Submission - inquiry by the Standing Committee on Legal and Constitutional Affairs into the Courts and Tribunals Legislation Amendment (Administration) Bill 2012

In 2008 the then Attorney-General, the Hon Robert McClelland, announced institutional reforms to improve the operation of the native title system. The Attorney-General identified that providing the Federal Court with the central role in managing native title claims, including native title mediation, would improve the efficiency and ability of the native title system to achieve results. In the Explanatory Memorandum to the Native Title Amendment Bill 2009 states that:

> "*Having one body actively control the direction of each case with the assistance of case management powers means opportunities for resolution can be more easily identified. Parties behaving with less than good faith can be more forcefully pulled into line. Where parties are deadlocked or unwilling to see common ground, the Court can bring a discipline and focus on issues through the use of its case management powers to ensure that matters do not languish.*"

The practice of case management and mediation are closely intertwined, and since the 2009 reforms were introduced the Court has successfully achieved a much higher rate of native title matters resolving than had previously been occurring. The Court now also refers most of the native title mediation to its legally trained Registrars, or to appropriately experienced mediators who are external to the Court, including members of the National Native Title Tribunal (the Tribunal). The experience of the Court indicates that a solid understanding of the law, Court practice and litigation process greatly contributes to an effective and outcomes focussed mediation.

The Court's approach, which has been reinforced by the 2009 Amendments and the Bill currently before Parliament and this Committee, is to focus on outcomes and to expedite the resolution of native title claims as resolution is in fact crucial to the recognition and protection of native title. It is the experience of the Court that delay is not evidence of sound agreement making process and at times it can be quite the contrary.

Amendments to the Native Title Act 1993 since 2009

The Federal Court has a broad and recently increased responsibility for progressing Native Title cases quickly and efficiently. There are three primary reasons for this responsibility.

First, the amendments to the *Native Title Act 1993* (Cth) in 2009 gave the Court a new and over-riding responsibility for managing native title cases. That occurred in a climate where, across Australia, concerns were being expressed about the very slow

pace at which cases were proceeding and the prejudice that flows from this to the Indigenous claimants and other interest holders.

Secondly, following some concerns about the authority of the Court to actively manage cases, again in 2009, amendments to the *Federal Court of Australia Act 1976* (Cth) made it very clear that the Court has both responsibility and authority to actively manage cases. The new legislation also places similar responsibilities on parties and their legal representatives.

Finally, following Attorney-General, the Hon Nicola Roxon's announcements as part of the May 2012 Budget, the mediation function and resources to support this function have been transferred from the Tribunal to the Federal Court, as have the corporate functions and budget of the Tribunal. These changes implemented on 1 July 2012 complement and indeed reinforce the objective of the native title institutional reforms introduced by the *Native Title Amendment Act 2009*.

The changes in 2009 to the Act removed the compulsory requirement to refer matters to the Tribunal for mediation and empowered the Court to take greater control of matters. This enabled the Court to apply various techniques to accelerate resolutions.

Successful outcomes from the 2009 Amendments

The evidence of the success of the amendments is clear. Prior to 1 July 2009, the majority of matters were before the Tribunal for mediation. In the 2007-08 financial year, 10 native title determinations were made, and in the 2008-09 financial year there were 13.

Since the 2009 amendments were introduced, there has been a sharp increase in native title determinations and the finalisation of claims. In the 2010-11 financial year, the Court determined 29 native title matters, with that number growing to 36 in 2011-12. As at 17 December 2012, 17 determinations of native title have been made in the 2012-13 financial year and 1 further determination is anticipated to be made before the end of the 2012 calendar year.

The results achieved since the 2009 amendments are reflective of a maturing jurisdiction, including the work of the Tribunal, the Applicants and the parties in the years leading up to these achievements. The results are also reflective of the Court's focussed approach to case management and mediation which has created momentum and instilled in all involved a sense of accountability and responsibility, leading to greater activity, creative approaches to resolution and increased outcomes.

Federal Court's ability to perform mediation functions

The Bill is one of the Governments responses to the implementation of the recommendations made in the Skehill Review. After consultation with the Court and the Tribunal, the Skehill report considered the Court's ability to perform native title

mediation, and noted that the Federal Court has legislative responsibility for case managing all native title claims. Despite this, no resourcing for the claim mediation function was provided to the Federal Court when the legislation was amended to confer that responsibility on it. Instead, the Federal Court had undertaken its current (pre 1 July 2012) level of claim mediation within its existing budget.

