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FOURTH REPORT OF THE PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND FUND

The National Native Title Tribunal Annual Report 1994/1995

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CHAPTER 1

Introduction

1.1 Having not come into existence until January 1994, the National Native Title Tribunal covered in its first annual report only the initial six months period during which it was established. The Tribunal's second annual report, that for 1994-95, is the first to cover a full year.

1.2 Like any newly-established body, the Tribunal faced a most demanding period over its first full year of operation. In addition to implementing a complex piece of legislation, the Tribunal needed to confirm its credentials and engender confidence amongst its clients. The Joint Committee, in its second report (para 2.5), expressed the judgement that the Tribunal had been soundly established. And the Committee has proceeded to monitor the Tribunal's activities over the 1994-95 year. The purpose of this report is to assess the Tribunal's account of that performance in its annual report for the period.

1.3 In reviewing the *National Native Title Tribunal Annual Report 1994/95*, the Joint Committee is required by s.206(c) of the *Native Title Act 1993* to report to both Houses of the Parliament on matters:

(i) that appear in, or arise out of, that annual report; and

(ii) to which, in the Parliamentary Joint Committee's opinion, the Parliament's attention should be directed.

1.4 The Committee approached this task in regard to the Tribunal's second annual report with somewhat higher expectations than applied for its first annual report. That is, not only has the Committee anticipated that the Tribunal should have been operating effectively, but that its identification of its role should be clear. Given that the Tribunal has elected to comply with the *Requirements for Departmental Annual Reports* approved by the Joint Committee of Public Accounts, the annual report should provide an account of the Tribunal's performance and achievements against those requirements.

1.5 In presenting this report to the Parliament, then, the Committee is seeking to fulfil its duties pursuant to the Act having regard to the Parliament's requirements for annual reports. Part 1 of the Joint Committee's report discusses issues central to the Tribunal's performance in 1994-95 while Part 2 examines the annual report against the published requirements.

1.6 Some developments that occurred following the reporting period were the subject of comment in the Tribunal's 1994-95 report. For instance the decision by O'Loughlin J in *Northern Territory v Lane* is commented on although that decision was not handed down until 24 August 1995.[1] This practice renders annual reports more effective and is supported by the Committee.

1.7 However, the task of reviewing the role and performance of the Tribunal in 1994-95 has been complicated by the fact that on 23 February 1995 the High Court handed down the *Brandy*[2] decision in which a statutory device for the registration and enforcement of determinations of a non-court with the Federal Court was held to be unconstitutional. The Tribunal President (Justice R.S. French) canvassed these issues in a Discussion Paper on Proposed Changes to the Act

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1 *National Native Title Tribunal Annual Report 1994/95* pp.4, 6 etc.

2 *Brandy v Human Rights and Equal Opportunity Commission 1995* 183 CLR 245.

published on 14 March 1995. Although the Keating Government's response to these difficulties, the Native Title Amendment Bill 1995, was not introduced in the House of Representatives until 29 November 1995 (outside the period of this review), it cannot be overlooked now in considering the Tribunal's report. (Similarly this Committee report was prepared following proposals put forward in May 1996 by Senator Minchin for the Coalition Government in a document entitled *Towards a More Workable Native Title Act*.)

1.8 Finally, it should be noted that while the Tribunal's second report was tabled in the House of Representatives on 26 October 1995, the dissolution of that House in January 1996 for a general election delayed the Committee in reviewing the report. Pursuant to s.204 of the *Native Title Act 1993* members of the Committee cease to hold office upon the dissolution of that House. The Committee met for the first time in the 38th Parliament on 19 June 1996. And a public hearing was held on 24 June 1996 to consider the Tribunal's report; the Tribunal Registrar, Ms Patricia Lane, provided evidence. The Committee's report was adopted on 26 June following a private meeting with Justice French on 25 June 1996.

CHAPTER 2

The Roles of the Tribunal

The Tribunal as Decisionmaker

2.1 Under the *Native Title Act 1993*, the Tribunal and the Registrar have significant decisionmaking powers. The President[3] has set out these powers as follows:

1. The decision of the Registrar to accept or refer to a Presidential Member an application for a native title determination or for compensation (s.63(1) and (2), s.64(1)).

