

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS  
NATIONAL NATIVE TITLE TRIBUNAL

**Question No. 188**

**Senator Barnett asked the following question at the hearing on 24 May 2007:**

Complaints:

- a) Please provide the number of complaints received for the past few years (since 1 July 2005)
- b) Please identify the nature of those complaints
- c) Please provide a copy of the code of conduct and identify relevant provisions in the Act that deal with conflict of interest matters

**The answer to the honourable senator's question is as follows:**

a)

2005/06	1 complaint
2006/07	0 complaints

b) The complaint was against an administrative staff member for misuse of the Tribunal's email system. The complaint was upheld and the employee reprimanded.

c) Sections 122 and 131B of the NTA deal with conflict of interest. The code of conduct for Members, conflict of interest policy for Members and Tribunal client service charter are provided.

## Client service charter

### **About the Tribunal**

The National Native Title Tribunal was created under the provisions of the *Native Title Act 1993* (Cwlth).

The main objectives of the act are:

- to provide for the recognition and protection of native title
- to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings
- to establish a mechanism for determining claims to native title
- to provide for the validation of developments invalidated because of the existence of native title.

The Tribunal acts as a mediator, or helper, in negotiations. The Tribunal is an independent body. It is not a Court. The Tribunal does not speak on behalf of governments, Aboriginal and Torres Strait Islander people, industry or community groups. Its role is to assist people in reaching agreements about native title in a spirit of mutual recognition and respect for each other's rights and interests.

### *The Tribunal's Structure*

The Tribunal is headed by a full-time President and assisted by 10 Members. The President and the Members are appointed by the Governor General.

It also has an administrative arm headed by the Registrar. The Tribunal employs staff for this administrative arm under the *Commonwealth Public Service Act 1992*.

### **Who is the Client Service Charter for?**

The charter is public statement of the National Native Title Tribunal's commitment and standards of service to all people and organisations that do business with it.

The Tribunal's work brings it into contact with a wide range of individuals, groups, communities, organisations, industry groups and all levels of government.

### **What our clients can expect from the Tribunal**

In providing service we try to ensure that our clients are not disadvantaged in any way because they are not near one of our offices. The Tribunal travels into regional Australia to carry out the majority of its work.

We aim for a quick turnaround of correspondence; we try to make our information available widely and quickly and we recognise the challenge of meeting the needs of our clients.

With your help we aim to find ways of improving our service to meet your needs.

Not all registries of the Tribunal have the capacity to provide a full range of services. Requests will be referred to the nearest registry for appropriate action.

In carrying out our work we will:

- treat all clients fairly and impartially
- be positive and helpful towards our clients, respond promptly to requests and where required by law, provide reasons for any Tribunal decision that we make which affect our clients
- provide explanations of the processes and standards we must follow and present these explanations in a form that our clients can understand
- ensure that clients are able to discuss the decisions which affect them with someone who is able to understand and respond to their concerns
- listen to clients when they suggest ways in which we might improve our service and give serious consideration to all the suggestions we receive
- provide access to disabled clients.

Despite our best endeavours, we know that you may sometimes encounter problems. When you are discussing your problem with our staff, please remember that the person may not be the responsible for the problem, nor the best person to solve it.

## **Standards of service**

The following standards define the minimum levels of service we aim to give all our clients.

We will be accessible in the following ways:

- staff will be available to answer telephone enquires from 8.30am to 5.00pm on working days
- the Tribunal provides extensive and up to date information on native title topics, legislation, applications and decisions on its comprehensive internet site
- all correspondence will include a contact name, direct telephone number and email address so you can contact the appropriate officer directly
- telephones will be answered personally wherever possible and voice mail is available for clients to leave messages
- telephone enquires will be transferred only once.

We will respond promptly in the following ways:

- we will deal with simple requests on the day we receive them
- we will provide copies of Native title Register extracts within 24 hours
- we will deal with requests for searches of the Register of Native Title Claims, National Native Title Register and the Register of Indigenous Land Use Agreements within three working days
- we will deal with all general enquires about our services within two working days

- we will provide clear guidelines on the information required by the Tribunal and the expected timeframes
- if not answered by the person you are calling, telephone calls will be returned within 24 hours.

