

## **The Native Title Reform Process – What will change and what will remain the same?**

Warwick Soden<sup>1</sup>

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1. I would like first to acknowledge the Gimuy Walubara Yidinji people on whose land we meet today, and to express my gratitude to the organisers of the conference for this opportunity to contribute.
2. As it has done in the past, this conference continues to provide an important forum for Indigenous Peoples, those who represent them, and parties and institutions involved in native title to identify some of the challenges of the native title jurisdiction, and to enliven debate and discussion about how these challenges might be met.
3. One of the themes of this conference – Tides of Native Title – is about the ebb and flow of native title law, policy and practice. This theme is a clever appropriation of the language first used by Justice Brennan in *Mabo*<sup>2</sup> and then perhaps devastatingly used by Justice Olney in the *Yorta Yorta*<sup>3</sup> peoples' matter.
4. Since those early days in the development of native title jurisprudence a new view emerges – Justice Merkel indicated in *Rubibi*<sup>4</sup> that *traditional* laws and customs are not fixed and

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<sup>1</sup> Registrar and Chief Executive Officer, Federal Court of Australia.

<sup>2</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1

<sup>3</sup> *Members of the Yorta Yorta Aboriginal Community v State of Victoria and Others* (1999) 4(1) AILR 91

<sup>4</sup> *Rubibi Community v Western Australia* (2001) 114 FCR 523

unchanging. Rather, they evolve over time in response to new or changing social and economic exigencies to which all societies adapt as their social and historical contexts change.

5. The same could well be said of the laws and policy governing the recognition of native title. 15 years after the High Court's decision in *Mabo* much has changed in the legal and policy environment and much remains the same.
6. This climate of change, that is, the Federal Government's legal and policy framework, the amendments to the Native Title Act and the resulting institutional change, provides an ever evolving opportunity to 'get it right', to achieve fair and just outcomes.
7. It is in this context that the panel meets to speak with you. In particular, Justice French spoke about the Court's procedural response to the legislative changes. My focus is about how the Court and the Tribunal will function efficiently and cooperatively within our respective spheres and in a way that is results driven.
8. The Government's objective in amending the Native Title Act was to, amongst other things, address a number of key issues rising out of the Claims Resolution Review, including:
  - Promoting better communication and coordination between the Court and the Tribunal
  - Removing duplication of functions between the Court and the Tribunal
  - Improving the effectiveness of Tribunal mediation, and
  - Facilitating improved behaviour of parties.And, the ultimate purpose of these changes?

As the Attorney General said in the Second Reading Speech to the Amendment Bill “To ensure the system delivers effective outcomes more expeditiously for all parties, and to encourage agreement-making in preference to litigation.

9. The logic of the most recent amendments to the Act and the reasons for them identified in the explanatory memorandum to the amendments and the second reading speech make it clear that more needs to be done to achieve greater expedition, but with a preference for agreement making. How, then, might this be achieved one might ask?
10. My focus today is to comment on how the Court intends to help in meeting the purpose of the reform objectives in two key areas.
  - Firstly, removing duplication of functions between the Court and the Tribunal, and
  - Secondly, promoting better communication and coordination between the Court and the Tribunal
11. As to removing duplication, although Native Title claims are proceedings in the Federal Court, the recent amendments to the Native Title Act have clearly placed the responsibility for achieving results with the Tribunal. In essence, the Court is prohibited from applying its ADR case management techniques while the matter is with the Tribunal for mediation. But the inevitable tension remains, which will require careful attention. A delicate balance will need to be found. On the one hand, matters cannot be allowed to remain too long in the mediation

process and appropriate pressure must be placed on the mediation process to produce results. The clear expectation is that the results will be “more expeditious” than the past. This is the intent of the reforms. On the other hand, the policy of the Act, reflected in the level of funding available, is to encourage agreement-making in preference to litigation. The possible tension in this preference is that agreement making is likely to be more time consuming than litigation.

12. Nevertheless, returning again to the essence of the reforms, we should look forward to speedier results without litigation.
13. So, what functions have been removed from the Court to avoid duplication with the Tribunal?
14. The Act now prohibits the Court referring the whole or a part of a matter to mediation before one of its registrars whilst the referral to mediation before the Tribunal remains in place. The Act also prohibits the Court from convening a conference to focus on the settlement of issues whilst the referral for mediation before the NNTT is active.<sup>5</sup>
15. The Court has always recognised that the Tribunal is the preferred mediator for native title cases. However, many of you would be aware that native title matters have been referred to Court annexed mediation with some impressive successes:

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<sup>5</sup> ss. 86B(6) *Native Title Act 1993* (Cth)

issues have been resolved without the need to resort to a contested Court hearing. Sometimes discrete and narrow issues were mediated; sometimes the entire matter was resolved.

