and I am not sure to what extent the court will want to influence the allocation of particular members. If the act does allow that, then, yes, it would help if I was consulted.

Senator SIEWERT—In terms of allowing mediators that are outside of the tribunal, do you have specific problems with that? Or do you think that would speed up the process?

Mr Neate—I do not know that it would necessarily speed up the process. It depends on what those people are engaged to do. If we can take, for the purpose of this discussion, the point that you and I have just been discussing—that is, even with the best will in the world and with close cooperation between the tribunal and the court, it takes some years for claims to move to resolution—then one of the challenges for the court in administering this is finding people who are suitably qualified and available to work through those processes for as long as it takes. The tribunal exists and is resourced to do that. We can call on a range of resources internally and, if need be, externally because I can engage consultants to see a matter through from start to finish, working in close cooperation with the court, so I do not see how the amendment in itself would necessarily speed things up. It may do in a particular case, but I do not think, of its own effect, it would necessarily achieve that outcome.

Senator SIEWERT—Can we just go back to the issues of connectedness and connection material. How many claims are—I know you said it before, but I missed writing it down—delayed because of the onus of proof?

Mr Neate—The figures I mentioned earlier are now a couple of years old—perhaps I should conduct a similar survey—but I think that 19 per cent of the claims in 2007 had had some connection material prepared. Six per cent of the claims, and I think they were probably primarily South Australian claims, were proceeding to a negotiated outcome without the requirement for connection material because there was some other outcome being negotiated. And the rest of them either did not have connection material or a program to prepare it, or there was some program in mind but the material had not been prepared. That meant that about 75 per cent of the claims had not been researched to a point where, say, a state government would sit down and have substantive negotiations, confident that they were dealing with the right people.

A related issue to that, and it is more apparent in some parts of the country than others, is the extent to which there are disputed overlapping claims between neighbouring groups, which themselves cause delays in negotiated outcomes because many respondents say, 'Look, we're happy to negotiate outcomes once that dispute between neighbouring groups is sorted out.'

CHAIR—Mr Neate, you mentioned consultation. I am assuming that you put in a submission to the proposed native title amendments discussion paper that was launched in December 2008?

Mr Neate—Yes.

CHAIR—In the Attorney-General's second reading speech, when this bill was introduced into parliament, he outlined the objectives of the legislation and said:

This change is in line with consistent stakeholder feedback.

It is also in line with the government's position in opposition. I am not asking you to comment on policy; I am just highlighting to you that if you look at the content of the Attorney-General's second reading speech, he indicates this is in fact legislation that reflects the current government's policy position. Did you provide some feedback to the discussion paper?

Mr Neate—Yes, we put in a submission in February this year I think. I do not have a copy with me.

CHAIR—Is it similar to the submission you have given to this inquiry?

Mr Neate—From recollection, it would have covered many of the same areas. Unfortunately, Senator, I did not think to bring it with me today. My recollection is that we would have raised similar issues, yes.

CHAIR—I also wanted to ask you about proposed schedule 5. I know you have given us comments today mainly about schedule 1, but this is about amendments to rep bodies. Do you have any comments about those amendments?

Mr Neate—No. I understand the objective of the government is to make the process simpler and more efficient. I am not in a position to say whether it will have that effect or not. I am certainly not suggesting that it will not. I am not qualified to comment on those provisions.

Senator SIEWERT—You may want to take this on notice. Earlier, when we were talking about how claims were being resolved, you said some were moving faster than others. Is there a common theme to the ones that have been moving faster? You talked about the ones in South Australia. Is that because the South Australian government is cooperating more? Is it because they do not deal with issues of, for example, mining? Are there common threads?

Mr Neate—There is a range of factors. The most recent consent determination in South Australia involved a whole range of parties with a whole range of interests, including, I think, exploration and mining companies. It was over 41,000 square kilometres of country. It has to be said that in a number of recent determinations, the court and the tribunal have worked very closely with the court—pushing parties and the tribunal along and us reporting regularly to the court and working, as we would apprehend it, in accordance with our respective statutory functions—with the court putting pressure on the parties and the tribunal to produce, and us responding. Also, it has to be said that where there is a proper prioritisation of claims, claims are not all being dealt with at the same pace but there is some reasonable order in which things are being done having regard to the respective resources of the parties. Again, with close management from the court and close mediation from the tribunal, they are the sorts of factors that can move things along. But really there has to be a willingness of parties to sit down and negotiate and not put things off—and to put appropriate resources into those mediations.

Senator SIEWERT—I have one more question, which relates to appropriation resources. It goes back to the issue of connectedness, which we were talking about earlier, and claims going in that do not have enough material. Is that because there is a lack of resources to help people actually get that material, or is there some other reason?

Mr Neate—The figures that I read to you earlier from our national report show that a large proportion of the claims were lodged before significant High Court decisions in, for example, the Yorta Yorta and Ward cases were delivered and before substantial amendments to the act were made. Many of the claims were lodged many years ago, before people could possibly have understood what sort of material would be required to get their claim over the line. Claims that come in these days are much better prepared, ordinarily pass the registration test and, in that sense, are more focused on the legal requirements, and people can sit down and negotiate. It is the older claims, which were never in a form that would satisfy the current legal requirements, that have to be brought up to speed. A number of those, as I mentioned earlier, have been struck out because they have failed the registration test on a couple of occasions and there is no real prospect of them moving in that form. They may be relodged in the future—that is, claims over the same area by the same groups may be relodged in better form—but a lot of the old claims just were never prepared to conform.

Senator SIEWERT—But those claims are not part of that statistic of 472, are they?

Mr Neate—No. The 472 remain in the system.

Senator SIEWERT—But I presume they are the ones that you are using for the statistics around the claims that do not have enough connectedness material.

Mr Neate—Yes, indeed. In terms of resources, I would simply make the point that this is not just about money; it is about having qualified people who are available to do the work.

Senator SIEWERT—I used 'resources' in the broader sense.

Mr Neate—Yes. I just wanted to make sure we had a common understanding of that. And it is about trying to ascertain in which of those claims, for there to be a practical and acceptable application for the parties, it is really necessary for a high level of connection material to be done at all. If it is not, then let's put those limited resources into those claims where connection material is necessary, not waste time and resources preparing reports which in the end are not beneficial or facilitative of the outcome.

Senator TROOD—On the matter of expeditious resolution of claims, I think you said that the tribunal now has nine members; is that right?

Mr Neate—Yes.

Senator TROOD—Is that more that it has had in the past? Is it less than it has had? How does that compare to the numbers that have been on the tribunal over a period of time?

Mr Neate—I think I mentioned in our last annual report—and I think we had slightly more last year—that this is the lowest number for a full year since the tribunal was established.

Senator TROOD—What was the peak that you had?

Mr Neate—I think in the early days it may have been up around 25. A number of those were part-time members; a number of those were serving judges of the Federal Court. But the number has reduced steadily over the years. It is now lower than it has been previously.

Senator TROOD—So you now have fewer members than you have ever had?

Mr Neate—Yes.

Senator TROOD—With regard to the point you make on page 13 of your submission, about the mediator's right of appearance before the Federal Court, you currently have a right to appear before the Federal Court; is that right?

Mr Neate—Yes.

Senator TROOD—So one of the consequences of this amendment is that you will lose that right to appear. That is my understanding of your submission.

Mr Neate—Yes. As I understand the amendments, the court might permit the mediator, be it us or any other mediator, to appear but the mediator will not have a right to appear. We currently have a right to appear.

Senator TROOD—But the particular entitlement that the tribunal has, with its expertise, is going to be lost as a result of these amendments?

Mr Neate—Unless the court invites us to appear on each occasion.

Senator TROOD—But you will not have a statutory right of appearance, will you?

Mr Neate—No.

CHAIR—Mr Neate, could you clarify something for me. You said that at one stage you had 25 members of the tribunal?

Mr Neate—I think that is right. If that is wrong, I will—

CHAIR—Was that full-time and part-time?

Mr Neate—A number of those were part-time members—they were full-time judges of the Federal Court who were also part-time members of the tribunal. I have figures that I could provide to you on an annual basis as to how many part-time, full-time, presidential members we have.

CHAIR—That would be useful. The 25 would have been in what years?

Mr Neate—Probably the late nineties.

CHAIR—How many do you think you have now?

Mr Neate—I know I have nine.

CHAIR—For how long has it been nine?

Mr Neate—Since February this year.

CHAIR—And last year?

Mr Neate—It would have been 11. One of my member's term expired in February this year, and in July last year another member resigned.

Senator TROOD—They have not been replaced?

Mr Neate—No.

CHAIR—Perhaps you get us those figures.

Mr Neate—Certainly.

CHAIR—But I am assuming that since the late nineties the numbers have diminished and have not been replaced for a number of years—is that correct?

Mr Neate—No, there have been replacements and reappointments at various times. You will see the statistics; if needs be, I can provide you with the names. People have come and gone, some have been replaced, some have had their terms extended.

Senator TROOD—But the overall numbers have declined.

Mr Neate—Yes.

CHAIR—Thank you for your time this morning. It is much appreciated.

Mr Neate—Thank you, Senator.

[11.47 am]

McAVOY, Mr Tony, Representative, National Native Title Council

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Mr McAvoy—I am a barrister. I have been engaged by the National Native Title Council to appear on its behalf in these proceedings.

CHAIR—Thank you. We have yet to receive a submission from the council.

Mr McAvoy—I do not have a copy of the submission to hand up today but I can speak to the issues that the National Native Title Council wishes to raise.

CHAIR—We understand that there is a submission coming—is that still the case?

Mr McAvoy—That is my understanding. I had assumed that it had arrived.

CHAIR—No, we do not have anything to date. We should expect that soon?

Mr McAvoy—You should. I can indicate that the submission goes to one point and I am ready to speak to that point and answer questions you may wish to ask.

CHAIR—We will do that. I just wanted to clarify whether you had bought copies of the submission with you.

Mr McAvoy—I do not have one with me but my chambers are not far away.

CHAIR—That is fine; we will wait until it is formally lodged with the committee. Could you begin by giving us an opening statement about the matters they want raised and then we will go to questions.

Mr McAvoy—I am appearing before this committee on behalf of the National Native Title Council, which is the peak body for native title representative bodies and native title service providers. The position that the National Native Title Council wishes to put is that, firstly, with respect to the amendment bill in its present form, the amendments are seen as non-controversial and the council does not take issue with them in their present form. The purpose of my appearing today is to convey to this committee and to the parliament the concern of the National Native Title Council that the opportunity to make some small changes to the act might go by at this stage but those small changes might have a significant effect on the way in which native title is litigated in Australia.

The particular issue which I have been instructed to bring forward today is the insertion into the legislation of a presumption of continuity. This is a concept which has been raised by the

Chief Justice of the High Court, the Hon. Robert French, in his article in the Law Reform Commission journal *Reform*.

CHAIR—I am sorry to have to stop you but my understanding is that that is not an aspect of the legislation.

Mr McAvoy—I understand that.

CHAIR—Okay. You are referring to the Attorney-General's recent public comments.

Mr McAvoy—I have a copy of the article, which I was going to hand up to you.