## **How you can help us**

To help us deliver the best possible service, when making an inquiry please consider the following in your dealings with us:

- provide us with complete and accurate information
- keep appointments or advise us in advance if you are unable to keep an appointment
- provide us with advance notice of any request for information or assistance so that we can plan to meet your request on time
- provide feedback on our service
- tell us about any special needs you have so we can try to meet them.

We are genuinely interested in your comments, feedback and suggestions on how we can improve our service to you. Please take a moment to tell us what you think either by emailing the Registrar advising:

the date and time you contacted the Tribunal  
if it was by telephone, in person, by letter or email and what it was about.

Please tell us if you were or were not satisfied with the service you received and why. Please add any other comments or suggestions. Your name and address is optional.

## **Complaints**

Our commitment is to provide a high quality, professional service at all times. We recognise that complaints provide valuable feedback on the quality of our service and the effectiveness of our programs and policies.

### *How to make a complaint*

Before you decide to make a complaint, please take a moment to decide whether it is about our service in general, a particular native title application, Tribunal members or staff.

The following sets out how you make a complaint about any of these:

- if you have a complaint about a particular staff member you should direct your complaint to the Registrar by writing to Registrar, National Native Title Tribunal, GPO Box 9973 Perth WA 6848, or calling free call 1800 640 501
- if you have a complaint about a particular Member please direct your complaint to the President, National Native Title Tribunal, GPO Box 9973, Perth WA 6848

- if your complaint is about any other aspect of our service you can contact the Registrar by writing to National Native Title Tribunal, GPO Box 9973, Perth WA 6848, or calling free call 1800 640 501
- If your complaint is about a decision relating to native title there are various avenues under the *Native Title Act 1993* (Cwlth) or other legislation which you must follow. Please ask for information about this.
- if you prefer to make your complaint in person, please do so at the public counter/reception area of Tribunal registries in each State or Territory
- if we have made a mistake or the problem has been caused by us, we will apologise and endeavour to rectify the situation
- we will ensure that we respond to your complaint within 14 days of receiving it
- complaints in regard to decisions on native title applications will be referred to the original decision maker, who will contact you to discuss the matter with the aim of reaching an agreed outcome or solution to your complaint
- if you are still dissatisfied with the decision, you may request that it be reviewed by a senior Tribunal officer who has not been involved in the application whose name and business address will be given in the first reply
- if you require an interpreter or someone with a similar cultural background to assist you please discuss this with us and we will assist the Tribunal will make every effort to resolve the matter to your satisfaction.

#### *Further complaints*

If you are dissatisfied at any time with our handling of your complaint or you feel that your complaint has still not been dealt with satisfactorily (i.e. after using the Tribunal's internal mechanism), you may contact an office of the **Commonwealth Ombudsman** in relation to the actions of the Registrar and staff of the Tribunal.

The Commonwealth Ombudsman has an office in each State and Territory except Tasmania.

Complaints to the Ombudsman can be made in person by calling free call **1300 362 072**, via the internet on [www.comb.gov.au](http://www.comb.gov.au) or in writing **GPO Box 442, Canberra ACT 2601**.

#### **Review and evaluation of the Client Service Charter**

We will review our standards and evaluate the effectiveness with which we are meeting your needs on a yearly basis. We will also conduct a review using an external and independent body. Feedback from our clients will be important in the review process.

**CODE OF CONDUCT FOR MEMBERS OF THE NATIONAL NATIVE TITLE  
TRIBUNAL**

1.1. In carrying out the functions and duties of a member of the National Native Title Tribunal, a member must:

- (i) behave honestly and with integrity;(ii) act with care and diligence;(iii) treat everyone with respect and courtesy and without harassment;
- (iv) comply with all applicable Australian laws;(v) comply with any lawful and reasonable direction given by the President in accordance with the responsibilities of the President under the *Native Title Act* (see e.g. s. 123 of the Act); (vi) maintain appropriate confidentiality;
- (vii) disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with those functions and duties;
- (viii) use Commonwealth resources in a proper manner;
- (ix) not provide false or misleading information in response to a request for information that is made for official purposes in connection with those functions and duties;
- (x) not make improper use of:

- (a) inside information; or(b) the member's duties, status, power or authority in order to gain  
or seek to gain a benefit or advantage for the member or for any other person.

