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Dr John White
Department of the House of Representatives
Standing Committee on Social Policy and Legal Affairs
Parliament House

Email: john.white.reps@aph.gov.au

Dear Dr White

Courts and Tribunals Legislation Amendment (Administration) Bill 2012

I refer to the current inquiry by the Standing Committee on Social Policy and Legal Affairs inquiry into the Courts and Tribunals Legislation Amendment (Administration) Bill 2012 (the Bill) and am pleased to be attending the roundtable hearing on Friday 30 November.

I note your advice that ordinarily witnesses before the Committee would not be afforded the opportunity to make an opening statement, in part due to the informality of the hearing process. In the absence of making such a statement and in order to save time I have prepared the attached notes. I will refer to them during the hearing and it may be of assistance to the members of the Committee if the notes were provided to them in advance.

The notes reflect my views and, in general, what I also believe to be the views of the Judicial members of the Federal Court's Native Title Practice Committee. In summary I welcome the proposed amendments as they finalise the implementation of the reforms, recommended in the *Report of the Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio* (the Skehill Review) and first given effect through amendments to the Financial Management and Accountability Regulations 1997, which commenced 1 July 2012.

Yours sincerely

Warwick Soden OAM
Registrar and Chief Executive Officer

Courts and Tribunals Legislation Amendment (Administration) Bill 2012

Inquiry before the Standing Committee on Social Policy and Legal Affairs as part of its inquiry into the Courts and Tribunals Legislation Amendment (Administration) Bill 2012 (the Bill)

Roundtable hearing on Friday 30 November

Warwick Soden OAM
Chief Executive Officer & Principal Registrar

Thank you for the opportunity to be here this morning.

I would like to commence with an opening statement. This is I acknowledge unusual and is an indication of the strength of my support for these proposed amendments.

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* 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* 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 Tribunals corporate functions and budget. These changes implemented on 1 July 2012 complement, indeed reinforce the objective of the native title institutional reforms introduced by the *Native Title Amendment Act 2009*.

As to the *Native Title Act* amendments, the changes in 2009 to the Act removed the compulsory acquirement to refer matters to the National Native Title Tribunal for mediation and empowered the Court to take greater control of matters. That enables the Court to apply various techniques to accelerate resolutions.

The Court made it very clear, prior to the legislation being passed by Parliament that the Court intended to take a much greater role in managing cases. In my evidence to the Senate Legal and Constitutional Affairs Committee on 16 April 2009 enquiring into the proposed legislation I said, amongst other things:

> *'We welcome the amendments. We welcome the responsibility and accountability that goes with them. We will manage the jurisdiction in a national and a co-ordinated way.*

The Court, we believe, is in the best position to work out what mechanism would be in the best interest 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 be resolved before any mediation can 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 to refer the matter to one of the Court 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.'

Furthermore I went on to say:

'... we take this proposed responsibility very seriously. We know it will come with a degree of accountability. We know there are many expectations 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, it will bring those changes which will speed up the whole process and produce outcomes.'

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 2007-08, 10 native title determinations were made, and in 2008-09 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 2010-11, the Court determined 29 native title matters, with that number growing to 36 in 2011-12. 10 determinations of native title have been made to date in 2012-13 and 8 more determinations are anticipated to be made before the end of the 2012 calendar year.

The Court's pride in the increasing number of consent determinations has been criticised by some as a public relations exercise and one that fails to acknowledge the work done by the Tribunal, the Applicants and the parties in the years leading up to this. So let me temper my comments by acknowledging of course the work that is undertaken by many to achieve these results. The Court, like the Tribunal, has been working tirelessly since 1998 to focus on improving the rate of resolution and the quality of the outcomes achieved. In saying this I am also very confident that as a result of the 2009 amendments the Court's focussed approach to case management and mediation 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.

This brings me to the Bill now before this Committee. The Bill as I note above 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 decisions and administrative actions that have occurred since the May 2012 Budget announcements; however I will recap as they make for an impressive list. Officers of 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 NNTT have signed an Interim MOU in relation to the changes to the NNTT's administrative arrangements and functions. It 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 NNTT. All of the NNTT's other current statutory functions and powers remain with the NNTT.
- The FMA Regulations were amended to remove the NNTT's FMA Act status as from 1 July 2012.
- NNTT bank accounts have been closed.
- Since 1 July 2012, funding to enable the NNTT 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
- I have made financial delegations to the Native Title Registrar and NNTT staff similar to those in place within the NNTT as at 30 June 2012 and the Native Title Registrar will be responsible for recruiting, managing and terminating NNTT staff consistent with the budget agreed with the Federal Court Registrar.
- The costs of all NNTT staff, as well as remuneration and ancillary costs of the statutory officers of the NNTT, 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 NNTT.
- 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 NNTT pending repeal of section 131 of the NTA (which specifies that the NNTT is a statutory agency for the purposes of the PS Act), at which point they will transfer to the Federal Court.
- The Adelaide Registry of the NNTT has closed.
- NNTT staff have co-located with Federal Court staff in Sydney.
- NNTT 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.

I am confident that the Committee can see that much has been done to implement these reforms and done very well with both the Court and Tribunal continuing to meet to monitor the ongoing implementation and effect of the reforms.

Once again: this Bill will finalise this implementation process by aligning the Act with the change in administrative practice, removing legal risk, and providing clarity for agencies and stakeholders.

In particular, the Bill makes amendments to remove the legal risk currently experienced (in what were always intended to be merely 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 NNTT 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. I understand that this framework was developed through consultation the Department of Finance and Deregulation.

It is my view 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. An uncertainly that would lead me as the Agency head to be most concerned as to the status and legal position of Tribunal staff and how the Court and Tribunal could appropriately manage any future arrangements.

I look 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.

Again, thank you for the opportunity to share this with you.