CHAIR—But the matter you are referring to is not actually part of the amendments of the bill that is before us. That is all. I just want to make that clear for the record.

Mr McAvoy—I understand that and so does the National Native Title Council. I submit that the comments by the Chief Justice are pertinent and they respond directly to the questions asked by Senator Siewert of the President of the National Native Title Tribunal, who gave evidence before me today—that is: how do we make this system work? If you want the National Native Title Council's opinion, the amendments that are proposed in this amendment bill are not controversial. They may make some small difference but they are not going to make any vast change in the way in which native title matters are dealt with. There is not going to be any rush of settlement of native title applications as a result of any of these amendments. However, if the parliament is interested in bringing forward settlement of native title applications and reducing the cost associated with the hundreds of applications that are presently before the court then a simple measure—one which is described by Chief Justice French in his paper as a modest proposal—would be to introduce a presumption of continuity. It would require a number of small provisions to be inserted into the legislation.

It is my submission that having inserted those provisions the initial premise for the establishment of the presumption could be made out in the application itself and the section 62(1) affidavit which supports the application, and then the burden would automatically shift to the states. I am aware that this committee is dealing with the bill as tabled.

CHAIR—Yes. The matters that you go to may well be—I am not aware of whether they will or will not—the subject of further legislative changes in the future. They might not be but they may well be, and I am sure that that bill will come to this committee if that is the case but we are a bit constrained because the Senate has asked us to inquire into and report on the bill that is currently before us and the matters that are before us. I understand where you are coming from and I think my colleagues are happy to hear what the council has to say but you need to bear in mind—

Mr McAvoy—Certainly.

CHAIR—that it may not be reflected in our report because it is not directly related to the bill before us.

Mr McAvoy—I appreciate the constraints that the committee has and I understand that the committee appreciates my position.

CHAIR—Yes.

Mr McAvoy—If I may, then, I will hand up copies of the article by the Chief Justice. It appears at page 10 of the Australian Law Reform Commission journal *Reform*, issue no. 93.

CHAIR—Mr McAvoy, do you want to say anything else?

Mr McAvoy—I am just waiting for the document to be circulated. I take you to page 13 of that document. The publication and the media coverage of this particular proposal for amendment are coincidental. My understanding is that these articles for this journal were written last year. Going to the second paragraph under the heading 'Lifting the burden—presumption' you will see that the Chief Justice sets out his ideas as to how such a presumption might work in practice. Most importantly, at about half way down the second paragraph he notes:

A fact sufficient to engage such a presumption might be that the native title claim group acknowledges laws and observes customs which members of the group reasonably believe to be, or to have been, traditional laws and customs acknowledged and observed by their ancestors.

The notion in and of itself that there should be a presumption of continuity in native title litigation should not be surprising. The evidence which traditional owners inevitably have to rely upon for that period which is beyond the living memory of traditional owners comes from the government. That material is often in the hands of the government or government functionaries so it is an interpretation of that material which is often the issue at question between native title parties and the government. As it presently stands, traditional owners are required, once their application is filed, to prepare a report which has been given the name 'connection report' for consideration by the states, usually, as the primary respondent. The traditional owners have to then go through an exhaustive process of trying to unveil every document that might exist in relation to all of the members of their claim group, go through the task of getting permission from the state to access those documents, have an anthropologist deal with what the documents may or may not say, get comment upon them from the traditional owners again, and then hand it back to the state for them to pore over. It seems to be a particularly cruel form of access to justice. The state has the resources and the capacity to look at the material it self. If it wants to challenge the continuity of particular people's connection then let them do so. Let them access their own material and do so. Instead, the onus is placed upon the traditional owners and complaints are made about the length of time it takes for claims to be settled.

Senator SIEWERT—You are arguing that it is basically reverse onus—that would be the end result.

Mr McAvoy—It is shifting the onus with respect to an element of the proceedings, which is not a concept foreign to Australian law; it happens in a variety of other places. Certainly the view of the National Native Title Council is that it would greatly assist the negotiation and settlement of native title matters because, as it is, the native title representative bodies and service providers are required to basically prioritise or place traditional owners in a queue until

sufficient resources become available to undertake what is a very costly process in preparation of the connection report, which the state requires.

Senator TROOD—Without having had the opportunity, of course, to read the whole of his honour's article, the thing that strikes me immediately in relation to the passage you have drawn our attention to is that it might be very straightforward if there is only one owner but it is less obvious as to how that can work when there is contested applications for ownership over a particular parcel of land.

Mr McAvoy—Senator Trood, if you could point me to a particular form of difficulty that you see I might be able to respond to it.

Senator TROOD—I do not want to spend a lot of time on this because, as the chair has rightly pointed out, this is not the issue that is before us, but you have pointed out:

A fact sufficient to engage such a presumption might be that ... members of the—

the—

group reasonably believe to be, or to have been, traditional laws ...

If members of several groups are laying claim to those laws then somehow or another you have to arbitrate, determine or mediate between those respective claims. A presumption is not going to help you very much, is it? The presumption will have to be made in favour of one of the parties.

Mr McAvoy—With respect, if you operate under the presumption that only one group can have native title rights and interests over one area of land then that might cause some difficulty but the understanding of native title rights and interests has long ago developed in this country to accommodate multiple interests by multiple groups. I cannot see that there is a particular concern that should be held.

Senator TROOD—It seems to me on the face of it to pose a problem. But we are not debating this issue now.

Mr McAvoy—The group that the Chief Justice is referring to is the applicant group. The group which forms the native title claim group is the group he is referring to. Because it is Federal Court litigation a group has to be identified as the people who are asserting the rights and interests. It is that group he is talking about. If that group is able to establish that they have a reasonable belief that the laws and customs that they observe are traditional then the Chief Justice has posed the proposition that there should be a presumption in favour of continuity.

Senator TROOD—The Chief Justice may well be correct on this issue and I do not wish to debate it with him or mediate a debate through you. Did you want to say something further in relation to your opening statement? We seem to have interrupted you.

Mr McAvoy—I did want to say something further. You will note at the top of page 13 in the second column there is an editor's note that his honour then set out a draft form of provision containing a presumption. I would like to hand up for the committee's use a copy of that draft

provision. The provision is topped and tailed by the comments of his honour in the journal article which were not published. Most importantly, at the foot of the provision his honour makes the disclaimer that this is rough drafting and is offered as a basis for discussion of the use of presumptions in this area. I invite the committee to take a moment to have a look at the rough draft that the Chief Justice has prepared, which will make provision for such a presumption.

The reason I have asked you to take a moment to read the draft provision is that I would submit to you that its content is not complicated. It does not raise new issues; it does not attack the skeletal structure of the Native Title Act; and it does not require an amendment to the definition of native title contained in section 223. All it says is that, in respect of one element, if the Aboriginal people making the claim can show that the laws and customs they are asserting are traditional laws or that they hold a reasonable belief that they are traditional laws, the state or the respondent has to disprove the continuity. The reality is that it is almost invariably the state.

There was some discussion about the good faith provisions in terms of how the addition of the further good faith provisions may assist in mediation. On their own, it is my view that they do not assist greatly. The reason is that the proceedings in the Federal Court are litigation. The state is a party and is entitled in the way that the law is presently structured to demand that the party seeking the remedy prove its case; it is entitled to do that. It can sit in mediation and require the applicant to prove each point to a level of satisfaction. Whilst in a spirit of settlement that might seem to be unreasonable, it is a long way short of being in bad faith or of there being an absence of good faith. However, if the presumption of continuity were inserted into the legislation, that would vastly change the path of negotiation. The state would then be required to identify what issues it chose to challenge, come up with some reasonable foundation for that and, if it had none, to enter into substantive negotiations. Unfortunately, for many traditional owners, simply reaching the point of getting into substantive negotiations with any of the respondent parties is a hurdle that many have been unable to attain as yet. In many cases, the state will not even talk to them about serious settlement because they have not presented a connection report.

I do not intend to labour this issue any further. I understand the limitations of the committee. I also would indicate that it is the National Native Title Council's view that it is unnecessary to wait a further 12 to 18 months for the amendment proposed by the Chief Justice to be inserted into the legislation. That is how long it will take. In his interview last week on *AM,* I believe it was, the Attorney signalled that that is the length of time it will take. The National Native Title Council does not cavil with the fact that there are a number of fundamental issues which do require broad consultation and which will require some time in order to develop appropriate policy positions. But an alteration to the way in which native title is litigated that involves the insertion of a presumption of continuity is not one of those. It is simple and can be done now.

The invite has been laid on the table to the committee to consider how it might deal with that information. I am available to answer any questions about how it might work in practice. I do not believe that there is anything further that I need to say with respect to the amendments as they stand or to the bill as it stands.

CHAIR—Thank you. In relation to the amendments contained in the bill before us, is it the view of the council that they would benefit the process and improve the current situation? If you say that they are not controversial, then I am assuming there is agreement for the amendments before us?

Mr McAvoy—Yes.

Senator SIEWERT—You are saying that the amendments are okay. If I understand you correctly, you are also saying that native title will be improved even more with the amendments on presumption of connectedness that you are talking about?

Mr McAvoy—Of an order of magnitude which is substantial.

Senator SIEWERT—Is it your position that the amendments that we are looking at now will not provide the order of magnitude that is necessary to get the change that, I would say, the government clearly wants in terms of speeding up the process? Is that right, or am I putting words in your mouth?

Mr McAvoy—I do not believe that the bill will do that. I do not have specific instructions from the National Native Title Council on that point, but my personal view is that it will not make any significant change to the speed with which matters are resolved.

I omitted to say something earlier, and that is that, whilst 12 to 18 months may not seem like a long period in terms of the formulation of policy and the introduction of bills and the passage of legislation, the pressure currently being placed upon applicants to proceed with their claims in the Federal Court is substantial. The Federal Court is requiring all parties to demonstrate a willingness and a capacity to proceed with the litigation. So, while it may not seem like a long time in the parliamentary cycle, it is quite a long time for native title applicants.

Senator SIEWERT—I do not know whether you were here at the beginning of this hearing when we were talking to Mr Neate—

Mr McAvoy—No, I was not.

Senator SIEWERT—But you were here for the latter part of his evidence.

Mr McAvoy—Yes.

Senator SIEWERT—I appreciate that the submissions on the Native Title Tribunal have only recently become available; but, if possible, I would appreciate your comments on them. I do not expect you to make any comments now—although, if you do want to make some comments now that would be fine. Could you take on notice the concerns of the tribunal? They have raised a number of them. The committee would value any comments that you wish to make about those concerns, including whether you think they are significant.

Mr McAvoy—At this point I have not considered, and I do not believe the National Native Title Council has considered, the content of the National Native Title Tribunal's submissions. I can take the question on notice and undertake to ensure the response is provided to the committee in due course.

Senator SIEWERT—That would be very useful. My final question goes back to your oral submission and your further submission that we are expecting: the bottom line is that you think the most significant amendment that could be made to native title would be the amendment that

you are proposing. You believe that this amendment would be of substantive benefit to native title resolution.