1.2. For the purpose of this Code of Conduct:

- (a) 'Australian law' means: (i) any Act of the Commonwealth, including the *Native Title Act 1993* or any instrument made under an Act; and (ii) any law of a state or territory, including any instrument made under such a law,
- (b) it is acknowledged that directions cannot be given to members about decisions they are empowered to make where they are specifically appointed to carry out functions under the *Native Title Act 1993* (e.g. in the conduct of a right to negotiate inquiry and any decision made in respect thereto).

2. A member must at all times behave in a way that upholds the integrity and good reputation of the National Native Title Tribunal.

3. A member must comply with any other conduct requirement that is prescribed by law relating to his or her status, functions and duties as a member.

# PROCEDURES FOR DEALING WITH AN ALLEGED BREACH OF THE CODE OF CONDUCT FOR MEMBERS OF THE NATIONAL NATIVE TITLE TRIBUNAL

## 1. Introduction

1.1 Members of the National Native Title Tribunal (members) have adopted and agreed to be bound by the Code of Conduct for Members of the National Native Title Tribunal (Members' Code of Conduct).

1.2 Members have also agreed to procedures for dealing with alleged breaches of the Members' Code of Conduct set out in paragraphs 2 to 7 following.

## 2. Complaints by an employee of the Tribunal

### 2.1 Informal resolution

2.1.1 Where an employee of the Tribunal: (a) has a complaint about the conduct of a member; and (b) the employee believes the conduct may constitute a breach of the Members' Code of Conduct; and (c) the nature of the issue is such that informal resolution of the issue with the member is appropriate and may be possible, the employee should seek informal resolution of the issue with the member.

2.1.2 Seeking informal resolution is optional and the employee will need to make a judgment on the appropriateness of undertaking it. 2.1.3 The employee may wish to discuss the possible informal resolution of the issue with his or her supervisor, manager or director.

### 2.2 Written complaints

2.2.1 If: (a) an employee does not wish to seek informal resolution of the issue; or (b) informal resolution has been attempted without success, the employee may discuss the issue with the Registrar and provide a written complaint to the Registrar.

2.2.2 The Registrar will advise the President that a matter has been raised about the conduct of a member.

2.2.3 The President may decline to deal with the complaint if it is trivial, vexatious or frivolous.

2.2.4 If the complaint is not trivial, vexatious or frivolous, the President: (a) will advise the member concerned; and (b) will provide the member with an opportunity to comment;  
and (c) may request a written response from the member.

### 2.3 Agreed course of action

2.3.1 If, in light of the nature of the complaint, the President considers it appropriate, the President will ascertain whether the employee and the member will agree to a course of action (an agreed course of action) to deal with the matter.

2.3.2 The President may, following consultation with and agreement of the parties, use internal or external mediation services in an attempt to resolve the matter.

2.3.3 If resolution is achieved, all documentation in relation to the complaint and the resolution is to be destroyed.

### 2.4 Formal investigation

2.4.1 If the employee and the member have not resolved the matter informally or established an agreed course of action, the President may appoint an appropriate person (not being a member, the Registrar, or an employee of



the Tribunal) to investigate the complaint in accordance with the process set out below.

2.4.2 The employee and the member shall have the right to decline to have the matter dealt with under these procedures or to request variations to the procedures which they consider appropriate to the circumstances of the matter.

(a) If the employee and the member decline to have the matter dealt with under these procedures, the procedures have no further application.

(b) If variations are agreed to by the President, the employee and the member, the procedures followed will be varied accordingly.