At 6.23, the Review considered it was apparent that Federal Court decisions about who should mediate a dispute were based solely on availability of resources. The Review noted that the Court did not consider that particular claims types are better mediated by the Tribunal rather than by staff of the Court, and the Court does not regard Tribunal mediators as being more skilled than Court mediators. The result being that up until 1 July 2012 the majority of mediations were performed by the Tribunal as it was the body resourced to perform native title mediations.

The Review did not draw any conclusion as to whether the Court and Tribunal mediation styles and approaches are more effective or the same. To assist this Committee I noted that mediation under the auspices of the Court is held within an overall case management strategy; that is the mediation is not usually open ended, it may be issue specific which then may lead to broader negotiations once impasses are identified and resolved. Registrar mediators bring experience in native title and Indigenous land law, as well as general legal expertise and a sound knowledge of the Court's practice. This is clearly an advantage to a mediator. All Court mediators are accredited to the national standard and are required to undertake relevant training to ensure development of their skills.

The external mediators appointed by the Court are usually highly experienced legal practitioners or ex-judges who are carefully selected by the docket judge and the parties as being best placed to resolve the particular dispute. Co-mediation is also utilised where the skills (or indeed gender) of two mediators complement each other and in some difficult cases have greatly assisted in achieving resolution of issues.

A good example of the effectiveness of Court management and mediation may be shown by a recently determined Queensland matter. The matter was previously in Tribunal mediation, and in early 2012 the Tribunal advised the Court that the matter was ready for Consent Determination.

After a period of time the Court removed this matter from Tribunal mediation, at the request of the parties. Given the nature of the issues required to be mediated the Court appointed a retired Qld Supreme Court Judge as an external mediator. In dealing with the parties the mediator carried the necessary gravitas and brought relevant sound knowledge of State legislation and its intersection with the *Native Title Act 1993* (Cth).

The mediator was able to list the mediation within days of the referral and travelled to far north Queensland to meet with the Native Title party, their legal team and the respondents. The matters in dispute were resolved over a two day mediation and a consent determination made on 14 December 2012.

Expediting Native Title claims is in the interest of justice

Expediting the resolution of claims is consistent with the requirement under the *Native Title Act 1993* (Cth) to 'recognise and protect native title'. Where claims are mostly over 10 years of age, and where many elders and native title claimants are unlikely to live to see their native title recognised, effective expedition of native title claims cannot be contra to the recognition and protection of native title.

The balance to be struck is the timely resolution achieved through a process, and with an outcome, that is sustainable and beneficial to the parties.

A clear example of this is to found in a North Queensland claim filed in March 2005.

During a regular review held by the Court in 2008 it became clear to the Court that claim had not advanced and orders were made ceasing Tribunal mediation. The matter was then referred to case management before the Court, requiring the filing of work plans with a clearly identified program of work as to the advancement of the claim. By the end of 2010 the Applicant had provided the required material to the State of Queensland for their consideration.

In April 2011 the Applicant advised the Court that it and the State was prepared to enter into substantive negotiations with the Applicant towards a consent determination and at directions on 30 September 2011, the application was referred to mediation by a Registrar and was listed for determination on a date to be fixed in August 2012 based on a timetable agreed to by all parties.

Multiple mediations were convened involving the legal representatives of all parties in person at the Court or by phone. This mediation was focussed on reaching in-principle agreement regarding the native title rights and interests to be recognised, the effect of land tenure and public works over the application area and the terms of Indigenous Land Use Agreements to be finalised between particular parties.

The mediation achieved agreement with all parties and on 1 August 2012 a determination was made with the consent of all the parties. The determination recognised for the first time in Queensland the non-exclusive right to camp and live on pastoral leases and also included reference to associated agreements between particular parties which were then to be lodged following the determination for registration as body corporate Indigenous Land Use Agreements.

Institutional changes already implemented

This brings me to the Bill now before this Committee. The Bill finalises the new institutional arrangements, Amendments to the *Financial Management and Accountability (FMA) Regulations 1997* took effect on 1 July 2012 ceasing the Tribunal's FMA Act status. As a result, I, as the Registrar of the Federal Court am the FMA Act Chief Executive for the Federal Court and Tribunal.