2. The decision of a Presidential Member to direct the Registrar to accept or not accept the application (s.63(3) and (4); s.64(2) and (3)).

3. The decision of a Presidential Member that a person can be a party to an application (s.69).

4. The decision of the President to direct a mediation conference (s.72).

5. The decision to terminate a mediation and referral of an application to the Federal Court by the Registrar (s.74).

6. The decision of the Tribunal to make or not make a determination in respect of an unopposed application or pursuant to an agreement (ss. 70, 71 and 73).

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3 French R S, *Discussion Paper on Proposed Changes to Native Title Act 1993* dated 14 March 1995 pp.1,2

7. The decision of the Registrar to accept or not accept an application objecting to the expedited procedures and to accept or not accept a future act determination application (s.77).

8. The decision of the Tribunal as an arbitral body on whether a proposed future act is an act attracting the expedited procedure (s.32(4)).

9. The decision of the Tribunal as an arbitral body in deciding whether or not a future act can be done and, if so, subject to what conditions (s.38).

10. The decision of the Tribunal to dismiss an application at the inquiry stage as frivolous or vexatious or where no prima facie case is made out or where an applicant requests dismissal (ss.147, 148 and 149).

2.2 Although not a court[4], in many ways the Tribunal displays the panoply of a court in exercising these decisionmaking functions: it bears the title of 'Tribunal'; its President retains the title 'Justice'; it holds inquiries, which may involve hearings[5], before making determinations[6]; and it may exercise powers traditionally associated

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4 The tenure of its members is not protected in accordance with Chapter III of the *Constitution*, which relates to the federal courts. Members of the NNTT are appointed for a period of not more than five years, as specified in the instrument of appointment (s.115 of the Native Title Act). By contrast, members of a federal court are appointed for a term expiring on their attaining the age that is, at the time of their appointment, the maximum age for justices of that court (s.72 of the *Constitution*).

5 s.151

6 s.139 ff

with courts.[7] Further, a party to an inquiry may be represented by a barrister or solicitor[8], and the Tribunal has powers to take evidence on oath or affirmation.[9] Indeed, the refusal of a person to take an oath or affirmation when required to by the Tribunal, or answer a question, is an offence[10], as is the giving of false or misleading evidence.[11] The Native Title Act also provides that it is an offence for a person to do an act which, if the Tribunal were a court of record, would constitute a contempt of court.[12]

2.3 In having some attributes of a court, the NNTT currently:

- administers the *prima facie* acceptance test in relation to a native title claim[13] (and, under the former Keating Government's proposed amendments to the Act, would have administered the proposed registration test)[14];

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7 For example, members may decide questions of law in the process of conducting an inquiry (s.144) and the Tribunal has the power to dismiss an application at any stage of an inquiry where considered frivolous or vexatious, or a *prima facie* case has not been made out (ss.147 and 148).

8 s.143

9 s.156

10 s.172

11 s.173

12 s.177

13 s.63

14 Item 27 of Schedule 1 of the Native Title Amendment Bill 1995 provided for the repeal of s.63 and its replacement with a new section requiring the Federal Court (with which, under the Amendment Bill, applications would henceforth be filed) as soon as practicable to give a copy of a filed application to the Tribunal. Item 93 of Schedule 1 of the Bill sought to insert a new s.190A requiring the Registrar of the Tribunal to consider such applications and accept them for

- determines whether a person is properly a party to a native title application[15] (it would no longer perform this function if the proposed amendments were made)[16];

- determines whether the 'expedited procedure' applies to a 'future act' proposal[17] (and would continue to do so under the proposed amendments); and

- determines whether and upon what terms a proposed future act may take place[18] (this role would also remain with the Tribunal under the proposed amendments).

