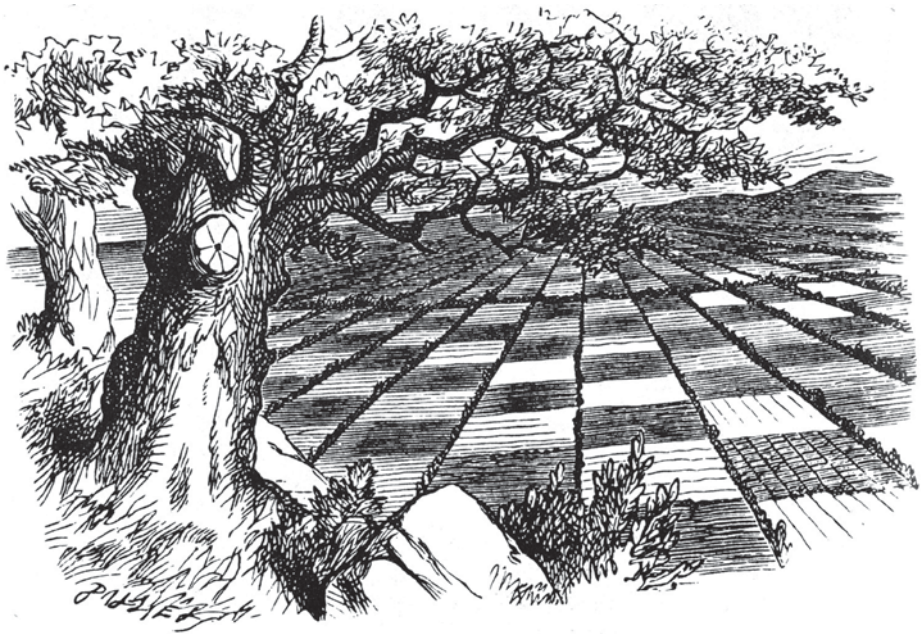
THROUGH THE LOOKING GLASS: THE FEDERAL COURT'S ACQUISITION OF RESPONSIBILITY FOR MEDIATING NATIVE TITLE PROCEEDINGS

By Susan Phillips



In May 2012 the Attorney-General announced that, from 1 July 2012, all mediation of native title proceedings (both claims and claim related ILUAs) will be dealt with by the Federal Court. Funding for the National Native Title Tribunal (NNTT) from 1 July 2012 becomes a subprogram within the Federal Court's appropriation and a number of the NNTT registries have been relocated, where possible, to spaces adjoining or within the court's premises. A number of the NNTT staff have been absorbed by the court, and the Federal Court District Registrars are now convening conferences in each state and region to work out the management of all the matters in mediation. The NNTT retains its ILUA and claims registration functions, and notification, future act mediation and arbitral functions.

The architecture of the *Native Title Act* is premised upon mediation as the means by which native title will be recognised. In passing the *Native Title Act* the Commonwealth Parliament promised parties would be brought together in what the Act's Preamble describes as 'a special procedure to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character'. The Act promised 'Governments should facilitate negotiation on a regional basis between the parties in relation to claims to land or the aspirations of ATSI peoples and proposals for the use of land for economic purposes'.

The statutory design for progression of native title claims still requires parties to be brought together and assisted to work out by agreement how their interests coexist and express the practical way in which that coexistence should be enjoyed in the future. However, the court will now have complete control over that process and it will be interesting to see whether the oft expressed judicial frustration with the pace of native title proceedings abates as the court brings its powers to bear on the issues which have, in the past, taken a long time to resolve.

There is a long history in Australia of reliance upon dispute resolution through procedures other than resorting to litigation in a court. The conciliation and arbitration systems for workplace disputes pre-dated Federation and were incorporated into our Constitution. Section 51(xxxv) provides conciliation and arbitration should be provided by the Commonwealth for the prevention and settlement of industrial disputes.

The immediate model for the NNTT was the Human Rights and Equal Opportunity Commission (HREOC), where parties complaining of breaches of their human rights could be brought together and a binding solution found.