Mr McAvoy—At this point, given that this bill is a minor amendments bill, certainly the amount of benefit to be achieved by a limited amount of change can be best obtained through the insertion of a presumption of continuity, in the National Native Title Council's opinion. There are other serious and fundamental issues with the legislation, but that is for another time and place. It is not the case, in the National Native Title Council's opinion, that the insertion of a presumption of continuity needs to wait and go up as a broader package of discussion. It is a fairly straightforward and simple concept, a very simple amendment which will deliver a significant change to the way in which native title is litigated.

Senator TROOD—This is the single most important reform that needs to be made, in your view. Is that right?

Mr McAvoy—No. I am sorry if I have given that impression. It is about minor amendments, amendments that can be done now without going into great shifts of policy or redefining native title so we set out on a whole path of renewed litigation about what native title means. We are not talking about amending section 223. All we are talking about are small amendments which, if they are tweaked in the right way, can bring about significant change. So it is not the single most important amendment that needs to happen in respect of native title. There are other, far larger issues that go to the core of native title. But in the process that the government has set about—that is, looking at minor amendments that will help expedite native title—this is a form of amendment that can be done easily and does not require an attack on the structure of the legislation but will deliver significant outcomes.

Senator TROOD—Perhaps I should rephrase: it is the single most important of the small procedural amendments that are necessary. Is that a more accurate description of your position?

Mr McAvoy—At this point of time, yes, that is the National Native Title Council's position.

Senator TROOD—So when the Attorney-General says that his aspiration is that there be a timely and efficient resolution of issues, that it be a resolution achieved through negotiation rather than litigation and that these amendments in this bill are going to achieve that objective, you are dubious about that claim, are you?

Mr McAvoy—Yes.

Senator TROOD—Can I put this to you: if these amendments were not adopted, in your view would it make any significant difference to the speed with which the resolution of claims proceeded?

Mr McAvoy—It is difficult to say whether they would make a difference to the speed with which claims are dealt with. The amendments do provide some assistance to the conclusion of native title matters, but as to the speed they are dealt with it is too difficult to say.

Senator TROOD—You are inviting the committee to be sceptical—

Mr McAvoy—Certainly.

Senator TROOD—about the Attorney-General's claim that this is going to revolutionise the system in ways which will allow expedition and justice to be achieved, in ways which he obviously wishes to be the case.

Mr McAvoy—Do you wish me to respond?

Senator TROOD—Yes. But don't if you do not wish to.

Mr McAvoy—What I can say is that it is the view of the National Native Title Council that the amendments are not going to deliver great changes in the speed which native title is dealt with in this country.

Senator TROOD—And do they have the potential to undermine the structure of resolution? That clearly, from your perspective, proceeds too slowly, but at least it is a structure which has worked in dealing with the range of challenges which the resolution of these matters confronts us with.

Mr McAvoy—I have many, many complaints about the structure of the Native Title Act and native title litigation as it appears in Australia, but I do not believe that it can be said that these amendments will serve to undermine the structure in any fashion. It places greater emphasis on the role of the court as the central body which is basically running the litigation. How that translates to effective case management and throughput of native title claims is yet to be seen. But, certainly, many of the amendments really only enhance existing powers and provisions. The court already has the power to refer matters off for mediation. The tribunal already has the power to make a report that a party is not mediating in good faith. Judges have already made consent determinations on the basis of agreed statements of fact.

Senator SIEWERT—There is the speed of outcomes, but it is also about whether we get better outcomes and fairer outcomes that actually deliver better for TOs. Do you think these particular amendments will have any impact there?

Mr McAvoy—There may be, if there is a greater take-up by the court of the notion that it is appropriate to recognise native title by way of consent determination upon an agreed statement of facts. But it is discretionary, and this legislation does not require a judge to do it in that way, and perhaps it cannot. But it certainly encourages the court to think about that as a means of dealing with consent determinations. That may be of assistance. But, in terms of the question of whether it is going to expedite native title proceedings, it is very hard to see how it can make all that much difference. When you are looking at a consent determination, basically you have got all the other parties in agreement. It is just getting the court to make the order recognising the existence of the native title. The longest delay is in getting into discussions and concluding discussions with the respondent parties, and invariably the primary respondents are state governments or the Commonwealth. That is where the real delays and problems are, and that is where this shifting of the onus of proof will have great effect.

Senator TROOD—The court already has the right and the discretion in relation to agreed statements of fact, does it not?

Mr McAvoy—Section 87 of the Native Title Act has been interpreted that way by—

Senator TROOD—Yes. So all this will do is confirm that the interpretation is correct—

Mr McAvoy—Yes; that is right.

Senator TROOD—or at least that that ought to be the case.

Mr McAvoy—Yes. The confirmation of that is important in that it appears that there are a number of strands of thought on the Federal Court benches as to what the current sections 87 and 87A mean. It is important in that it gives some parliamentary guidance. But, in answer to your earlier question, no, I do not believe it is necessarily going to speed up litigation.

Senator TROOD—But that is part of the problem here, isn't it? You touched on it not just in relation to this matter, Mr McAvoy, but in relation to the court dealing with native title claims in general. There is a measure of individualism about the way in which justices deal with these processes. So there is not a high degree of continuity in the Federal Court. Justices may be applying an act but they are applying it in different ways which are not necessarily consistent. A judge in Queensland may be doing something different to a judge in New South Wales or Victoria. These amendments are not going to fix that. In fact, they may facilitate a greater degree of fragmentation, mightn't they?

Mr McAvoy—They may.

Senator TROOD—That is at least a possibility.

Mr McAvoy—They may, but certainly the insertion of the proposed amendments to section 87 indicate that the making of a determination of native title on the basis of an agreed statement of fact is something that the parliament has contemplated and is not something outside the proper interpretation of that.

Senator TROOD—I know that. I was referring to the reforms more generally, which may have the consequence of, rather than trying to develop a high degree of consistency and continuity in the way in which these issues are dealt with, resulting in a high degree of fragmentation and ad hoc approaches as we bring, for example, mediators into the process who it is not clear, to me anyway, from the bill have any particular qualifications for undertaking the task—although one assumes they will have.

Mr McAvoy—It did not escape the notice of the National Native Title Council either that there is no requirement for qualifications for mediators. But, nevertheless, the varied responses of the bench to a variety of provisions of the Native Title Act are part and parcel of the Australian legal system and adherence to principles of judicial discretion. I do not believe that the National Native Title Council's position is one where it wants to unnecessarily seek to limit the judicial discretion. In relation to consent determinations of native title, barring parliamentary pronouncements such as that which is proposed, they are not matters that ever go on appeal. So there is no guidance within the court as to what is expected or how sections are to be interpreted. That is just the nature of a consent determination—nobody ever appeals them. In that respect,

you end up with a range of views as to what the section means and I do believe that section 87 will give some assistance and guidance to the members of the bench.

Senator TROOD—Does the council have a view, or do you wish to present a view to us, about the role of the mediators that are proposed under the bill and their qualifications?

Mr McAvoy—I do not wish to comment on that. My personal view though in relation to the circumstances in which mediation is undertaken is that it is far too simple for parties to confuse the issues in mediation by drilling down and requiring proof of the minutiae of native title. The capacity to that is enabled by the legislation in the way in which it currently exists. I do not believe that even the most skilled mediator would be able to resolve some of the native title litigation that currently exists. That is in part because of the difficulties with evidence but in many cases there are overarching policy issues that a mediator just cannot deal with where there is a capacity for parties to seek proof of every point.

CHAIR—Thanks, Mr McAvoy, for your time today.

Mr McAvoy—Thank you for your indulgence.

CHAIR—We wait with interest to see the written submission when it is forwarded to the committee.

Mr McAvoy—I suspect that it will arrive some time later today. I will convey the question on notice with respect to the National Native Title Tribunal submission and pass on any response that the council wishes to make.

Proceedings suspended from 12.30 pm to 1.20 pm

KARLSSON, Ms Tiffany Louise, Principal Legal Officer, Legislation, Scrutiny and International Team, Native Title Unit, Attorney-General's Department

MURPHY, Mr Jeffrey Mark William, Acting Assistant Secretary, Claims and Legislation Branch, Native Title Unit, Attorney-General's Department

ROCHE, Mr Greg, Branch Manager, Portfolio Governance, Department of Families, Housing, Community Services and Indigenous Affairs

CHAIR—I now welcome representatives from the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs. Thank you for lodging your submissions, which we have labelled No. 2 for our purposes. Before we start, I remind you that the proceedings of the Senate have resolved that an officer of a department of a Commonwealth or state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to the minister. This resolution prohibits only questions asking for opinions on matters of policy. It does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. I also remind you that any claim that you may make that it would be contrary to the public interest to answer a question must be made by a minister and must be accompanied by a statement of basis setting out that claim. To begin with, Mr Murphy, do you have an opening statement?

Mr Murphy—No, Senator, I do not.

CHAIR—Mr Roche, do you have an opening statement?

Mr Roche—No.

CHAIR—We will go straight to questions. Senator Siewert.

Senator SIEWERT—You were here for the evidence this morning and you will have read the tribunal's submission, so I would like to ask for your response to it. Obviously I am not looking for a policy response but, in terms of the operation of the amendments and how much more effective this new process is going to be, I would appreciate your comments on (a) where you see the benefits of the changes and (b) whether the comments that the tribunal have made are issues that you have looked at and whether you see them as concerns. If you need to respond separately, the answer can come from either agency or on behalf of both.

Mr Murphy—In general terms, some comments have been made about whether the amendments in the bill will make improvements to the system. As the Attorney has made clear, the purpose of the amendments is to allow for broader, more flexible and quicker resolution of claims through settlements in particular rather than litigation. The main way that this is going to be achieved is through giving the court key control of management of claims, which will allow the court to clearly identify the best ways to settle the claims through settlement and choose the most appropriate mediator for a particular claim, including taking into account the qualifications of a particular mediator and their relevance to a particular claim.

The amendment relating to the court being able to accept agreed statements of fact will make it clear that the court is able to do that so that the parties can reach agreement on facts. That should allow for speedier resolution of consent determinations in some cases where there is agreement between the parties. In terms of flexibility, the amendments will make clear that the court can make consent orders in relation to matters other than native title. That will give the court flexibility to make orders in relation to matters beyond native title that are the subject of agreement between the parties, but only where there is agreement between them, so that will allow the court to take that into account. Giving the court control of claims and allowing it to use its case management powers to manage claims, to focus the parties on the issues and to set appropriate time frames for the parties to mediate claims and resolve issues, should prevent matters from languishing in mediation. Those are the kinds of things in a general sense that the amendments will achieve and that will bring about broader, more flexible and quicker resolution of claims.

Senator SIEWERT—On the issue of languishing in mediation, you heard us talking with Mr Neate this morning about connectedness and that that is one of the key issues holding up the process. Is it the department's contention that that is wrong? What percentage of cases do you think these amendments will help? My understanding of what the tribunal is saying is that there are a large number of cases that will not be helped by this because they are not about not enough mediation going on but about information being missing or the connectedness issues being unresolved.

Mr Murphy—I am not sure that I can give you the percentage of cases that would be helped. I think it is acknowledged that there are issues around connection and the difficulty of proving connection. The Attorney has recently said that he is willing to explore, for example, Justice French's proposal, which has been talked about earlier today, about the presumption in relation to connection.

