

**Submission of the National Native Title Tribunal to the
House of Representatives Standing Committee on
Aboriginal and Torres Strait Islander Affairs'
Inquiry into Capacity-Building in Indigenous Communities**

Summary

1. The National Native Title Tribunal (the Tribunal) assists people to resolve native title issues. The Tribunal was set up in 1994 under the *Native Title Act 1993* (the Act) and is part of the Attorney-General's portfolio.
2. The Tribunal works closely with communities across Australia to assist people to resolve native title applications through mediation and to make agreements that recognise all parties' rights and interests in land and waters. It carries out these functions in an impartial and fair way, taking into account the views and concerns of everyone involved in the process.
3. The Tribunal mediates native title claims under the supervision of the Federal Court of Australia. It promotes agreement-making as the preferred way to resolve native title matters rather than lengthy and costly litigation. In recent years, parties have shown a greater willingness to seek agreements and to negotiate alternative outcomes where native title determinations are not possible.
4. Through its statutory role and experience in assisting people resolve native title issues, the Tribunal is in a unique position to understand the skills and knowledge parties require to achieve fair and agreed outcomes.
5. The agreement-making process can only be effective if all parties have the necessary knowledge and capacities to participate fully in the process. Once agreements are reached, effective corporate structures need to be in place for native title holders to be able to enjoy the benefits.
6. The Act has been a catalyst for many Indigenous communities to increase their knowledge and skills in a wide range of areas such as Australian and traditional laws, agreement-making, mediation and negotiation. Importantly, the application of such knowledge and skills is not restricted to the native title negotiating table.
7. The Act provides the legal basis for Indigenous communities to exercise their rights and make decisions autonomously. The effective exercise of these rights

requires governing structures that are culturally appropriate. Indigenous organisations such as ATSIIS and the native title representative bodies have identified this as a key area where existing capacities need to be further developed. The Tribunal is collaborating with ATSIIS on aspects of this work.

8. The Tribunal engages in partnerships at multiple levels to contribute to the development of the capacities of parties where needed. For example, it works with communities but also with organisations representing applicants and other parties to share its expertise in native title processes and encourage the establishment of links between native title stakeholders. The aim is to create a native title environment that is more conducive to agreement-making. This, in turn, places the Tribunal in a better position to reach its strategic objectives in a more cost-effective and efficient manner.
9. This submission outlines:
 - A. the role and functions of the National Native Title Tribunal and the Native Title Registrar under the *Native Title Act 1993* (Cwlth)
 - B. the Tribunal's strategic approach aimed at creating an environment that is favourable to agreement-making
 - C. the range of strategies and initiatives contributing the capacity-building of Indigenous parties and stakeholders.

Introduction

10. Native title is only one component of Indigenous affairs and, by corollary, only one area in respect of which there may be a need for capacity-building of Indigenous communities and organisations. Further, the Tribunal is only one of a number of agencies involved in native title matters. However, the Tribunal wishes to contribute, consistently with its statutory mandate, to build the capacity of Indigenous communities and organisations (as well as non-Indigenous stakeholders). It does this because the ability to identify and enjoy native title rights, and agreements that flow from those rights depends upon strong community structures and governance.

A. Role and functions of the National Native Title Tribunal and the Native Title Registrar

11. The Act established the Tribunal and sets out its functions and powers. The Tribunal's main role is to assist people to resolve native title issues. This is done through agreement-making. The Tribunal also arbitrates in relation to some types of proposed future dealings in relation to land (future acts).
12. The President, deputy presidents and other members of the Tribunal have statutory responsibility for:

- mediating native title determination applications (claimant and non-claimant applications)¹;
- mediating compensation applications²;
- reporting to the Federal Court of Australia on the progress of mediation³;
- assisting people to negotiate indigenous land use agreements (ILUAs), and helping to resolve any objections to area and alternative procedure ILUAs⁴;
- arbitrating objections to the expedited procedure in the future act scheme⁵;
- mediating in relation to the doing of proposed future acts⁶; and
- arbitrating applications for a determination of whether a future act can be undertaken and, if so, whether any conditions apply⁷.

13. Under the Act, the President is responsible for managing the administrative affairs of the Tribunal, with the assistance of the Native Title Registrar. The Act gives the Registrar some specific responsibilities, including:

- assisting people at any stage of any proceedings under the Act, including assisting people to prepare applications⁸;
- assessing claimant applications for registration against the conditions of the registration test⁹;
- giving notice of applications to individuals, organisations, governments and the public in accordance with the Act¹⁰;
- registering ILUAs that meet the registration requirements of the Act¹¹; and
- maintaining the Register of Native Title Claims, the National Native Title Register (the register of determinations of native title) and the Register of Indigenous Land Use Agreements¹².