However, a feature of our constitutional arrangements has been the courts' vigilance regarding their domain under Chapter III of the Constitution. Delegations of power to tribunals which the courts have found encroached upon judicial functions have been found unconstitutional. Shortly after the establishment of the NNTT in *Brandy v HREOC* (1995) 183 CLR 245, the capacity of HREOC to provide binding solutions for parties in dispute was set aside. The consequences of *Brandy* meant the NNTT's capacity to determine, where the parties had reached agreement, that native title exists was no longer possible. The determination of facts and declaration of native title as an in rem interest binding upon the world at large could only be done by the court.

The 1998 amendments to the *Native Title Act* caused significant discomfort to the court. The Federal Court was very proud of its disposition rate — the average time it took for a matter to be disposed of from commencement to final orders was 18 months. In Senate estimates this could be contrasted usefully with Supreme Court proceedings with an average disposition rate of three years. The transfer to the Federal Court overnight in September 1998 of almost 900 matters — irrespective of their status before the NNTT — meant proceedings commenced in 1994 and

1995, — of which there were (and still are) many, confounded these statistics.

To accommodate the change the court set a provisional disposition target for native title matters of three years, having regard to their unique nature. It is doubtful that this goal has ever been achieved in a claimant application. Eventually in its annual reports the court started to quarantine the native title matters to their own category so that the 'balance' of the court's statistics could be restored. Wilcox J complained in a national Native Title Users' Group forum in 2003 that to hear and determine all the active native title claims would take the court 75 years. This showed a fundamental misunderstanding of the nature of native title proceedings and the role of the court in relation to them. The docket system in the Federal Court means matters are managed by the same judge from the beginning to the end. Where claims are in mediation and eventually resolved by consent the judge acts largely administratively until the very end, when they make orders that the parties have worked out — if the court regards them as appropriate.

Many legal representatives of parties to native title proceedings have had the experience of finding that their primary objective after the transfer in 1998 of native title proceedings to the Federal Court was to keep the court at bay so that the work of progressing the claim could continue or, in the alternative trying to use the court as a way of urging other respondents and the NNTT on through some of the blockages that occur. The court has frequently noted that parties are not getting on with progressing the claim and matters have been brought into closer and more intensive judicial management now with full control over mediation of the claims. It will be interesting to monitor the effect.

Out of all the matters that have been filed under the *Native Title Act*, only 25 are litigated determinations. There have been 1985 claims (claimant, compensation and non-claimant) made. Only 474 are active proceedings, meaning 1511 have been resolved by one means or another — the bulk of them, 1486, by means other than judicial determination following a hearing. There have been 187 determinations, out of which 143 have recognised the existence of native title. Determination of contested proceedings regarding the existence of native title by the court has therefore only happened in 25 out of the 1985 proceedings filed.

Julius Stone commented in relation to mediation :

> By the nature of mediation, directed as it is to secure agreement, the merits of the dispute on the facts or law are almost necessarily subordinated. "To achieve success, the mediator is inclined, therefore, to encourage compromise rather than advise adherence to legal principle." The mediator tends, in short, to follow the line of least resistance, and does not—or at least does not have to—bring an objective judgment to bear on the issues before him. On the other hand, mediation has a value corresponding to this shortcoming, namely, that a settlement thereby produced may be better designed to settle not merely the merits of the dispute, but the mutual relations of the disputants.

The extent to which the court falls within or without of this paradigm will now be susceptible to the same assessment as formerly applied to the NNTT. The extent to which this is an appropriate fit with the judicial purpose and functions of a court will be demonstrated in the months and years to come. The loss of corporate experience and memory the NNTT possessed may itself be a setback for many of the claims where mediation was fairly advanced. The accumulation of experience in native title matters for all of the clients, institutions and practitioners since 1998 has made disposition of matters far quicker than was possible in the past. As has already occurred, full credit for the increasing number of consent determinations has already been claimed for the court before Senate estimates. More thorough analysis of the processes by which the determinations made since the 2009 amendments were achieved may show that the credit for the increasing rate of resolution of native title claims by consent should at least be shared.

Opposite page: illustration by Sir John Tenniel from *Through the Looking-Glass, and What Alice Found There* by Lewis Carroll, 1871: This page: The Nyangumarta Karajarri determination in May 2012: Judge and Nyangumarta dancers. Credit: Susan Phillips.