The *Native Title Act 1993* (NTA) needs to be amended to reflect these changes and finalise the implementation process, remove legal risk, and provide clarity for affected agencies and stakeholders.

I am sure that the Committee is aware of all decision and administrative actions that have occurred since the May 2012 Budget announcements, however I will recap as it is an impressive list and those from the Court, the Tribunal and the Attorney General's Department who, working together, were responsible for implementing these reforms deserve our recognition and congratulations.

- The Federal Court and the Tribunal have signed an Interim MOU in relation to the changes to the Tribunal's administrative arrangements and functions. The MOU sets out their agreed roles and responsibilities for the period 1 July 2012 until the amendments to the *Native Title Act*, currently before the Committee, are passed.

- Almost all native title claims (other than those close to resolution) have ceased to be mediated in the Tribunal. All of the Tribunal's other current statutory functions and powers remain with the Tribunal.

- The *Financial Management and Accountability (FMA) Regulations 1997* were amended to remove the Tribunal FMA Act status as from 1 July 2012.

- Tribunal bank accounts have been closed.

- Since 1 July 2012, funding to enable the Tribunal to effectively discharge its functions is provided by the Federal Court under a dedicated sub-program set out in the Portfolio Budget Statements (PBS). This budget was agreed between the myself as Registrar of the Court and Registrar of the Tribunal

- Financial delegations have been made to the Native Title Registrar and Tribunal staff similar to those in place within the Tribunal as at 30 June 2012 and the Native Title Registrar will be responsible for recruiting, managing and terminating Tribunal staff consistent with the budget agreed with the Federal Court Registrar.

- The costs of all Tribunal staff, as well as remuneration and ancillary costs of the statutory officers of the Tribunal, including the President, Deputy

Presidents (if any), Members and the Native Title Registrar are met from the sub-program.

- The Federal Court is providing all corporate services necessary to support the Tribunal.
- Tribunal corporate services and claims mediation staff transferred to the Federal Court from 1 July 2012.
- The remaining staff (approximately 96 as at 1 October 2012) will stay with the Tribunal pending repeal of section 131 of the NTA (which specifies that the Tribunal is a statutory agency for the purposes of the *Public Service Act 1999*), at which point they will transfer to the Federal Court.
- The Adelaide Registry of the Tribunal has closed.
- Tribunal staff have co-located with Federal Court staff in Sydney.
- Tribunal is considering its options in Cairns (lease expiry in May 2013) and Brisbane (lease expiry in April 2015).
- A permanent MOU has been agreed by the Court and Tribunal to take effect from the date that the current proposed NTA amendments take effect.

Much has been done to implement these reforms with both the Court and Tribunal continuing to meet to monitor the ongoing implementation and effect of the reforms.

Courts and Tribunals Legislation Amendment (Administration) Bill 2012

The Bill makes amendments to remove the legal risk currently experienced during the transitional arrangements by having a single FMA Act Chief Executive, but two Public Service Act Agency Heads, with potentially conflicting legal responsibilities and powers, including in relation to staff. The Bill removes this risk by consolidating the Tribunal and Federal Court agencies for the purposes of the *Public Service Act* (much as they have already been consolidated for the purposes of the FMA Act), and clarifying the agency's administrative and governance framework. It is understood that this framework was developed through consultation the Department of Finance and Deregulation.

The next step is for the *Native Title Act 1993* to be amended to reflect these changes and finalise the implementation process, remove legal risk, and provide clarity for affected agencies and stakeholders. The amendment to the *Native Title Act 1993* will facilitate the transfer of the remainder of the Tribunal staff and some of its administrative functions to the Court, and to reflect that the Tribunal is no longer a statutory agency for the purposes of the FMA Act.

The Court believes that if the Bill (as it relates to the *Native Title Act*) was not passed in its current form, the institutional reforms will be unable to be finalised leading to legal and administrative uncertainty regarding in particular the status and legal position of Tribunal staff and how the Court and Tribunal could appropriately manage any future arrangements.

The Court looks forward to the publication of the Committee report on this Bill and to the Court's continued co-operation with the Tribunal in respect of our shared responsibilities to resolve native title disputes quickly.