The key point to make about the amendments is that giving the court control has the potential to help across all native title claims by encouraging settlement and bringing about faster resolution across the board. I think the department's view is that it should potentially help in all cases. As I said previously, the agreed statements of facts amendment is obviously going to be of assistance where there is agreement between the parties about particular facts, so that may not be the case in all claims. It is very difficult to give a percentage for the cases where that would help. In relation to the power to make consent orders about matters other than native title, there is a lot of evidence that parties are negotiating these wider agreements already—access agreements, agreements creating opportunities for employment, business opportunities and so on—and the court can become more involved by being able to make orders about them. So I think there is a potential for that amendment to be of assistance in relation to a lot of different claims.

Senator SIEWERT—The point made by the tribunal was that a lot of these processes or mechanisms are already available to the tribunal and to the court. Is it that they are not clear enough or not effective enough?

Mr Murphy—I think probably the key amendments that have been talked about in that context are the one relating to the agreed statements of fact and the broader determinations. The feedback the department has received in the past is that there is a lack of clarity about those points and that judges would be assisted by having these amendments to clarify that they do have

the power to accept agreed statements of fact and they do have the power to make orders going beyond native title. So, on those kinds of provisions, although there might be some judges willing to make those kinds of orders, others may not be so. We believe they will be of assistance.

Senator SIEWERT—In clarifying issues more than anything—to clarify powers?

Mr Murphy—That is right.

Senator SIEWERT—In terms of mediators outside the tribunal, how does the department see that that would operate? Who were you thinking of, and what would the qualifications be of the people who would be involved?

Mr Murphy—Consistently with the main policy behind the amendments of giving the court the key control over the management of claims, it will be up to the court to determine who the most appropriate mediator is, whether that be a body or an individual, and the amendments provide that the courts should refer a matter to an appropriate person. They also provide that the court may take into account the qualifications, experience and skills of people in determining who should be the mediator. So that does give the court broad discretion, but, as the explanatory memorandum points out, one of the reasons for that is allowing the court to appoint the most appropriate person—someone, for example, with experience in Indigenous dispute resolution or experience in relation to a particular area which is the subject of the claim. I think that is the reason the court has been given a discretion in relation to that. I should point out that I am not even sure that the members of the tribunal—I might be corrected on this—are required to be accredited mediators, so I guess that is also consistent with that.

Senator SIEWERT—That is something we can check. What is the department's response to the issues that were raised that individual judges will have discretion and there will not be as much coordination or consistency across Australia? How will you ensure that form of coordination?

Mr Murphy—Obviously judges have a degree of independence, and that is a constitutional protection, but I think it is logical that, if you are moving control of the management of cases to one body and clarifying that the court has key control over management of how claims are resolved, that should in fact create a greater degree of consistency in the way claims are handled. The other thing I would say is that the court has indicated that it is going to look at this issue and the judges will work together in terms of, for example, regional call-overs and looking at matters more collectively and ensuring consistency across the management of cases. I think the court submission to the committee points that out.

Senator SIEWERT—The point you raised about constitutionality and judges being independent goes, as I understand it, to the heart of the tribunal's concerns—that is, at least with the tribunal you can ensure a level of coordination and consistency more than you can with individual judges, for the very reason that you have just articulated. So, when it comes down to it, how can we be confident that we are getting that level of consistency of approach?

Mr Murphy—I guess the main point is that you are moving to use one body. Although the judges are independent, there is obviously a degree of collegiality among judges and among

registrars of the court and so on in the way they handle mediation and so on. That should ensure a degree of consistency in the way the court approaches these matters, and it is something the court has said that it will work on.

Senator SIEWERT—We have not had a lot of submissions but we have had submissions, particularly that of the tribunal, that raise issues about the approach that has been taken. In working out whether we want to support this legislation, we want to make sure the issues that are raised are being adequately dealt with, which is why I am going to the issues the tribunal have raised. One of the other issues that the tribunal raised was the issue around the court being able to—and this is their interpretation of the amendments—specifically appoint a member of the tribunal as a mediator, which would effectively undermine the decision making of the tribunal and the president. Is that how the legislation was intended to work, or is it a misinterpretation of the amendments?

Mr Murphy—It is our expectation that matters would be referred to the tribunal and not to individual members, so that should not create an inconsistency with the powers of the president, for example.

Senator SIEWERT—So the way it would work would be that the court would appoint, as mediator, the tribunal and the tribunal would take it from there.

Mr Murphy—That is right. For example, 94D(2) of the amendments refers to the tribunal as the mediator when it is defining the mediator where the mediator is the tribunal, so that is the expectation about how that would work.

Senator SIEWERT—If a mediator other than the tribunal were being appointed, would it get down to appointing individuals or could you say, 'This organisation will be the mediators'?

Mr Murphy—The amendments would allow for an individual or an organisation to be appointed.

Senator SIEWERT—So, if it were to be an outside mediator, either could be appointed.

Mr Murphy—An organisation could be appointed as the mediator, yes.

Senator SIEWERT—The other issue that was raised by the tribunal was the fact that the tribunal has a lot of expertise in house. If I understand the argument correctly, the management of the cases would now be outside the expertise of the tribunal and the court would not have access to that same expertise in terms of case management. What is your response to that?

Mr Murphy—The court may have more to say about this later.

Senator SIEWERT—I will ask the court.

Mr Murphy—My understanding is that the tribunal and the court will continue to work together in the way they handle claims. The tribunal, I notice, has acknowledged that and fully intends to work cooperatively with the court under the amendments. It would be expected that the tribunal would assist in relation to geospatial and mapping services where that is necessary

and perhaps provide some research services as well to assist claims where they are mediated by someone other than the tribunal.

Senator SIEWERT—Another issue that was raised was about resources for any future processes outside the tribunal which are currently carried out by the tribunal—for example, mediation provided by outside organisations or individuals. How is it envisaged that that process will be resourced?

Mr Murphy—It is expected that the court will be in charge of appointing the mediators and that the court would fund and pay for the mediators that are appointed if they are not the tribunal.

Senator SIEWERT—Thank you.

Senator TROOD—I want to take up that last point. So you are saying that the expenses involved in the appointment of mediation will be borne by the Federal Court—is that right?

Mr Murphy—That is right.

Senator TROOD—And it will not be borne by the tribunal.

Mr MURPHY—The cost of the mediator—for example, paying their wages or salaries—will not be; no.

Senator TROOD—What about the additional costs that might be involved with regard to the logistic support that might be required by a mediator—the travel costs and all that sort of thing? Is that a cost to be borne by the Federal Court?

Mr Murphy—That is right; it would be.

Senator TROOD—So none of these costs will be shifted to the tribunal?

Mr Murphy—That is essentially right; the court will be—

Senator TROOD—Is it right or is it essentially right?

Mr Murphy—That is subject to the point that the tribunal may provide assistance along the lines I have just referred to—the mapping and possibly some research assistance—although my understanding is that the court is quite self-reliant when it conducts mediations itself and that there would not be a heavy reliance on the tribunal's services. So that is right: the bulk of the costs would be met by the Federal Court.

Senator TROOD—The court and indeed the tribunal are both self-sufficient when they are seized of a matter and have jurisdiction themselves, because they are funded to take care of those issues, but if the court is going to provide for a mediator then that is a whole different question. It may be that that person is appointed by the court to undertake a mediation, but it is not clear from the bill—maybe the intention is clear in your mind but it is not clear from the bill—where these costs are to be borne. I think that is the point that Senator Siewert was alluding to, and it is

one that concerns me. You have an expectation that these costs will be borne by the court but it is not clear from the bill that that is where the costs are to be borne.

Mr Murphy—The only thing I can say about that is that it is a matter that has been discussed with the court and that is my understanding of the way it would work. So in practice we do not think that would be an issue.

Senator TROOD—I am delighted the Chief Justice of the Federal Court is so relaxed about it. Are you intending to provide additional resources to the Federal Court to facilitate these activities?

Mr Murphy—We will certainly be monitoring the department in consultation with the court, and the tribunal will be monitoring the effect of the implementation of the amendments and making sure that the tribunal and the court are appropriately resourced. It is expected that the impact of the changes would be felt over time so there would have to be a continual assessment.

Senator TROOD—Is it your expectation that there will be additional costs involved as a result of appointing mediators?

Mr Murphy—Additional costs?

Senator TROOD—Beyond those that are currently borne by the Federal Court and the tribunal.

Mr Murphy—I am not sure that there will be additional costs. Obviously, there will be costs involved for the court in appointing external mediators. It will depend exactly how many are appointed in practice and the extent to which the court is able to absorb any additional costs.

Senator TROOD—You have not satisfied me on this matter, I have to say. It seems to me that this is still a matter lacking in clarity in the bill. You may have a view on how this will work but if I were the president of the tribunal or the Chief Justice of the Federal Court I would not be comfortable with the answers you have given with regard to the additional burden of resources that these amendments were going to impose on my institution. It seems to me, from what you have said, that there is every likelihood that they are going to have to find further resources to fund these kinds of activities.

Mr Murphy—It is possible. As I said, it is something that the department will need to monitor in consultation with the court and the tribunal.

Senator TROOD—Okay. What is your expectation as to the mediators to be appointed? Who do you anticipate they will be? Are they supposed to have particular qualifications? Do you expect they will have some recognised qualification in mediation or, for example, experience in mediation in relation to native title activities? Perhaps you can just let me have your views on that, please.

Mr Murphy—Yes. As the amendments explain, it is a matter for the court, to take into account the qualifications and experience of the mediators it appoints. This is detailed to some extent in the explanatory memorandum. There is a National Mediator Accreditation System, and

they may be mediators accredited under that scheme. They may be mediators the court has some knowledge of and confidence in, mediators who have experience in relation to Indigenous dispute resolution—they have particular standing, for example, in the Indigenous community and they have particular knowledge, as I mentioned earlier, of the area which is the subject of the claims. So there is quite a broad discretion given to the court to take into account the full range, I guess, of qualifications and experience people might have to make sure the best mediator is appointed for a particular claim.

Senator TROOD—So you are taking what I might call a minimalist approach here in terms of specifying the qualifications of the mediators, rather than trying to lay out what qualifications you expect these people to have?

Mr Murphy—I would say that the approach that has been taken is consistent with the overall policy, and the stated government policy, of giving the court control of native title claims.

Senator TROOD—What about problems with possible conflicts of interest that mediators might have? What do we do about that?

Mr Murphy—I would expect that, in the normal course of events, that is something the court would ask mediators to disclose—whether there were any conflicts of interest involved.

Senator TROOD—So you would expect the court to seek from any potential mediator a declaration of any potential conflicts of interest beforehand?

Mr Murphy—I think that would be a fairly standard thing. For example, when you are engaging a solicitor or someone like that, you need to be aware of whether they have any conflicts in the case that might prevent them from being involved.

Senator TROOD—Correct me if I am wrong about this, but there are quite strict rules that apply to courts and members of the tribunal as to accountability and things of that kind, but these mediators that you are contemplating will essentially be outside the system apart from the fact that they are, as the bill is drafted, likely to have absolutely critical and fundamentally important roles to play in trying to resolve native title claims. They are outside the standard sets of practices which might actually be important in ensuring their honesty, their integrity and their capacity to do the work that is required of them. Am I wrong to be concerned about this?