¹ See *Native Title Act 1993*(Cwlth) (NTA) ss. 61(1), 13(1), 86A, 86B, 86E, 136G

² See NTA ss. 61(1), 50(2), 86A, 86B, 86E, 136G

³ See NTA ss. 86E, 136G

⁴ See NTA ss. 24BF, 24CF, 24DG, 24CI(2), 24DJ(2)

⁵ See NTA ss. 32(3), 75

⁶ See NTA ss. 31(3), 29

⁷ See NTA ss. 35, 75

⁸ See NTA s. 78

⁹ See NTA ss. 190A, 190B, 190C, 190D

¹⁰ See NTA ss. 63, 66

¹¹ See NTA ss. 24BG, 24CG, 24DH

¹² See NTA Parts 7, 8 and 8A

14. Applications for a native title determination (claimant and non-claimant applications) and compensation applications are filed in and managed by the Federal Court. Although the Court oversees the progress of these applications, the Tribunal performs various statutory functions as each application proceeds to resolution¹³.
15. Future act applications (applications for a determination whether a future act can be done, objections to the expedited procedure and applications for mediation in relation to a proposed future act) are lodged with and managed by the Tribunal¹⁴.
16. The Act requires the Tribunal to carry out its functions in a fair, just, economical, informal and prompt manner¹⁵.
17. The Tribunal has developed policies and procedures in relation to providing capacity-building assistance¹⁶.

B. Creating an environment that is favourable to agreement-making

18. The Tribunal brings native title applicants and other parties together through its facilitation of the native title process. The aim of the mediation process is to avoid or shorten the litigation process. It also increases prospects of outcomes that are acceptable to the parties rather than imposed on them by a Court. Successful mediation improves the likelihood that agreements will endure because they are based on continuing relationships between the parties. The Tribunal's role is to assist applicants and other parties reach such outcomes.
19. In its *Strategic Plan 2003-2005*, the Tribunal states its purpose as follows: “*We work with people to develop an understanding of native title and reach enduring native title and related outcomes.*” The strategic plan also describes the direction taken by the Tribunal to achieve organisational objectives and improve services to its clients and stakeholders. This includes working towards an environment that is favourable to the making of agreements to resolve native title matters.
20. A key part of this process involves ensuring that parties have the capacity to engage in the native title and agreement-making processes, which is crucial to achieving results. Parties who have the required knowledge, skills and preparation are able to make more informed decisions about their rights and interests. This, in turn, helps them achieve outcomes which meet their needs.

¹³ See NTA ss. 61, 63, 64(4), 86B, 86C, 86E, 87, 136G(1), 136G(2)

¹⁴ See NTA ss.32(3), 35, 75

¹⁵ See NTA s.109(1)

¹⁶ <http://www.nntt.gov.au/publications/data/files/Revised%20assistance%20procedures.pdf>

21. The Tribunal has made considerable efforts to identify specific client needs and develop appropriate responses. Recent consultations include a client satisfaction survey commissioned by the Tribunal, consultations with staff and clients in preparation of the *Strategic Plan 2003-2005* and the Parliamentary Joint Committee's inquiry into the Tribunal's effectiveness – see paragraph 25 below. These consultations indicated that parties—both Indigenous and non-Indigenous—face a range of capacity issues, such as the lack of adequate technical resources or the need for a better understanding of the legislation and available options.
22. The Federal Court has also recognised that, in working out mediation programs, the Tribunal and the parties may have regard to the resources limitations and other practical constraints under which each of them must operate¹⁷.
23. When parties lack capacity, it can slow down the agreement-making process. The Tribunal has an important role in assisting native title parties by contributing to building their capacity to ensure that they are effective participants in the process.
24. In an effort to address limitations and enhance the agreement-making environment, the Tribunal has expanded its initiatives to assist parties. It collaborates with applicant groups, other parties and their representatives, often on request, sharing its resources and expertise to contribute in building parties' capacity where needed.
25. The Parliamentary Joint Committee on Native Title, in its *Report on the effectiveness of the National Native Title Tribunal*, recommends '*that the National Native Title Tribunal continue to explore partnerships to develop programs aimed at capacity building within organisations involved in the native title process.*'¹⁸
26. The Indigenous Governance Conference held in April 2002 in Canberra stated that '*it is crucial to develop skills and capacities in communities for people to effectively carry out the tasks of governance so that it delivers tangible benefits for communities and the people.*'¹⁹ Part C of this submission outlines the Tribunal's strategic approach to contributing to the development of Indigenous parties' and stakeholders' capacities to make effective decisions and achieve results through the native title processes.

