ADVANCING LANDS DISPUTES NEGOTIATIONS IN NSW

Special Rapporteur: Edward Basha is a fifth year Arts/Law Student at Macquarie University and an intern at ADC.

On 16 March 2017, the Australian Disputes Centre was delighted to host two of Australia's leading experts in Aboriginal Land Rights and Native Title. As a follow on to the ADC's highly successful Land Rights seminar in 2016, Ms Helen Shurven of the National Native Title Tribunal (NNTT) and Mr Stephen Wright of the Deerubbin Local Aboriginal Land Council (DLALC) returned to the ADC to conduct a seminar on the use of Alternative Dispute Resolution (ADR) in Land Rights disputes. During the seminar, Ms Shurven and Mr Wright shared their insights on the 'how' and 'why' of using ADR in this important area. The speakers gave an overview of Native Title and Land Rights claims in New South Wales (NSW), spoke of the appropriateness of ADR in resolving these disputes and the importance of implementing a tailored and appropriate ADR process.

Differentiating Land Rights Claims from Native Title Claims

Ms Shurven commenced the evening with an insightful discussion on the use of ADR to assist land dispute negotiations in NSW. Before touching on more complex issues, Ms Shurven took attendees through a broad overview of Land Rights and Native Title in NSW. While the terms 'land rights' and 'native title' are used somewhat interchangeably by many, the distinction is important as these areas relate to distinctly different issues and are governed by different statutes.

Governed by the *Aboriginal Land Rights Act 1983* (NSW) (*ALRA*), Ms Shurven explained that the essence of Land Rights claims is the return of Crown Land as compensation. With no requirement for a traditional connection to the land, these claims are made by Aboriginal Land Councils over certain types of Crown Land. While over 2,500 claims have been granted in NSW, over 30,000 have not yet been determined – highlighting the demand for effective dispute resolution in this area.

Governed by the *Native Title Act 1993* (Cth) (*NTA*), native title can be thought of as a bundle of rights and interests on a specified area. The existence of native title in an area is a matter to be determined by the Federal Court of Australia. In response to native title claims, section 223 of the *NTA* requires the Court to determine whether the native title group has maintained a connection to their land according to traditional laws and customs from sovereignty (1788) to the present time. If it is found that native title does exist, section 225 of the *NTA* requires the Court to ascertain who holds the native title and interests, the nature and extent of other rights and interests in the area, the relationship between native title and non-native title rights and interests, and whether there are any native title rights conferring exclusive rights against other persons. In NSW, there have been 11 determined applications and 20 not yet determined claimant applications. There are 39 determined non-claimant

applications, which are applications made by someone who has a non-native title interest and is seeking a determination that native title does not exist.

In my view, these figures highlight the need to develop a suitable, mutually beneficial approach to dispute resolution in this area.

Relationship between ADR and the *Aboriginal Land Rights Act 1983* (NSW)

Stephen Wright then led a discussion on the interrelationship between the *ALRA* and ADR. Mr Wright focused specifically on section 36AA of the *ALRA*, which governs Aboriginal Land Agreements (ALA). Section 36AA of the *ALRA* sets out what constitutes an ALA. Pursuant to the *ALRA,* an ALA includes agreements that are financial in nature, relate to the exchange, transfer or lease of land, impose conditions or restrictions on the use of land, allow for joint access to and management of land, undertakings by an Aboriginal Land Council or the Crown Land Minister with regard to the lease, transfer, management or use of any land and the resolution of disputes arising under an ALA.

In terms of the ADR process used in negotiating an ALA, Mr Wright noted that the process will require: acceptance by Aboriginal Land Councils and the Minister; acceptance by any other parties asked to join an ALA negotiation; recognition by government actors that the process is not the same as 'consultation'; adequate resources and skilled Aboriginal ADR practitioners. Consistent with accepted ADR practices, Mr Wright spoke of the requirements of confidentiality, good faith, a clear process for dealing with 'authority' issues, facilitation of the process by an independent 3rd party, private sessions and orderly negotiation meetings.

Following his explanation of the interrelationship between section 36AA, ALAs and ADR, Mr Wright discussed principles for ALA Negotiations. Notable principles were that ALA negotiations are voluntary, with shared understandings and good relationships between the parties being the foundation for success. The outcome should be equitable and accessible for Aboriginal stakeholders and outcomes should be solution-focused to deliver social, cultural and economic benefits for Aboriginal people and greater certainty for the government.

Closing Remarks

A central issue addressed by Ms Shurven and Mr Wright was the importance of a culturally aware approach to dispute resolution. Considerations such as structuring the process in a culturally sensitive manner (in contrast to the often more rigid structure of commercial disputes) and simply dressing in a way that will assist participants to feel at ease are not often front of mind for dispute resolution practitioners, but are of the utmost importance in this setting.

The presentations of both Helen Shurven and Stephen Wright facilitated an insightful discussion into an area that requires the attention and unified commitment of the legal profession. When looking at the number of not-yet-determined native title and ALA claims, it is apparent that consideration needs to be given to appropriate dispute resolution processes in order to address the backlog. As mentioned by our speakers, the dispute resolution process needs to be tailored and culturally sensitive. It needs to progress in a manner where parties build a trusting, non-adversarial relationship. In order to achieve these outcomes, my view is that cultural awareness training ought to be prioritised and programs should be established, giving Indigenous Australians the opportunity to receive specialised

mediation training. As Mr Wright highlighted, this is where ADC can assist with its significant cross-cultural expertise and focus on Aboriginal and Torres Strait Islander Mediation training programs.

About the Speakers

Helen Shurven

As one of just four members of the National Native Title Tribunal – appointed by the Governor General of Australia – Helen Shurven is a true expert in the field. As an accredited mediator under the Australian National Mediation Standards, Ms Shurven has conducted hundreds of hours of face-to-face and telephone mediation in Native Title matters. She conducts tribunal mediations to assist parties make agreements toward the resolution of future act matters, as well as indigenous land use agreements. Further to this, Ms Shurven has made over 300 arbitral decisions under the *Native Title Act 1993* (Cth).

Stephen Wright

After graduating from Macquarie University in 1989 with a Bachelor of Politics and a Bachelor of Laws, Stephen Wright has had an illustrious career devoted to Aboriginal Land Rights. Before taking on his current position as the Chief Operation Officer at DLALC – one of the largest private landowners in Western Sydney – Mr Wright served as the Registrar of *ALRA* for 18 years and the New South Wales Aboriginal Land Council. His expertise in the area are further highlighted through his 20+ years' experience as a mediator and conciliator.