Mr Murphy—I think any concern is ameliorated by the fact that the court can make—and the amendments make this clear—orders in relation to the conduct of mediation. The court is responsible for engaging mediators and engaging an appropriate mediator with the appropriate skills and experience for a particular case. I think that addresses those concerns.

Senator TROOD—Well, have you given any thought to the fact that it might be useful if individuals who wish to be appointed mediators register beforehand so that there is a list of those people available? Then the appropriate kinds of declarations could be made so that, when the court is in a position where it needs to appoint a mediator, it can go to that list of people who are already pre-preferred or something like that—unless I have missed that in the bill. Is that contemplated the bill?

Mr Murphy—It is not specifically referred to in the bill, but I understand that that is the way the court would approach the appointment of mediators under the amendments, yes.

Senator TROOD—Why do you understand that?

Mr Murphy—Because we have had discussions with the court about the amendments and the implementation of the amendments.

Senator TROOD—Is the court going to produce a practice note or something like that which will set these things out so that it is clear, or are you intending to perhaps rely on the regulations in relation to the bill in regard to this matter?

Mr Murphy—There is scope for regulations to specify certain matters, but in terms of a practice note I think that is something you would have to address to the court.

Senator TROOD—What is your expectation about this? I am encouraged to know that you have had a discussion with the court about it, but what is the court's intention with regard to this matter? Are they essentially saying, 'Leave it to us, we'll sort it out'?

Mr Murphy—The court already engages mediators in other matters, so it is experienced in doing this. I might be corrected on this, but I understand it keeps lists of mediators, so it would be able to draw on that. The court would keep a list of appropriate mediators with relevant expertise in relation to native title matters.

Senator TROOD—Wherever people come to this debate, one thing I think everybody is agreed upon is the fact that native title claim mediations are complex and require a level of expertise which is rather different to mediating a contract dispute or something of that kind. The people we are looking for here are people with unique abilities. Whatever list the Federal Court might possess at the moment does not necessarily involve people with that kind of expertise, does it?

Mr Murphy—Not necessarily, but obviously the implementation of the amendments will occur over time and that knowledge will be built up over time by the court.

Senator TROOD—So you are going to kind of try it out and see how things work and then, if necessary, perhaps amend the act again in relation to this area? Is that the plan?

Mr Murphy—The court has obviously been involved in native title matters for a long time and has appointed some external mediators, I think, as registrars of the court. So it has knowledge of suitable people who work in this field and would not be starting from nothing, but what I am saying is that the court would build up a knowledge and a list of appropriate practitioners and people who could be used as mediators.

Senator TROOD—Perhaps you might like to give some thought to the issues I have raised about mediators and reflect on whether or not some of the concerns I have raised have some merit and deserve a little more attention than you seem to have given them so far. A point you made in your submission and the Attorney made in his second reading speech was around this

opportunity for consent orders beyond matters of native title. What kinds of things are we contemplating here that might be 'beyond' native title?

Mr Murphy—They are potentially quite broad. It depends on what matters the parties involved negotiated that are relevant to settling the claim. As I mentioned earlier, there could be opportunities for employment or setting up businesses; there could be access agreements. It could be a range of matters. The idea is to create a degree of flexibility so that the court can take into account the matters that have been negotiated by the parties to achieve a more holistic and complete resolution of the claim. As I said before, they are the sorts of matters that are being negotiated by parties at the moment, but they would be included in consent orders that could be enforced as orders of the court.

Senator TROOD—So this particular power is one that you see being exercised in the way in which the court is exercising that power at the moment? In other words, you do not—

Mr Murphy—I am not sure that the court is exercising that power at the moment. That is what the amendment does: it makes it clear that the court is able to make consent orders in relation to matters other than native title.

Senator TROOD—In matters other than native title?

Mr Murphy—That is right.

Senator TROOD—Relating to native title?

Mr Murphy—Matters arising out of a particular claim that relate to the claim that is before the court.

Senator TROOD—It is a while since I did constitutional law, but have you investigated the constitutionality of this particular provision?

Mr Murphy—We have, and we are confident that it is constitutional.

Senator TROOD—So you have given some serious thought to whether or not this is within the power of the Commonwealth.

Mr Murphy—Yes.

Senator TROOD—And it does not trespass upon the constitutional responsibilities of states.

Mr Murphy—That is right. We do not have any concerns about the constitutionality of the amendment.

Senator TROOD—Are you concerned, or is it a matter that has come to your attention, that parties might come to the court with a view to trying to exercise that particular responsibility even though it may not be related to a native title claim?

Mr Murphy—It would be restricted to matters arising out of a native title claim. They are restrictions that are already in section 87 of the act, so it could not be completely unrelated to the claim.

Senator TROOD—I am a bit confused about this, because I assumed that the court could only make a consent order in this area if it were a matter adjunct to a native title claim—that is, a matter that either was before the court already or had come before the court as a native title claim—and that, as a part of settling the native title claim, the court might make some consent orders with regard to other matters. What I am concerned about is the possibility that parties might see this as an opportunity to seek the jurisdiction of the court in areas which are tangential to native title claims but not actually a native title claim.

Mr Murphy—They would be related to the native title claim, because it would be the parties to the claim that would be asking the court to make the consent orders.

Senator TROOD—So there is no intent to allow litigants to come to the court to take advantage of this particular provision unless they are already before the court or intending to come to the court in relation to a native title claim.

Mr Murphy—That is right. It has to arise out of a section 61 application for a determination of native title or compensation.

Senator TROOD—Which particular provision in the bill is that? Can you tell me, Mr Murphy?

Mr Murphy—It is essentially the existing provision in section 87, which the amendments are subject to. Subsection 1(a) provides that if agreement is reached between the parties on the terms of an order of the court in relation to the proceedings—

Senator TROOD—Is this in section 87?

Mr Murphy—Yes, that is right.

Senator TROOD—Which page of the bill is it?

Mr Murphy—It is not in the bill; it is in the act.

Senator TROOD—I see. So this is on the basis of the existing act.

Mr Murphy—That is right. The amendments are subject to—

Senator TROOD—I understand. You are amending the act, obviously.

Mr Murphy—That is right.

Senator TROOD—Which particular amendment is it that relates to this particular point?

Mr Murphy—These are amendments in schedule 2.

Senator TROOD—What page of the bill is that?

Mr Murphy—Pages 25 to 26, for example, deal with the amendments to section 87.

Senator TROOD—I am looking at page 25—item 5 of schedule 2, at the end of section 87. There is 'Add:', and then there is a heading: 'Orders about matters other than native title'.

Mr Murphy—The point is that they would not be matters that are at the moment settled by a native title determination as set out in section 225 of the act. They could be matters that are relevant to the settlement of the claim—for example, an agreement with a government that a business would be created or that employment opportunities would be created in a statutory authority or something like that. They would arise out of the claim and be relevant to the settlement of the claim, but they are not matters that are dealt with under a native title determination. In that sense—and I guess this is shorthand—they are matters other than native title matters as defined in, for example, section 225 of the act.

CHAIR—Do you mean the setting up of a land trust or a body that might be responsible for the title? Give us a practical example.

Mr Murphy—If, for example, there were Department of Defence interests in relation to the area that is the subject of the claim, and there were issues about how native-title holders could exercise their native-title rights and interests over that claim, there would be an access agreement—

CHAIR—An agreement between the native-title holders—

Mr Murphy—And the Commonwealth.

CHAIR—The Department of Defence, in that example?

Mr Murphy—Yes. Or it could be an offer to give land to the claimants in order to facilitate settlement, or it could be an opportunity, as I said, for them to act as rangers—that kind of thing. These things are not related to the native-title rights and interests, but they are related to the claim and they are important to the claimants in terms of settling the claim and getting resolution.

Senator TROOD—I hope you are right that this is as straightforward as you think it is, but I have some fears about this being an area of trespassing upon states rights—for example, state forests that are declared under state acts and things of that kind. I am a bit concerned that there might be some confusion of objectives, which litigants might choose to take advantage of.

Mr Murphy—Usually the states would be the government respondent and they would be involved in the agreement. These orders can only be made with the consent of the parties.

Senator TROOD—Senator Siewert asked you a question about the role of the tribunal and the appointment of mediators. At least in the tribunal's mind, the legislation is not clear as to

whether individual members of the tribunal are to be appointed as mediators. But you have assured us that the intention is that there be mediators and the court and the 'body', so when the bill refers to the 'body' being appointed as the mediator, you are talking about the tribunal. I acknowledge that there could be other bodies, but the primary body is likely to be the tribunal, is that right?

Mr Murphy—That is right, the tribunal is one possible mediator.

Senator TROOD—But not individual members of the tribunal?

Mr Murphy—No.

Senator TROOD—If the president's body were appointed as a mediator, he would then be in a position to make appropriate decisions about the use of his resources?

Mr Murphy—That is right. There should be no conflict with the president's powers.

Senator TROOD—What is the policy rationale behind the changes to the right of appearance before the Federal Court? The tribunal, as I understand it, has a right at the moment, but it is proposed to change that arrangement.

Mr Murphy—The government's policy is that the court is the more appropriate body to manage these claims. Consistent with the policy of giving the court key control of native-title matters, it would be up to the court to decide whether it needs to hear from the mediator, including the tribunal, or not. You are right that the automatic statutory right will be taken away, but that is consistent with the government's policy.

Senator TROOD—I am just trying to understand what the logic of the policy is.

CHAIR—That is not a question you would be able to ask these officers.

Mr Murphy—It probably goes to the merits of the policy.

CHAIR—It does. The rationale behind the policy is something you would need to ask the minister about.

Senator TROOD—So what you are telling us is that this provision is in the bill because the government has decided it should be in the act.

CHAIR—Yes.

Senator TROOD—And it has no more merit than that.

Mr Murphy—Because that is the government's policy—that is right.

Senator TROOD—I suppose we can assume the government thinks it is in facilitation of the objectives it set for itself.

CHAIR—The rationale behind the government's policy is outlined—is it not?—in the Attorney-General's second reading speech to this bill.

Mr Murphy—That is right. The point has been made that the government feels that the court is the most appropriate body to manage native title claims, and that is consistent with stakeholder feedback.

Senator TROOD—This is the matter that has perplexed me in looking at the bill and during the hearing today. The Attorney has emphasised the waste and unnecessary litigation that has gone on. Everything you have said and other witnesses have said—and indeed the bill itself—concentrates all our attention on the court having a greater role and more responsibility in this area, which seems to have a measure of inconsistency. On the one hand, the Attorney is saying there has been too much litigation and it has been unproductive and slow and we have not got a resolution of all these matters; on the other hand, the bill seems to be putting more responsibility in the hands of the court, which to my mind—and perhaps it is a simple-minded approach—seems to encourage the view that the court will have greater control over these issues.

Mr Murphy—On the face of it I understand what you are saying, but the bill is all about mediation in the sense that it is all about giving the court control over mediation—deciding who mediates a matter, giving it powers in relation to making orders about mediation. The amendments relating to agreed statements of fact and matters other than native title are about consent orders. So it really is all about mediation and amendments to the mediation process to encourage negotiated settlements.