¹⁷ *Frazer & Ors v Western Australia* [2003] FCA 351

¹⁸ Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Fund, *Effectiveness of the National Native Title Tribunal in fulfilment of the Committee's duties pursuant to subparagraph 206(d) (i) of the Native Title Act 1993*, December 2003, p.54

¹⁹ <http://www.reconciliationaustralia.org/docs/speeches/governance2002/outcomes.doc>

C. Strategies and initiatives contributing to the capacity-building of Indigenous parties and stakeholders

27. Capacity-building has been defined as *'the process by which individuals, organisations, institutions and societies develop abilities (individually and collectively) to perform functions, solve problems and set and achieve objectives.'*²⁰
28. In the context of native title claim mediation, 'capacity' refers to the ability of the claim group or other party to participate in the mediation process effectively so as to enable them to make durable agreements that have meaning for each of the parties in their own cultural or institutional domain. These agreements may contribute, for example, to the making of a consent determination on native title.
29. The capacity of groups to engage in the process is crucial to the success of any agreement-making process. If they are well-prepared, the parties will be able to concentrate and make informed decisions about their rights and interests rather than be distracted by misunderstanding or uncertainty about the process.
30. The Tribunal therefore needs to be able to identify the capacity of parties to participate in mediation effectively and implement strategies to develop that capacity. Capacity issues may need to be addressed at every stage of the mediation. Strategies to develop a party's capacity to participate in mediation may also involve institutions or people other than the Tribunal.²¹
31. The Tribunal seeks to engage in partnerships at multiple levels to contribute to the development of Indigenous parties' and stakeholders' capacities. Current initiatives are in partnership with:
- Indigenous communities
 - Indigenous organisations
 - industry sectors
 - government.

Contributing to developing the capacities of Indigenous communities

32. To be effective participants in the native title process, Indigenous communities often need to develop their capacities in areas such as:
- decision-making
 - assessing external influences
 - representation
 - implementation

²⁰ UN Development definition of capacity-building quote p.7 in D.Vickery, 'Capacity-building: An Indigenous Land Corporation Approach', *Conference Proceedings Shifting Camp: 12th Biennial Conference of the Australian Rangeland Society*, Kalgoorlie, 2-5 September 2002, pp.207-13.

²¹ Paragraphs 26-9 are extracts from: National Native Title Tribunal, (2003) *Mediating Native Title Applications: A guide to National Native Title Tribunal Practice*, NNTT, Perth, p.151 (internal Tribunal document)

- information
- resource capacity—human and financial.

33. Native title processes and outcomes can redefine relationships and power within Indigenous communities. They also place demands upon communities to implement agreements reached as a consequence of exercising procedural rights. These factors need to be taken into account when negotiating agreements. Ideally, strategies to address these issues are developed during the negotiation of agreements and in the implementation of agreements.

34. As part of the mediation process, the Tribunal plays a role in seeking to identify and implementing strategies that increase the ability of the applicants (and other parties) to be effective participants in mediation. This is intended to create a mediation environment that is more conducive to achieving outcomes that are acceptable to the parties. This work includes activities such as:

- working with the native title claim groups and other Indigenous parties to enhance their decision-making capacity in relation to an application
- providing targeted information (including about the mediation process, the roles of participants in the process and developments in the law) to particular parties according to their needs at particular stages of the mediation
- working with parties to facilitate strategic planning
- assisting native title holders in establishing culturally appropriate and effective native title corporations to hold and manage native title.

35. Recent examples of the Tribunal's work in this area are the workshops for applicants conducted in 25 different locations across four states between April and December 2003. Representative bodies around the country had requested the Tribunal to provide information to applicant groups about the legal process leading to a determination and the options available to them when making decisions about how best to progress their claims. Tribunal teams combining staff with high level legal, geospatial and case management experience and skills conducted workshops that were specifically designed to provide the information needed by the particular claimant groups. In total, the Tribunal made presentations to approximately 450 claimants and 70 representative body employees. The understanding gained at the workshops meant that many of the applicant groups felt able to make decisions to progress their claims, deciding for example to continue negotiations towards a settlement or to amend their application.

36. The Tribunal's assistance to parties to the Torres Strait regional sea claim in Queensland is another example. The area under claim is the subject of an international treaty arrangement with Papua New Guinea and the mediation will require cross-border issues to be addressed. The Tribunal developed a structured approach to the mediation and met with the board members of the Torres Strait Regional Authority, representatives of prescribed bodies corporate from

individual communities, and legal and anthropological staff to outline its approach. The Tribunal's aim is to deliver a statement of relevant interests and issues, which will form the basis of terms of reference for the parties to the claim.

37. The Tribunal may also provide assistance in setting up arrangements for Indigenous people to manage developments within their communities. For example, the Tribunal recently assisted in the negotiation of an ILUA which establishes a process to deal with native title issues affecting the provision of infrastructure on Palm Island.