2.4.3 If the President appoints a person to investigate the complaint, the investigator will: (a) undertake a fair and unbiased investigation, giving all persons involved an adequate opportunity to present their case;

(b) conduct the investigation in accordance with the principles of procedural fairness (below); (c) maintain confidentiality and release information on a 'need to know' basis only; (d) interview all relevant people and provide each person with a record of the interview with that person;

(e) prior to the interview, give each person the opportunity to nominate an independent person (a friend, or a legal or employee representative) to accompany them at the interview;

(f) following the interview/investigation give each party the right of reply, but not the right of cross examination; and

(g) provide the President with a full report of the investigation including recommendations about the action (if any) that the President should take.

2.4.4 The report and its recommendations will be forwarded in writing to the President for action which will be taken as soon as possible to finalise the process.

2.4.5 Possible outcomes may include the following actions: (a) referral to the Attorney-General; (b) referral to the Australian Federal Police; (c)

acknowledgment of fault and/or apology; (d) change in work practices; or  
(e) no further action.

2.4.6 The complainant and member will be advised of the action (if any) proposed by the President. Depending on the outcome of the investigation it may also be appropriate to advise other relevant persons.

2.4.7 Documentation relating to the investigation is confidential to the President unless disclosure is required by law.

## 2.5 Protection for complainants

2.5.1 The Tribunal expects all employees and members to be treated in a fair and equitable manner. Accordingly, where a complaint is made in good faith under these procedures:

(a) the protection provided under section 16 of the Public Service Act 1999, section 170CK (2)(e) of the Workplace Relations Act 1996 and section 76 of the Occupational Health and Safety (Commonwealth Employment) Act 1991 will apply to the complainants; and

(b) any equivalent statutory protection afforded the member, including the provisions of the Native Title Act 1993, will apply to the member.

2.5.2 There is no specific protection against liability for defamation in respect of complaints. Where a complaint or a response to a complaint is made in good faith and to an authorised person there may be some protection available under the various state/territory laws. The defences available vary from jurisdiction to jurisdiction.

2.5.3 If a complaint has been made in good faith and the complainant considers that he/she is suffering discrimination or harassment both personally and professionally as a result of the complaint, a review of action may be lodged under the Public Service Regulations 1999

detailing the concerns. Claims will be investigated and appropriate action will be taken.

## 2.6 External review of a complaint

- 2.6.1 Notwithstanding the internal processes which have been established, and in the absence of agreement to the contrary: (a) an employee may decide to make an application for review of a member's actions to the Merit Protection Commissioner under section 33 of the Public Service Act 1999 or through other processes external to the Tribunal; and/or (b) a member may take action through other processes.

In that event, to the extent that the external application for review or the other external process deals with issues raised by the complaint, all internal processes for the resolution of those parts of the complaint subject to an external process may be suspended pending the outcome of the external process.

## 3. Complaints by another member or any other person

- 3.1 Where a complaint is made by another member or by any other person against a member, the complaint will be referred directly to the President. The President may decide to deal with the complaint in accordance with the procedures adopted for dealing with complaints made by an employee insofar as they can be applied.

## 4. General provisions concerning how complaints are dealt with

- 4.1 All members have the right to have complaints against them objectively and professionally investigated in a confidential manner. In the interests

of procedural fairness, any member being investigated will be given the opportunity to offer an explanation for their behaviour.

4.2 All complaints will be dealt with by those involved, including the Registrar and the President, expeditiously. It is in the interests of all parties to endeavour to resolve matters as expeditiously as possible to ensure there can be an ongoing working relationship after the matter has been resolved.

## 5. Delegation of President's functions under these procedures

5.1 The President may, by signed instrument, delegate to one or more of the Presidential members, all or any of the President's functions under these procedures.

## 6. Complaints against the President

6.1 Where an employee of the Tribunal has a complaint about the conduct of the President and the employee believes the conduct may constitute a breach of the Members' Code of Conduct, the President will delegate to the longest serving Presidential member the President's functions under these procedures for the purposes of dealing with the complaint.