Senator TROOD—But a lot of the provisions of the bill seem to do no more than affirm jurisdiction the court has already assumed. I admit it clarifies some of the responsibilities the court may have, but they are matters that are already under the court's jurisdiction. We do not seem to be going much further along the path of trying to achieve these objectives, beyond the fact that we have introduced this group of people, mediators, who are going to become part of the system. Beyond that, we do not seem to be adding a lot to the whole process.

Mr Murphy—The government and the Attorney see the giving of control over claims to the court as a significant institutional reform that will make a significant difference and that will increase the speedy resolution of native title claims.

Senator TROOD—The Native Title Council, whom you heard from today, is one party that is not persuaded that is going to actually occur.

Mr Murphy—In that regard, I would point out to the committee that the claims resolution review, which led to the current arrangements, in 2005 conducted widespread consultations, including with native title representative bodies that the council represents. As is reflected in the minority report of this committee in relation to the 2007 bill, there were widespread concerns about the effectiveness of the tribunal as a mediator. Therefore, there is a clear view from NTRBs that this is a significant change that would assist the resolution of native title claims.

Senator SIEWERT—I want to ask a follow-up question.

CHAIR—There is two minutes left, and then we have to move to the next witness.

Senator SIEWERT—The council raised before lunch the issue around some pressure from the courts to resolve issues quickly and go to litigation. That seems to me to conflict with the intent of this bill, which I understood to be to facilitate negotiation and mediation so as to not have people going down the litigation path. It seems to me that you have the court acting in a way that is contrary to what you want to achieve in these amendments.

Mr Murphy—I am not sure that that is necessarily the case. You would have to look at the situation in each claim. Some of these claims might have been sitting around for quite a while with not much happening and the court may have decided that it is time to set deadlines and put pressure on the parties. For example, there might be no evidence that there has been much happening in terms of negotiation. That is judgment call for the court. But in its essence that is consistent with these amendments, because the government wants the court to take a more active role in management of claims.

Senator SIEWERT—So a more active role may be telling them to go straight to litigation. Is that what you are saying?

Mr Murphy—One of the issues which the amendments are intended to address, as the Attorney has said, is the problem of claims just languishing and parties doing nothing and there being delays. The court might assess that the best way to move things forward and deal with the claim is to set timetables and require the parties to bring forward evidence of connection or extinguishment.

Senator TROOD—Do we have many examples of the court coming to the Attorney's office and saying, 'We need additional powers, because we can't move these claims forward'? Is the court expressing frustration about its lack of power to move these claims forward in a way that would facilitate their ready and quick resolution?

Mr Murphy—I am not so sure that that has come from the court. But, as I said before, a range of stakeholders have expressed, in the context of the 2005 claims resolution review and in the inquiry into the 2007 bills, concerns about the way that the tribunal was conducting mediations. That has led to this change of moving control of management of claims to the court.

Senator TROOD—We had the 2007 amendments, which, as I understood it, were intended to address some of these concerns. Haven't they gone far enough?

Mr Murphy—As you might know, there was a minority report out of the committee looking at the 2007 bill. The minority report took the approach which these new amendments take—giving the court control. There was a split when the claims resolution review looked at institutional reform between the two consultants about which was the best way to go. The Labor Party in opposition took the approach that was adopted by Graham Hiley QC and that is the approach which is reflected in the amendments.

CHAIR—Mr Roche, before we finish, did you have anything that you wanted to say or add?

Mr Roche—To assist the committee in relation to the discussion about the unhappiness in the Federal Court, that is a particular problem in Queensland, where a couple of the judges, Dowsett J in particular, have expressed unhappiness. This is not a reflection on the tribunal per se but is

about the need to get matters moving. It is perhaps a reflection of the problem that were occurring in Queensland that the 2007 amendments were designed to overcome in relation to changes in recognition areas and periods and not necessarily related to the matters that are the subject of this bill.

CHAIR—If my memory serves me correctly, I was deputy chair of the committee in 2007 when we held the inquiry into those bills. There were a range of stakeholders, including native title representative bodies, with a whole range of different views. That is why, I suspect, that having distributed your discussion paper to over 70 stakeholders the committee has had only four submissions to date on this legislation. Usually people do not submit if they are happy with the legislation that is going to go through, particularly when it comes to native title amendments.

Senator SIEWERT—It also may be because of the lack of time to make submissions, Chair.

CHAIR—Except that I am pretty certain that people in the native title industry would well and truly know what is going on and know that this bill is around and that is emanated from that discussion paper. I will ask the secretariat to distribute to members of the committee the recommendations in the dissenting report on the 2007 legislation so that people will know the basis for this policy change. I thank the three of you for your appearance this afternoon.

Mr Roche—I neglected to mention earlier that the submissions on the discussion paper have now been published on the department's web site.

CHAIR—Yes. I noticed that in your submission, which you sent last week, you said that they would be published shortly.

Mr Murphy—Shortly; that is right. They have.

CHAIR—So those 27 submissions in response to the discussion paper are on the web site now?

Mr Murphy—That is right. They were put on the web site yesterday.

Senator TROOD—Have all of the submissions been published, Mr Murphy?

Mr Murphy—There was one that was provided on a confidential basis. That has not been published.

Senator TROOD—Whose is that? Obviously, you cannot reveal the content of it if they have asked you not to, but—

CHAIR—You will need to check if they even want it to be known publicly—

Mr Murphy—Yes. I would prefer to check that.

Senator TROOD—Perhaps you could advise the committee as to whether or not it is appropriate to release at least the name of the submitter.

Mr Murphy—Absolutely.

CHAIR—I again thank you for your appearance this afternoon.

[2.21 pm]

ANDERSON, Ms Louise, Native Title Registrar, Federal Court of Australia

SODEN, Mr Warwick, Chief Executive Officer/Registrar, Federal Court of Australia

CHAIR—I now welcome representatives from the Federal Court of Australia. Thank you for appearing before us. Do you have any comments to make about the capacity in which you appear?

Mr Soden—Madam Chair, I would like to thank you for adjusting the program to ensure that I was here. May I place on the record that I got here on time, notwithstanding my earlier concerns about a delayed flight. Thank you for making that adjustment.

Ms Anderson—I am appointed as a deputy registrar of the court, but my responsibilities are native title and technology, which is an interesting mix.

CHAIR—We have your submission. Before I ask you to make an opening statement, do you want to make any changes or amendments to that submission?

Ms Anderson—Thank you. We refer to an annexure, the court's submission to the Attorney-General's discussion paper, which was released in December last year. I apologise for the oversight but I am not sure whether the committee received that annexure. If it did not I will forward it.

CHAIR—Are you talking about the discussion paper itself?

Ms Anderson—The court's submission to the discussion paper.

CHAIR—No, we didn't. We have the discussion paper but we do not have your submission to that. However, we have just been told that they are all up on the website so we can probably get access to it.

Ms Anderson—My apologies that it was not attached to the submission.

CHAIR—That is fine. Do you want to make an opening statement?

Mr Soden—Yes, thank you. I should commence this opening statement by saying it is quite unusual for the court to make an opening statement to a committee of this kind. It is usually the case that we are here and happy to answer any questions, but I think the fact that we are prepared to give an opening statement is an indication of the strength of the view within the court about our support for these proposed amendments. That leads me to what is a short opening statement.

We welcome the amendments. We welcome the responsibility and accountability that goes with them. We will manage the jurisdiction in a national and a coordinated way. These are complex cases. They are not the same. Just because they are called native title cases does not

mean there should be any assumption of the way in which they ought to be treated. There is a plethora of issues of different kinds in many of them and there are different people in them. Whilst they might have some common denominators, it is often the case that although the issues might look similar they can be essentially very different. We believe there is an assumption that they ought to be treated inconsistently but in a consistent way and in a coordinated way.

The court, we believe, is in the best position to work out what mechanism would be in the best interests of these cases. It may be that a special referral to a case management conference under the direction of a judge might be most appropriate. It might be that a special hearing on a specific issue that needs to resolved before any mediation could take place would be the most beneficial thing to be done in a particular case. It might be that the court thinks the best thing to do is refer the matter to one of the court's staff or another particular person who was not a member of the tribunal to exercise the mediation powers of the court by referral. It might even be a referral to the tribunal in the ordinary course.

The court has a wealth of experience in managing a whole lot of different cases, including native title cases. It applies the principles of active case management. It has an international reputation for the way in which it is innovative and brings to bear the best approach to the issues that need to be resolved in different cases. In terms of coordination across the country, the court has specialist lawyers in each of the states and territories or former territories across Australia. They are experts in native title. They work closely with the judges in each of those states, particularly the native title judges who have responsibility for coordination in each state. They are in a very good position to give advice and assistance to the judges about what needs to be done in a particular matter to ensure coordination and this constant discussion between the judges across the states about coordinating issues, including priorities and the like.

I could go on and answer many of the questions that I had the benefit of hearing whilst I was in the back of the room, but it is probably not appropriate that I do so at this point. I just wanted to reiterate the court's view that we take this proposed responsibility very seriously. We know it will come with a degree of accountability. We know there are a lot of expectations to be placed upon us as a result of the extra responsibility and accountability, but we embrace that. These cases are crying out for a new and innovative approach to be taken. We believe, with the broad experience we have not only in this jurisdiction but in the way in which cases can be looked at and treated differently, we will bring those changes which will speed up the whole process and produce outcomes.

One important point is that it would be wrong to assume that the court focuses on litigation first. We do not. Our focus on all the case management approaches is the best way to resolve the dispute. Some cases require litigation, but it is certainly not the case that we focus on litigation as the primary way in which to resolve a matter. The evidence of that is that most of the cases in our court do not result in litigation. Most are resolved by agreement between the parties and, in many of our cases, as a result of mediation by staff of the court.

CHAIR—Thanks. I will start the questions. In your submission to us you say that the court is currently reviewing its approach to the management and improvements of this bill. Can you just give us an update of where that review is at and what you are hoping it might achieve.

Mr Soden—Ms Anderson might fill in any of the gaps that I leave. It is not a formal review of the kind you might be thinking of. We have increased the activity of the coordinating judges in terms of meetings and discussions and the like to look at how we will take on this responsibility and accountability, what arises from it and how we will ensure that coordination takes place. There have been a number of meetings and discussions. As recently as two weeks ago, we had all of the judges involved in native title cases—not only the coordinating judges—in a meeting in Adelaide to discuss how we will manage the coordination of these cases.

CHAIR—You say in your submission that if the bill is passed in its current form, then you proposed that the judges review each state and territory case load. Has that started to happen?

Mr Soden—No, it has not. But on the assumption that there would be broad support for these proposals, we have started to do some work in preparing information on the assumption that the judges will undertake reviews of every pending case across the country.

Senator SIEWERT—Of every case?

Mr Soden—Every case.

Senator SIEWERT—So the 472, which I think are now on the books?

Mr Soden—Yes, that is the plan. We propose to have a fresh look again at every case across the country.

Senator SIEWERT—Do you have a time frame for that?