2.4 The Native Title Act provides that the Tribunal may make consent and unopposed determinations of native title and compensation.[19] However, following *Brandy's* case there is doubt as to the enforceability of such determinations given that the Tribunal is not a court within the meaning of Chapter III of the Constitution. Under the former Government's proposed amendments, the sections of the Native

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registration on the Register of Native Title Claims unless the Registrar is of the view that, *prima facie*, the claim cannot be made out. The Bill provided for an appeal to the Federal Court. A person who is registered becomes eligible to partake in negotiations concerning proposed future acts on the land, such as mining and exploration (ss. 26 to 44 of the Native Title Act).

15 s.69

16 Item 40 of Schedule 1 of the Native Title Amendment Bill would have repealed the existing s.69. Item 1 of Part 1 of Schedule 2 of the Bill provided for amendments to the *Federal Court Act 1976*. The proposed s.18AB provided that Judges of the Federal Court may delegate to Judicial Registrars power to, *inter alia*, determine parties to proceedings under the Native Title Act.

17 ss.32(4) and 237

18 ss.38 and 39

19 ss.70, 71 and 73

Title Act purporting to give the Tribunal power to make determinations of native title and compensation would have been repealed.[20]

2.5 The administration of the acceptance test is significant in that acceptance of a claim is a pre-condition of mediation under s.72 of the Native Title Act. Further, as the Act is presently framed, acceptance of a claim confirms the right of the native title claimants to negotiate under ss.26 to 44 in relation to proposed future acts such as exploration and mining. In short, although the acceptance of a claim does not indicate its prospects of success, it confirms procedural rights which may yield substantial benefits for native title parties in negotiations with mining companies. Following the decision of Justice O'Loughlin in the Federal Court on 24 August 1995 in *Northern Territory v. Lane,* the Tribunal has been registering native title applications on the Register of Native Title Claims upon their lodgement; the report advises (p.6) that this is subject to a three month guillotine of acceptance. Registration entitles the claimant to the right to negotiate in relation to future acts such as mining if a government party proposing to grant a mining right issues notices under s.29 of the Native Title Act.[21] If a claim subsequently fails the s.63 *prima facie* acceptance test, the claim is removed from the Register of Native Title Claims and the claimant thereby loses the right to negotiate. Since the High Court's

20 The proposed s.18AB of the Federal Court Act provided that Judges of the Federal Court may delegate to Judicial Registrars power to, *inter alia,* determine uncontested applications. Of course, the Federal Court would have continued to have jurisdiction to determine contested applications.

21 If there is native title over land and the right to negotiate procedure is not complied with, the mining or exploration right will be wholly invalid: s.28. The government party proposing to issue the tenement must serve a s.29 notice on, *inter alia,* any 'registered native title claimant': s.29(2)(b). Section 253 defines 'registered native title claimant' to mean, in essence, a person whose name appears in an entry on the Register of Native Title Claims.

decision on the *Waanyi*[22] appeal in February 1996, it must now be less likely that applications will fail the *prima facie* test.

2.6 In addition to administering the acceptance test, the Tribunal also has power to make decisions concerning whether a mining or exploration right may be granted, and whether the 'fast track' expedited procedure applies. To date this decisionmaking power has attracted less attention and controversy than the administration of the acceptance test. The first determinations regarding the expedited procedure (known as 'objection applications' because they are initiated by the native title party filing an objection to the expedited procedure) were made in late 1995. In most cases, the expedited procedure has been found to apply. Importantly, the Tribunal is not only required to determine whether, on the facts, a particular matter attracts the expedited procedure; it also interprets s.237 of the Act, which defines the ways in which the procedure applies. For example, in its first ruling on the applicability of the expedited procedure, the Tribunal held that the question whether a proposed act would involve 'a major disturbance to any land or waters concerned' (s.237(c)) is to be judged by the standards of the general community, rather than from the particular standpoint of the indigenous community concerned.[23] This is a significant point of interpretation from which the Social Justice Commissioner has dissented.[24] The first determinations under ss.38 and 39 of the Native Title Act regarding when and in what circumstances mining may proceed were expected in early 1996.

2.7 In summary, the Tribunal has critical decisionmaking powers; and the amendments proposed in the Keating Government's bill would have left the Tribunal with a continuing role concerning determinations. A native title claimant would only

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22 *North Ganalanja Aboriginal Corporation v Queensland* 135 ALR 225.