16. Although some matters have come before the Court for mediation, the Court has always reinforced and assumed the central role of the Tribunal in this process. By way of example, more than 350 native title cases are presently before the Tribunal for mediation. In the past a number have been successfully resolved. Only about 20 cases have been subject to an order for Court annexed mediation by the Court..
17. So, again, at the risk of repetition, there will be no Court mediation unless the Tribunal or a party requests that the Court cease mediation before the Tribunal and the judge is satisfied that the request is proper.
18. It is important to note, however, that ceasing mediation before the Tribunal does not prevent the Court from, in the context of finalising the case, referring a matter to ADR to be carried out by another body or person or, possibly referring the matter back to the Tribunal. But I suggest that the Court is not going to readily refer a matter to court annexed mediation for example where it has made orders ceasing mediation before the Tribunal. The Court would, I also suggest, be entitled to presume that the cessation of mediation at the Tribunal will lead to orders programming the matter for trial.

19. It should also be expected that the Court would be concerned about delay. Any matter in which an order to cease mediation is sought is likely to be a matter filed in the Court many years ago and it might also be reasonable for the Court to assume that following an application for orders that mediation cease, all the efforts of the Tribunal have been expended and a speedy trial is warranted.
  
20. I should also make it clear that, following cessation of Tribunal mediation, the Court's normal suite of case management options may be brought to bear on cases – for example, managing the expert evidence via a registrar's conference or the Judge may direct that limited evidence be heard to reflect, on a representative basis, the applicant's case. It is even possible that the Court might order the resumption of mediation in the light of such limited evidence. These case management initiatives are likely to be undertaken in the context of the matter progressing to trial.
  
21. These are some of the areas where the reforms are designed to remove the duplication. You have heard from Justice French as to how the Tribunal's mediation process may be supported by the Court to achieve results. You will hear more, no doubt, from the Tribunal about how it proposes to improve and expedite their mediation processes.
  
22. The reforms are also designed to improve the institutional relationships between the Court and the Tribunal, particularly by

better communication. Justice French spoke about the Court's revised approach to its native title practice, one that reflects the regional approach to the cases adopted by the Tribunal, and an approach that will provide an opportunity for the Tribunal to better communicate to the Court as to which cases are progressing, why, how and when.

23. This leads me to the second issue, i.e. the topic of effective communication. Improving communication between the Court and the Tribunal was a major focus of the Claims Resolution Review. The review and the subsequent amendments to the Act reflect a policy position that requires both institutions to operate with a common purpose to ensure the more effective and expeditious resolution of claims. The reforms encourage a strengthening of communication in respect of specific claims and approaches to be taken in broader case management on a regional basis. That is, which cases should be given priority in a coordinated way?
24. The Claims Review reflected some concerns that wasted resources and delay arose out of ineffective communications between the two institutions.
25. Concern was also raised in the Review that dual management by both the Court and the Tribunal cause frustration and confusion amongst parties. Examples were given including - frustration as Court orders for the provision of certain material may divert resources and prevent the parties from actually engaging in

Tribunal mediation.

There were suggestions that parties were required to meet competing demands and comply with inconsistent timeframes.

26. We are doing much to respond to these concerns on an administrative level, with informal communication – by which I mean that communication required to maintain productive, professional and effective relationships between regional court registrars and Tribunal case managers.
27. Additionally, the Act provides for more formal communication requirements. The kind of communication contemplated includes the Tribunal providing the Court with case specific mediation reports and regional mediation progress reports, regional work plans, reports concerning a failure to comply with a direction of the presiding member and reports arising from a review. The Tribunal has also been given a right to appear before the Court at a hearing that relates to any matter that is currently before the Tribunal for mediation, for the purpose of assisting the Court in relation to a proceeding. Clearly, that right is about communication.
28. With these rights – that is, the right to appear and the right to report, comes an added responsibility of obligation. It is now reasonable to assume that the Court will also expect to be informed, in clear terms, as to which matters are progressing well in mediation and require minimal court supervision and which matters require the Court to respond to assist in achieving

results.

29. In conclusion I remind you of the objectives of the amendments  
- to ensure the system delivers effective outcomes more expeditiously for all parties, and to encourage agreement-making in preference to litigation
  
30. It is interesting to note that the Act does not prescribe any time frames in which the Tribunal and the parties are to deliver effective outcomes. However the legislation does provide some measures by which to achieve this stated aim more expeditiously.
  
31. By way of one example, to ensure more effective mediation the Tribunal have been given some coercive powers to do things in order to ensure parties participate productively in mediation and thereby improve the timeliness and effectiveness of mediation.
  
32. No matter how described, the essence of the reforms mentioned is to deliver quicker mediated results. These cases are matters pending in the Court. Of course the Court will do what it can to help produce a most expeditious, fair and just result for all concerned.