Mr Soden—No, we have not, but the expectation of many of us is that it would be within a few months.

Senator SIEWERT—Once the bill is passed.

Mr Soden—Yes, in a few months, after the bill has passed.

CHAIR—Finally, on the first page of your submission, you say that you have already had proposed meetings between the officers of the A-G's Department and the Native Title Tribunal and the likely impact on the work of the court. Can you outline for us not only the impact, but also the cost, and whether that will be assumed within your existing cost structure or whether there will be further resources needed?

Mr Soden—Our present plan is to undertake everything I have mentioned within our existing budget. There might be a shift of timing in respect of some of the things we would otherwise do that will enable us to undertake the initiatives I have mentioned, but at this stage we do not envisage any immediate need to seek any additional resources to take over this responsibility.

Senator SIEWERT—I will continue on from there, but I also have some questions about the review and the management of the 472 cases. In terms of resources, Senator Trood was asking the department earlier about this, the engagement of outside mediators, for example, will be a cost that the court will have to bear. Do you still think that will be—

Mr Soden—Within our resources? Yes. The assumption that we will engage outside mediators is right, but it would be wrong to assume that it will be a massive change from inside to outside. We have a lot of very good and experienced internal registrars of the court who have had experience in mediating native title cases with extraordinary success. But, if we decide that in a particular matter it cries out for someone kind of special—other than someone in the tribunal, or the tribunal per se, and other than one of our staff—and if the parties are very keen to engage a person who they think might be able to be a game breaker, for want of a better term in respect of the key issues involved, we have the resources to employ that person.

Senator SIEWERT—I am glad that you do. I would have thought that, even internally, your current registrars are not sitting around twiddling their thumbs; I would anticipate they have significant workloads already. It still seems to me there would be a resource issue in terms of the extra workload that you are about to take on.

Mr Soden—It will be a matter of priorities. It is always a matter of priorities. And it is our view that some priority must be given to moving these cases along a little bit faster than has previously been the case. And if that is going to be done by some of our staff doing more work in relation to mediating native title cases or working on native title cases to the detriment of some other cases, that does not mean the other cases will suffer. Something else might be able to be done to them by direction of the judge and without the benefit of one of our staff mediating those cases. In other words: instead of the focus being on mediation of other non-native title cases, we might have to shift some of the resources to native title cases to put the priority where, at the moment, it needs to be.

Senator SIEWERT—I think we determined that it was 472 cases that the tribunal said are currently on the books. As I understood your previous comment, you intend to review all those cases within the next couple of months. I appreciate that you have also said that you have already had meetings with the tribunal. Say you have a conflict with the tribunal; it has been handling a particular case in a certain way. How are you going to deal with the conflict that you may have with the tribunal if members of the court think that the case should be handled differently and there is a fundamental disagreement on how those cases should be handled?

Mr Soden—In our meetings with the tribunal, we have indicated that we intend to go through this process of looking at all of the cases. The tribunal will have the opportunity. We would expect their assistance in relation to information to the court about what might be the best thing for that case. It is clear that many of these cases will remain with the tribunal for their purposes. If there is a difference between the tribunal and the parties, the court will have to make a decision and give the reasons as to why the court makes any decision that a matter pending in the tribunal will be moved from the tribunal and that some other process will be undertaken. But the court is not going to do that without giving the parties and the tribunal an opportunity to give information to the court about what is the best thing, from their perspective, to do on the matter.

Senator SIEWERT—I would hope that this would not be the case, but if a disagreement eventuates then the tribunal has a lot of access to resources; it has its internal resources—geospatial resources—and various other levels of expertise. If there is a disagreement with the tribunal about a case and the court takes a different approach, you are then perhaps going to need to also engage other expertise to deal with the issues that the tribunal would normally deal with.

Mr Soden—Not necessarily.

Senator SIEWERT—How would you handle it?

Mr Soden—It all depends on what is going to happen to the case. Let us assume that there is a difference between the parties and the tribunal about whether the matter ought to stay in the tribunal for mediation and that the parties say to the court, 'We would like the matter to be taken back into the court for the purpose of having something else done to it.' There are a range of things that could be done. There might be a requirement for some early evidence to be taken on a particular issue. There might be a request to the court that it take control and give directions in relation to an issue that needs to be heard and determined by the court. To be frank, there may be a request from the parties for the matter to go back to the court so that the court can refer it to mediation by one of the court staff on a particular issue that the parties think the court staff might be very good at resolving—some particular conflict involving overlap or whatever. So it does not follow that there would be the impact that you mentioned.

Senator SIEWERT—When you are reviewing the cases, I presume that you are not going to be taking over more intensive management of cases just where the parties request that; I presume you will look at it and, if there has been no progress, you may potentially have a more active involvement in that particular case despite the parties not requesting that you do so. Is that right?

Mr Soden—I think that is a very fair assumption. The one thing that must be remembered is that these are all proceedings in court. They are all pending proceedings in the court. We are concerned, as many other people are, about how old they are and how long they are taking. We think it is certainly very appropriate to review these cases, particularly where the parties might ask us not to do anything, as to what the reason is. What is behind them?

Senator SIEWERT—I will ask you a question that was raised by the National Native Title Council this morning. Ms Anderson was here when the issue was raised. The issue is changing the presumption of connectiveness and changing the legislation. They are proposing that an amendment be introduced that changes the presumption of connectiveness along the lines that Justice French articulated in his recent article.

Mr Soden—Which, as I must place on the record, was written when he was a judge of our court.

Senator SIEWERT—Yes.

Mr Soden—It would be wrong to suggest that it is an article of Justice French as the Chief Justice.

Senator SIEWERT—Yes, I appreciate that. The chair may tell me that I am not allowed to ask for an opinion, but I will ask, and then the chair can tell me no! Do you have an opinion on whether that would be a constructive amendment? It does not have to be whether it is to this bill or later on; the council was obviously suggesting that it be an amendment to this bill, but whether it is or not—

CHAIR—That is not a matter that we are inquiring into, so—

Senator SIEWERT—I am interested in your opinion as to whether you think that would help.

Mr Soden—It is probably not appropriate, Madam Chair, that I give an opinion.

CHAIR—That might be the subject of a letter you write, perhaps, rather than a question you ask.

Mr Soden—It is probably not appropriate that I give an opinion, and it is not a matter that I have given some careful thought to. I suppose it is fair to say that I am not in a position to give opinions.

Senator SIEWERT—Okay, let me change the direction of the question. It was put by the tribunal this morning that the issues around connectedness are—and I hope I am not misquoting them—largely the cause of delay in the bulk of cases. How would you intend dealing with that issue? My understanding of part of their contention was that these changes to the way that we are addressing mediation will not address the bulk of the delays because that is about connectedness and the lack of documentation, and therefore in the longer term that needs to be addressed—sorry, no, they did not say that. My comment then is: how are we going to address those issues? In other words, are the changes that this bill proposes to make going to deal with the bulk of the delays that it seems to me everybody really wants to deal with?

Mr Soden—I do not think there is an easy answer to that question, and I will—

Senator SIEWERT—If there was we would not—

Mr Soden—give you my personal view. I would be surprised if it were not shared by many of the judges of the court. Connection and the attitude taken by respondents to connection are a problem. I believe, however, that the court being seen and being given the responsibility and accountability for managing all of these cases will put an emphasis on the judges to find ways to resolve some of the bottlenecks caused by the attitudes being taken into connection material. The big, fundamental difference between us and the tribunal in relation to that issue is what the judges can do by way of orders of the court, from the powers that they have, which may put some real pressure on the respondents to change their attitude in relation to their approaches to requirements for connection material. That is my view. I know it is shared by many of our judges. I would hope that this new responsibility would refocus our attention on the issue of how to solve the problem of connection.

Senator SIEWERT—Thank you.

Senator TROOD—So what are the particular provisions in this bill that are giving the court the capacity to take a more central role in managing these cases?

Mr Soden—I cannot tell you the number in the amended bill, but in essence it is the provision that takes away the mandatory referral to the tribunal—or, in a policy sense, the provisions of the bill that shift the responsibility from the tribunal to the court by the removal of the mandatory requirement for the court to refer the matter to the tribunal for mediation.

Senator TROOD—So it is this particular provision on which you hang your argument about the capacity of the Federal Court to take a more proactive role in managing these issues and the assumption upon which you have built your activity with regard to coordination and taking a more proactive role, reviewing all the cases and things of that kind. Is that right?

Mr Soden—In some senses it has refocused our role to what it was prior to the 1 July amendments where that mandatory referral to the tribunal came into existence. Prior to that we had that role, though we did not exercise it probably as powerfully as it might arise as a result of these amendments where the court is given clear responsibility and authority. But since 1 July 2007, as a result of those amendments and the expectation that everything be referred to the tribunal and the court not mediate, we have not. This reverses that, and we are proposing to take that responsibility, take it seriously and accept the accountability. We have heard the comments about coordination across the country; we take that seriously. And we agree with the concerns that have been expressed broadly that things have taken too long and there needs to be changes.

Senator TROOD—I think we all agree on that point, that these claims take far too long to resolve, but there are obviously matters of evidence and a great deal of complexity involved with them. Your submission lists on page 3 a range of options which are available and which I assume you are now saying to us you intend to exercise. But these options are already available for the court, aren't they?

Mr Soden—In essence, yes; but, as I explained, we have not focused on those kinds of options since 1 July 2007 where the main responsibility has been with the tribunal.

Senator TROOD—Why not? The court has had the entitlement, the right, the jurisdiction and the power to exercise these options if it chooses to do so. What are you saying—that it has abrogated its responsibility and basically said, 'We're not proposing to exercise these options, we're going to give it to the tribunal to sort out'?

Mr Soden—No, certainly not. I think it is fair to say the judges have been conscious of the expectation in that legislation that matters ought to remain in the tribunal until the possibility of a mediation is exhausted.

Senator TROOD—So the powers have been there but the court has been reluctant to exercise them for fear that it will tread on the responsibilities of the tribunal?

Mr Soden—No, I do not think we would have any fears about treading on the responsibilities of the tribunal if that was the right thing to do in certain cases. I think the court in respect of any matter before it at any time has been conscious of a number of issues: the wishes of the parties, the applications of the parties, the views of the parties, the fact that the matter is in the tribunal, the status of the matter in the tribunal and, as well, the fact that those amendments that I mentioned—the 1 July 2007 effective amendments—were clear in their message that the matter should remain in the tribunal unless for some special reason the court pulled it out of the tribunal—but that has been the exception rather than the rule.

Senator TROOD—Correct me if I am wrong but the amendments were also clear in their message that the powers that the court already had to manage these cases were not being removed from it; that if a judge of the court chose to exercise these powers in relation to any one

of the large list that you have put in your submission—management of claims on a grouped or regional basis, early neutral evaluation etc—then that judge could use any of those powers at the time if he or she chose to do so.

Mr Soden—And has, for good reason.

Senator TROOD—I am just struggling to come to an understanding as to why things had changed. It seems to me there are two matters that are substantive here. One is that the court will now have the capacity to be able to appoint mediators and the second is that it does not necessarily have to send things on a mandatory basis off to the tribunal. Beyond that, the court's powers in some cases are reinforced and clarified but they are essentially the same powers as the court has had for a long period of time.