Contributing to developing the capacities of Indigenous organisations

38. The native title representative bodies and ATSIS have identified a range of issues which require attention in order to develop the capacities of the representative bodies. These are: corporate governance, management and staff development, information technology, collaborative research partnerships and applied capacity-building. ATSIS and the Tribunal have ongoing discussions on their respective roles and priorities and the Tribunal has engaged in several areas. Recent examples of initiatives in partnership with Indigenous and other organisations include the establishment of heritage protection protocols and of mapping systems to enhance geospatial capabilities.
39. Other projects aim to develop the knowledge and skills of staff of representative bodies and include a joint initiative with ATSIS where senior anthropologists mentor more junior ones. The Tribunal is also a partner in several research programmes with the University of Melbourne, James Cook University and the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS).
40. During 2003-2003, the Tribunal conducted seminars for legal representatives of claimant groups in New South Wales, Queensland and the Northern Territory, aimed at enhancing their skills in meeting the conditions of the registration test process.
41. In South Australia, the Tribunal expanded its assistance to the representative body and other parties as part of its involvement in the Statewide ILUA Strategy. It provided research material to the representative body regarding connection and the preservation of evidence of elderly or infirm witnesses, and provided regular native title updates to the fishing industry.
42. In Western Australia, the Tribunal assisted the South West Aboriginal Land and Sea Council in conducting community meetings in the South West, leading towards the Noongar People amalgamating six applications into one single claim.

Working with industry sectors

43. A positive approach on the part of industry sectors such as the pastoral, fishing and mining industries in relation to native title mediation is a significant aid to achieving successful outcomes. Several factors may impact on the willingness of

bodies representing parties to make agreements. These factors may include external or political influences and differences between large companies and individual operators. The industry bodies' level of awareness of the options available to them and of the claimants' interests is central to their capacity to be effective participants in the process.

44. The Tribunal assists industries in developing that capacity through provision of information and help in identifying options. It also facilitates forums where claimants and parties can discuss their interests, promotes the creation of links between government agencies, business and Indigenous communities and convenes working groups to develop strategies encouraging negotiated outcomes. Such forums and working groups further contribute to the development of the capacities of the Indigenous participants.
45. An example of this work is the national Indigenous Fishing Right Conference, held in Fremantle in October 2003. The Tribunal organised the conference in collaboration with the Aboriginal and Torres Strait Islander Service, Fisheries Research and Development Corporation, the Department of Agriculture, Fisheries and Forestry, National Oceans Office, WA Department of Fisheries, WA Department of Industry and Resources and the WA Department of Premier and Cabinet through the Office of Native Title. About 200 people involved in various aspects of customary and commercial fishing and the regulation of fishing activity were brought together for the first time.
46. As a result of the conference, the Tribunal is convening a technical working group to look in detail at options for people wanting local, regional, state and national structures to develop indigenous fishing strategies. A key outcome of the working group will be a National Indigenous Fishing Meeting to facilitate a significant reduction in litigation and encourage negotiation between Indigenous people and the commercial fishing industry over indigenous fishing claims.
47. The Tribunal plans to continue its contribution to the development of policy and options at national and state levels with other industry sectors, using the Indigenous fishing strategy as a model.

Working with government

48. At state and territory level, the Tribunal works closely with government bodies to increase the capacity of officers to participate effectively in mediation. This often involves organising joint forums with other stakeholders (including Indigenous parties or their representatives), enhancing networking opportunities. For example, in Victoria during 2002-2003, the Tribunal held bi-monthly forums on various topics and provided ongoing information and assistance to the State of Victoria, the Chamber of Mines and Mirimbiak Nations Aboriginal Corporation towards development of a series of template mining related agreements and ILUAs.

49. The Native Title Forum, organised in December 2002 with the Western Australian State Government's Office of Native Title and the Western Australian Aboriginal Native Title Working Group, brought together a broad group of interested parties. Looking at innovative options for the way forward after the High Court's decision in the *Ward* case, the forum led to the creation of the Native Title Strategy Group and the Fishing Interest Group. Both groups are ongoing forums for parties and government representatives to build relationships and develop workable solutions to native title issues.
50. At a national level, as mentioned in paragraph 32, the Tribunal collaborates with ATSIS to ensure both organisations agree on their respective roles and priorities in assisting Indigenous communities and representative bodies in developing their capacities.
51. At a Commonwealth Government level, the Tribunal seeks to contribute to a coordinated whole-of-government approach to the consideration of native title matters and development of related policies and services for Indigenous Australians. For example, it participates in working groups sponsored by the Attorney General's Department which seek to coordinate the activities and funding of Commonwealth agencies involved in native title. There may also be value in the Tribunal contributing to other Commonwealth Government forums such as the Ministerial Council for Aboriginal and Torres Strait Islander Affairs and the COAG Indigenous Initiatives.

Conclusion

52. It is the Tribunal's observation that in native title matters initiatives at all levels are required to address Indigenous parties' capacity to participate and benefit, including at the community level. The Tribunal is keenly interested in the recommendations of the Committee.