## 7. Tribunal to resource procedures

7.1 The President will ensure that resources will be made available to ensure that complaints are dealt with expeditiously.

## PRINCIPLES OF PROCEDURAL FAIRNESS

- Inform the member against whom an adverse decision may be made, as fully as possible of any allegations against them;

- Provide the member with an opportunity to put their case, whether an oral hearing or otherwise, wherever possible;
- Hear all parties to a matter and consider all arguments, where a decision has to be made between competing interests;
- Ensure that no person judges their own case or a case in which they have a direct interest; and
- Act fairly, promptly and without bias in making decisions.

**CONFLICT OF INTEREST POLICY FOR**

**MEMBERS OF THE NATIONAL NATIVE TITLE TRIBUNAL**

**1. Statutory Provisions**

1.1. Members are bound by section 122 of the *Native Title Act 1993* (the Act) which provides:

**“Disclosure of interests**

*Member to disclose conflict of interest*

(1) A member who has a conflict of interest in relation to an application under Part 3 or an inquiry by the Tribunal must disclose the matters giving rise to that conflict: (a) if the member is the President – to the Commonwealth Minister and the parties; or (b) in any other case – to the President and the parties.

*Requirement for consent*

(2) The member must not take part in the inquiry or exercise any powers in relation to the application or the inquiry unless: (a) if the member is the President – the Commonwealth Minister and the parties consent; or (b) in any other case – the President and the parties consent.

*Meaning of conflict of interest*

(3) For the purposes of this section, a member has a conflict of interest in relation to an application under Part 3 or an inquiry by the Tribunal if the member has any interest, pecuniary or otherwise, that could conflict with the proper performance of the member’s functions in relation to that application or inquiry.

(4) Without limiting subsection (3), a person has a conflict of interest at a particular time in relation to an application under Part 3, or an inquiry by the Tribunal, if:

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- (a) at that time, the person is employed by, or engaged as a consultant to, an organisation that has an interest in the subject matter of the application or the inquiry; or
- (b) at any time in the 12 months immediately before that time, the person was so employed or engaged.”

## 2 Principles

2.1 A fundamental purpose of the Tribunal is to facilitate the recognition and protection of native title.

2.2 The role of the Tribunal includes: (a) assisting parties to achieve a consensual resolution of applications including native title and compensation applications, and right to negotiate matters; (b) acting as an arbitral body with respect to certain future acts; (c) holding inquiries at the direction of the Minister and otherwise in accordance with the Act; (d) assisting in the negotiations of Indigenous Land Use Agreements and other agreements as requested.

2.3 It is essential to the success of the Tribunal that it be and be seen to be independent, impartial and professional in the exercise of its powers and the discharge of its functions under the Act. Accordingly, each member of the Tribunal should avoid: (a) conflict of interest; and (b) bias against or in favour of a person or entity.

2.4 A conflict of interest or apprehension of bias will arise where there is an actual conflict or bias or where it might reasonably be thought that there is a conflict or bias. In considering whether a member is or is not seen to be free of any interest incompatible with impartiality the criterion is whether a fair minded person, having knowledge of the relevant facts, could reasonably conclude that the member is in a position where his or her impartiality would or could be impaired.

## 3 Definitions

3.1 In this policy: (a) “application” means an application under Part 3 of the Act or an inquiry and includes a request for assistance in negotiating an Indigenous Land Use Agreement and any other matter involving the exercise of function by a

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member under the Act;

(b) “interest” means a direct or indirect interest, pecuniary or otherwise, and includes interests held by members of the family and associates of a member which interests are in the care, management or control of the member or are known to the member;

(c) “Tribunal” means the National Native Title Tribunal.

#### 4. Rules

4.1 Except with the consent of the parties and:

(a) if the member is the President – the Commonwealth Minister; or (b) in any other case – the President,

no member of the Tribunal shall do any work in relation to any application in respect of which that person has been involved prior to his or her appointment to the Tribunal. For the purposes of this paragraph, a prior involvement includes the preparation of the application, the provision of advice to any person in relation to the application (whether before or after it has been lodged with the Tribunal), the gathering of evidence or information in relation to the application or the representation of a party in mediation conferences.