Mr Soden—The court has always had the power to appoint mediators. Prior to the 1 July 2007 amendments it made orders appointing some of its staff as mediators in native title jurisdiction.

Senator TROOD—When you say 'its staff', do you mean your registrars?

Mr Soden—Yes, and there were some other non-Federal Court employees engaged in mediations under the existing provisions of the Federal Court of Australia Act and the rules, but, as I said, since 1 July 2007 the clear policy was that matters should go to the tribunal first and they should stay there until the possibility of a mediated result was exhausted.

Senator TROOD—Are you saying the court took that policy from what it understood to be the thrust of the amendments that came into force on 1 July 2007?

Mr Soden—I think that was the thrust of the amendments, yes.

Senator TROOD—How many of the justices of the court actually deal with native title issues?

Ms Anderson—There are 11 judges of the court who have native title list judge responsibilities, which means they coordinate and look at the overall list in a regional or a state context but do not necessarily actively manage a case one on one. Overall we have 18 judges managing or having some involvement in native title cases. For example, Justice Finn is hearing the Torres Strait sea claim, which has now had judgment reserved. There are a number of judges who have matters like that and there are 11 who have an active coordinating role in the list.

Mr Soden—I was going to say 20—I was close!

Senator TROOD—You were not far off—no, that is good. In light of this additional responsibility as you see it that the court is assuming, do you anticipate that more judges are going to be brought into dealing with native title matters or are you comfortable that the number you have assigned to that area is good enough?

Mr Soden—No. There will be more judges involved in native title cases. There is a clear view amongst the judges that there is a keenness or willingness for more judges to be involved in native title cases, and that will occur.

Senator TROOD—Perhaps you cannot answer this question at this stage, but are you thinking that there will be a substantial expansion of the number of judges or are we talking about adding two or three that will take on lists?

Mr Soden—No, not take on lists. I think the number of judges managing the lists will remain fairly constant—the 11 that Ms Anderson mentioned. As a result of that increased management activity of those judges there is probably going to be a need for more judges to be involved in the issues or the work arising from that increased activity, but that does not mean there will be trials. There might be something that needs to be done by a judge short of a trial, and there will be more judges willing and available to do that work.

Senator TROOD—What are the individual judges doing about gaining some kind of background in native title law and resolution?

Mr Soden—Some of them already have experience in native title, but they just have not been a judge involved in a native title matter. Those judges and other judges who are interested in getting that experience were actually at that meeting I mentioned earlier, held two weeks ago, involving the judges to be involved in managing and coordinating native title.

Senator TROOD—Did that meeting two weeks ago include the existing judges involved in native title or the existing judges and those who are likely to be drawn in to practise in this area?

Mr Soden—Not everyone who wanted to be there was able to go from amongst those judges who have existing responsibilities for list management or have existing experience. Other judges who have not yet had an allocation of a native title trial were at the meeting, but I do not think that that group is the total number of judges that is likely to ultimately be involved in native title matters.

Senator TROOD—Your submission refers to the matter of coordination and consistency as being a desirable objective in this area of public policy, but we have this difficulty, have we not, of justices being rather reluctant to follow particular injunctions as to how they should act in their own courts in this area. This has been a consistent problem, hasn't it, between different judges of the court in Queensland and Victoria, for example, and across states. They have had quite different approaches to questions of native title. How are you going to solve that problem?

Mr Soden—You mean questions of the management of native title, not questions of native title?

Senator TROOD—Yes.

Mr Soden—There are different views, as a matter of law, in relation to what—

Senator TROOD—No, I am not suggesting that justices are doing different things, but the process, and how it is managed, is a critical part of the problem. There seem to be profoundly

different approaches among the different judges on the actual management of cases. That affects their own sense of their independence, and their constitutional independence of course, and it is not clear to me that the court, or indeed the Chief Justice, has the capacity to rein in that sense of constitutional propriety that they have.

Mr Soden—There have been some issues arising in the past as a result of the different approaches taken by the different judges. That is not to say that the different approaches were necessarily wrong in the places they were exercised.

Senator TROOD—No, I am not making that point.

Mr Soden—So it does not follow that there needs to be a consistency of approach by judges in one state as compared to another state. That needs to be clear, from our perspective. You may, however, have a judge in one state—whether it be Queensland, Victoria or Western Australia—taking a different approach in relation to different cases. That is not a matter of judicial independence; it might be simply a matter of different cases needing different attention. It should not be assumed that cases which, on the face of it, appear similar ought to receive the same attention. That is the essence of the judicial process. Often it is up to the judge who can see what might be the best thing for a particular matter. That inconsistency is something that we believe can be very beneficial. Consistency might have the effect of dumbing down an approach rather than taking advantage of the innovation that might be available.

Senator TROOD—I do not disagree with that. Clearly these claims are all different and they may well demand different kinds of approaches to their resolution. That means, at different stages in the process, one might give directions which would take a case on a different course from another one that the same judge is handling. I do not have any difficulty with that, but I do think some general consistency in the way they are dealt with, and the speed they are dealt with et cetera, is a desirable objective.

Mr Soden—We certainly accept that the institutions involved in the native title will benefit from a better understanding of what is likely to happen as a result of a matter before the court. There was a mention in one of the questions earlier on about whether the court is going to give some guidance or a practice note. The answer is yes we will. It will be very comprehensive, it will give an explanation of what is expected and it will list a whole lot of options that the court will focus upon. The consequence of that will be that some of the institutions that have been involved will need to think about how they might do things differently—faster or in a different way. That, we believe, is not necessarily a bad thing arising from a refocused attention on these matters, a look again at everything that is pending, and some things are going to change. Where do you think this leaves the tribunal in this process?

Mr Soden—Involved.

Senator TROOD—Involved?

Mr Soden—Yes. We have had meetings with the tribunal. We have told them the kinds of things that I am expressing here. We can understand the tribunal's concern about being clear about what we are going to do. We are being is clear as we can, at this stage, about what we are likely to do, but things will change, things will be different. At the end of the day, there are going

to be many matters that are likely to remain in the tribunal for mediation in the ordinary way. On the other hand, there is going to be a new look at some of these matters, and some might be referred to another person for another process.

Senator TROOD—But you still see the tribunal as having a critical and important role in the whole process of resolution. After all, there is a very considerable resource there. There is an already established institution with a great deal of expertise in mediation. I am sure the government has told you there are no more resources available for exercising this responsibility. You cannot expect any more resources so you are going to have to manage the additional powers that you are undertaking within your existing resources. Perhaps that means that the tribunal will end up with more work than it previously had.

Mr Soden—We expect the tribunal to continue to perform a very important role in mediating native title matters and in providing the other facilities that it undertakes. But to be frank it would be wrong to assume that every matter that is presently before the tribunal will remain with the tribunal. The process that I mentioned, of the court looking at every case that is pending, will result in some things changing.

Senator TROOD—So you are foreshadowing the possibility that some issues currently before the tribunal might be removed from the tribunal?

Mr Soden—Yes. I could not exclude that possibility.

Senator TROOD—Conversely, does it follow that the tribunal might become more fully seized of responsibility for some issues which are not before the tribunal.

Mr Soden—That possibility is true; yes.

Senator TROOD—Just on this matter that I have explored, of appointing a mediator—I think it is section 86—is it your understanding that the legislation, when it appoints a mediator, is not envisaging that it would reach into the tribunal to appoint a particular member of the tribunal as a mediator?

Mr Soden—No, we have never done that. A matter is referred to the tribunal for mediation. There is no proposal that I am aware of—and I would be aware of it—for the court to appoint a member of the tribunal to do a mediation. There is no suggestion of that at all. I do not know where that has come from.

Senator TROOD—You had said that some things are going to change.

Mr Soden—That will not change. But let me make it clear that if the court decides that another person—not a tribunal member—is to receive a mediation, it will make an order for a person to be a mediator. I heard a question, earlier on, about whether we are going to refer a matter to another institution for mediation. I cannot imagine what institution that might be, and that is not on the radar so far as I am concerned at this stage. We would be very, very concerned about who is going to mediate a native title matter. That is why we have no difficulty with referring the matter to the tribunal and leaving it to the president to work out who receives it. That is quite acceptable. We have no problem with that at all but when it comes to someone else

we will be very concerned about who that person is. We are very likely to get the views of the parties to the proceedings about the particular person who might mediate a matter or undertake some other ADR function but I do not envisage at this stage any reference to any other institution for mediation, other than the tribunal.

Senator TROOD—I see. Do you have a list of people with expertise in the area of native title?

Mr Soden—No; we do not have a list but we know of people. It may be that we do generate a list but not a list that would be exclusive in the sense that we would only use those people. That would take away the opportunity of using someone where the parties have said: 'We've got this issue. We think this person is the ideal person to resolve it. If that issue is resolved we will be able to settle this matter.' That would be an attractive option.

Senator TROOD—I can see that. I am not suggesting you should not go beyond that. I am interested to know whether there is a body of people here who have expertise that could be called upon—

Mr Soden—Within the court—

Senator TROOD—to participate in the process. You have mentioned the registrars. You do not have in mind anybody else in the court, do you?

Mr Soden—No.

Senator TROOD—So we are talking about other mediators—mediators outside the court. I do not have any difficulty in identifying them. What I am interested to know is whether that they have the skills, the expertise and the qualifications that are necessary—and indeed that they are avoiding any possibility of conflicts of interest in resolving the matter.

Mr Soden—All of those things would be automatically considered before we would make any referral to another person for mediation. One issue that I should mention, just so that you know the extent of the options that we are thinking about is, is that we might decide that if we referred a matter to one of our registrars for mediation that it might be beneficial for a co-mediator to be involved. That person might be an Indigenous person who is a person that the applicants are happy to have involved and who might be able to bring some special benefit to the process in being a co-mediator in the process. They are the kinds of things that we are thinking of as ways in which these very old and languishing cases can be accelerated.

Senator TROOD—Can you have a co-mediator who has an interest in the proceeding? The purpose of a mediator is to have someone who is separate from the parties to the proceedings.

Mr Soden—I hesitate to say 'no', because I would not want to exclude the possibility. It would be a rare instance where a co-mediator would have any interest in the outcome. That, I agree, would be contravening the principles of a mediator. But if all of the parties agree that a particular Indigenous person would be an excellent person to have and would help in the facilitation of the mediation, it would be a factor that we would have to think about very carefully.

Senator TROOD—That is a profoundly different proposition to having someone who is related to the applicant.

Mr Soden—I did not want to suggest that we would have an Indigenous person related to the applicant involved in co-mediation.

Senator TROOD—I thought that you said that.

Mr Soden—No.

Senator SIEWERT—He said 'acceptable', which is different.

Senator TROOD—For a mediator to be properly exercising the role that I understand that mediator has they would have to be a person acceptable to the parties, not just the applicant.

Mr Soden—That is clear. I agree. I wish to make that clear, yes. They would have to be acceptable to all the parties.

CHAIR—Thank you very much for your attendance this afternoon. Your appearance is noted and very much appreciated. I thank all the witnesses who have given evidence before our committee hearing today.

Committee adjourned at 3.07 pm