



04 November 2013

Access to Justice Arrangements
Productivity Commission
PO Box 1428 Canberra City ACT 2601

By email: access.justice@pc.gov.au

Dear Commissioners

Productivity Commission Issues Paper on Access to Justice Arrangements

The National Native Title Tribunal (the Tribunal) welcomes the opportunity to provide a submission to the Productivity Commission in relation to the matters raised in the Access to Justice Arrangements Issues paper.

The scope of the issues contained in the Issues Paper are wide ranging. This submission provides background information about the context within which the Tribunal operates and then discusses those issues most relevant to the work of the Tribunal.

Yours sincerely

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Submission in response to the Access to Justice Arrangements Issues Paper

The National Native Title Tribunal (Tribunal) is an impartial, independent administrative agency, established by the *Native Title Act 1993* (Cwlth) (NTA). The Tribunal is responsible for a wide range of functions, and delivers a range of services, which are provided for under the NTA.

The Tribunal's clients and those accessing the native title system form a broad and diverse range of groups and industries, including Aboriginal people and Torres Strait Islanders, Commonwealth, state and local government, the mining industry, pastoralists and graziers, fishers, primary producers and water users. These parties are often situated in remote areas.

The NTA sets out the objectives for the Tribunal's way of operating, including that the Tribunal:

- carries out its functions in a fair, just, economical, informal and prompt way;
- may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders; and
- is not bound by technicalities, legal forms or rules of evidence.

As a whole, these provisions provide practical mechanisms to achieve equity and improve access to justice. They emphasise the resolution of disputes through mediation and provide funding to bodies to provide specialist services and legal advice to claimants and respondent parties, building capacity to engage effectively in the system.

Given this context, the Tribunal has directed its submission to discussion of alternative dispute resolution, the cost of application fees before the Tribunal and improving accessibility to Tribunals:

Alternative Dispute Resolution

The preamble of the NTA states that the procedures set out in the legislation for the recognition of native title rights and interests, ensure that, if possible, such recognition occurs by conciliation or in a manner that has due regard to their unique character.

Members of the Tribunal have various alternative dispute resolution functions under the NTA, including:

- Negotiation of Indigenous Land Use Agreements (ILUAs) and statutory access agreements;
- Mediating native title determination applications referred for mediation by the Federal Court;
- Mediating agreements about whether certain developments affecting native title may be done;
- Providing dispute resolution assistance to representative Aboriginal and Torres Strait Islander bodies; and
- Providing dispute resolution services in relation to the withdrawal of objections to Indigenous Land Use Agreements.

The Tribunal utilises a multi-disciplinary approach to agreement making and provides specialist services to ensure that parties can effectively participate in the native title process. This approach acknowledges the differing socioeconomic, cultural and educational backgrounds of parties, which may impact upon the ability to appropriately access and engage with the native title system.

The financial costs of accessing civil justice

The Tribunal's arbitral processes involve the payment of fees for lodgement of an application for a future act determination or an expedited procedure objection application.

Division 2 of the NTA prescribes the applications under the NTA which attract a fee upon lodgement. Section 76 identifies that Expedited Procedure objection applications attract a fee. Currently, the fee prescribed by the Native Title (Tribunal) Regulations 1993 (Regulations) is \$755.00 per application and is subject to indexation. Only a native title party can object to the application of the Expedited Procedure.

Regulation 8 specifies exemptions to the payment of this fee and Regulation 8A provides for the Native Title Registrar (Registrar) to waive the requirement to pay a fee on lodgement of the application. Regulation 8 compels the Registrar to take account of the income, day-to-day living expenses, liabilities and assets of the person who is otherwise liable to pay the fee in determining whether the payment of the fee would impose financial hardship on the person.

The majority of native title parties lodging an objection to the application of the Expedited Procedure qualify for exemption under Regulation 8. For example, native title representative bodies recognised by the Commonwealth Minister under s 203AD of the NTA are exempt. However, as more native title claims are determined, relevant Prescribed Bodies Corporate (PBCs) are established to manage native title rights and interests. PBCs do not attract an automatic exemption to the payment of fees, although they may be eligible for a refund of these fees if the native title party is successful in their objection.

In theory, given that a large portion of those persons lodging objections are Indigenous Australians, the fees might be considered to impose a barrier to access to justice, however in practice, fees for Indigenous clients are generally waived under the fee waiver provisions of the Regulations. It should be noted that an increasing proportion of objection applications are received from PBCs, which are not eligible for a fee waiver at the time the application is made, although they may later be eligible for a refund.

Improving the Accessibility of Tribunals

The Tribunal endeavours to promote access to dispute resolution and justice more broadly through the provision of assistance, which is a key area of the Tribunal's business under the NTA. The Tribunal provides a wide range of forms of assistance under the NTA, pursuant to powers of the Registrar and the President, including:

- Assisting with the preparation of applications, including claimant, non-claimant, compensation, or objections to expedited procedure, as well as preparing applications to register ILUAs;
- Conducting searches of registers or other records;
- Assisting with the negotiation of agreements, including negotiating ILUAs and negotiating a statutory access agreement;
- Assisting with Indigenous dispute resolution, including assisting native title representative bodies and native title service providers to perform their dispute resolution functions;
- Providing information about native title, including native title system statistics, information sessions and information products on native title; and
- Geospatial information and mapping services, including preparing area descriptions and maps for claims, ILUAs, future act matters and to assist in resolving claims.

These services allow clients to readily access accurate and up-to-date information and build parties' capacity to engage effectively in the native title system.

In relation to the question of legal representation within the context of tribunals, the Tribunal is of the view that representation should not be limited within this jurisdiction. Given the technical and complex nature of the NTA, it can be difficult for users to effectively navigate the system in the absence of legal assistance. This is particularly the case with the future act provisions of the NTA which may involve complex commercial negotiations.

The Tribunal uses a variety of mechanisms to ensure that the benefits of simplicity and informality are not undermined in Tribunal processes. These include conducting mediations and conferences in relatively informal settings, using conference rooms rather than formal hearing rooms and, where possible, holding mediations and conferences on country.