4.2 Except with the consent of the parties and:

(a) if the member is the President – the Commonwealth Minister; or (b) in any other case – the President,

no member of the Tribunal shall do any work in relation to an application if, within the period of twelve months prior to the lodging of the application, that member has carried out any work in relation to native title matters for a group, person, or organisation which is or represents a party or eligible party to the application. This



prohibition does not apply if the work carried out was for a government and did not involve the relevant application.

4.3 Except with the consent of the parties and:

(a) if the member is the President – the Commonwealth Minister; or (b) in any other case – the President,

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no member of the Tribunal shall do any work in relation to an application in respect to which that member has any interest, pecuniary or otherwise, that conflicts or could reasonably be seen to conflict with the proper performance of that member's functions in relation to the application.

4.4 (a) No member of the Tribunal shall be engaged by, represent or otherwise act on behalf of any party in relation to an arbitration or inquiry arising under the Act. (b) Subject to (a), a member may not be engaged by, represent or otherwise act on behalf of any party in relation to a court proceeding, mediation, negotiation or assistance concerning any matter arising under the Act, except with the consent of the parties and the President. (c) When a member is engaged by, represents or otherwise acts on behalf of a person, group or organisation in relation to a matter concerning native title other than those matters referred to in (a) or (b), the member will inform the President.

4.5 Nothing in the foregoing shall be taken as limiting the proper performance of functions of a member of the Tribunal by a member in the ordinary course of dealing with any party concerning any matter arising under the Act.

4.6 Without limiting the generality of the foregoing, a conflict of interest may arise if a member has: (a) an interest in or in relation to land or waters in an area covered by the application; or (b) an interest in shares, options, units, warrants or like instruments in, or a directorship of, any company which is a party to the application or has an interest in or in relation to the land or waters covered by the application.

4.7 Each member of the Tribunal is required to provide to the President of the Tribunal a list confidential to the President of any past and present associations or involvements and interests which may reasonably give rise to the appearance or fact of a conflict of interest in relation to any application or matter within the jurisdiction of the Tribunal. The list should be updated when circumstances change.

4.8 Because of the nature of work performed by the Tribunal conflict of interest could include conflict of cultural interests.

4.8.1 A cultural interest is one where a member has a cultural relationship with parties external to the Tribunal which gives rise to a real or perceived conflict of interest. Included in this category of relationships may be the extended family relationships within an Aboriginal or Torres Strait Islander community, or a past association with Aboriginal and/or Torres Strait Islander parties to native title claims either directly or indirectly.

4.8.2 It is not possible to prescribe all the situations where a possible conflict of cultural interest might arise and members will necessarily need to be aware of circumstances where there is a real, or risk of, conflict. When such a situation occurs, the member concerned shall draw the conflict to the attention of the President and briefly document the following points:

- (a) the cause of the real/potential conflict of cultural interest, including the nature of the cultural conflict (if any) and past relationships or experience with the issue;
- (b) the parties who may be affected, and/or hold the perception of such a conflict; (c) the problems which such a real/potential conflict might give rise to, if known; (d) suggestions, where appropriate, as to how the problems might be overcome.

4.9 When an issue of conflict of interest arises:

- (a) if the member is the President – the longest serving Presidential member; or (b) in any other case – the President

will determine what action should be taken in light of the circumstances.

<sup>i</sup> The test for the apprehension of judicial bias was promulgated by the High Court in *Ebner v The Official Trustee in Bankruptcy and Clenae Pty Ltd v ANZ Banking Group* (2000) 176 ALR 644, 75 ALJR 277. The Court said:

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“Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror) ... the governing principle is that, subject to qualifications relating to waiver ... or necessity ..., a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. The principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.” (paragraph 6, emphasis added)

The Court also discussed the notions of “interest” and “association”. It referred to “the necessity for an independent and impartial tribunal”, and stated that “concepts of independence and impartiality overlap, but they are not co-extensive” (paragraph 60, emphasis added).