23 *In the Matter of Irruntyju-Papulankutja Community*, Application WO 95/7, 6 October 1995, p.6.

24 *Native Title Report July 1994-June 1995*, pp.148ff.

gain the right to negotiate if the claim passes a registration test. That test would be in similar terms to the current acceptance test, and would be administered by the Tribunal with a right of appeal to the Federal Court. Importantly, under the proposed amendments the Tribunal would continue to determine future act matters, although the Federal Court rather than the Tribunal would decide in contested cases whether a person is entitled to be a party to an application.

The Tribunal as Mediator

2.8 As the Act stands:

- the President must direct the holding of a conference of the parties;[25]
- the President may hold a conference and mediate in relation to matters arising in an inquiry;[26]
- the Tribunal must, if called upon to do so, mediate in relation to a future act proposal under the right to negotiate procedure.[27]

The President

2.9 Mediation is conducted in relation to an *opposed* application for a native title determination or compensation.[28] In those circumstances the President of the

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25 s.72

26 s.150

27 ss.31(2) and 32(5)

28 s.72

Tribunal must direct the holding of a conference of the parties or their representatives to help in resolving the matter. Any such conference must be presided over by a Tribunal member. Unless the parties otherwise agree, statements in such a conference are without prejudice and the member is to take no part in subsequent proceedings in relation to the application.

2.10 The President has a discretion to direct a conference of the parties or their representatives to help resolve a matter relating to an inquiry.[29] This allows the Tribunal to mediate in a range of situations. For example, the President may direct a conference where the Tribunal is conducting an inquiry into whether the expedited procedure applies in relation to a future act proposal. Again, unless the parties otherwise agree, statements in such a conference are without prejudice and the member is to take no further part in the application.

The Tribunal

2.11 The first stage of the right to negotiate procedure requires the government proposing to issue the tenement or acquire the land to negotiate in good faith with native title parties and the grantee party. At this stage the Tribunal must, if requested to do so, mediate among the parties to assist in obtaining their agreement as to whether and upon what terms the proposed act (mining, exploration etc) may proceed.[30] Mediation is not compulsory in relation to a future act matter, although it appears to be intended to be compulsory that parties negotiate in good faith. Curiously, there is no 'quarantine' clause providing that statements made in a pre-inquiry mediation of a right to negotiate matter are without prejudice and that the

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29 s.150

30 ss.31(2) and 32(5)(b)

member conducting the mediation must not take any further part in the proceedings.[31]

2.12 The Keating Government's proposed amendments and the Minchin proposals would not detract from the Tribunal's mediating role; it would remain its primary function. The amendments envisage native title claims being lodged with the Federal Court, in order to overcome the problems raised by *Brandy's* case. Under the proposed s.86A, the Federal Court would generally have been obliged to refer to the Tribunal for mediation those native title claims lodged under s.61 of the Act.[32] An exception would be where the Federal Court makes an order that there be no mediation on the ground that it will be unsuccessful or unnecessary.

The Tribunal's Perception of its Role

2.13 During the reporting period the Tribunal undertook the important process of developing a corporate philosophy encompassing a mission statement and key objectives. Tribunal Members and staff devised the following mission statement:

> *The purpose of the Tribunal is:*
>
> 1. To facilitate the recognition of native title.
>
> 2. To promote just agreements about native title and the use of traditional Aboriginal and Torres Strait Islander lands and waters in ways that:
>
> - Are fair, just, economical, informal and prompt;

31 Contrast ss.31(2) and 32(5)(b) with ss.72 (3) and (4) and 150(3) and (4).

32 Native Title Amendment Bill, Item 50, Schedule 1

- Take account of the cultural and customary concerns of Aboriginal people and Torres Strait Islanders, and the interests of all other people affected by native title issues;

- Promote an informed discourse between Aboriginal and non-Aboriginal Australians.[33]

2.14 The Tribunal has also prepared a conflict of interest policy discussed at Chapter 4 of the annual report (p.25). It is stated that the aim of the policy is:

> to avoid the perception or reality of any bias or partisanship in the way the Tribunal carries out its functions.

The policy itself is set out in Appendix C (pp.125 to 127); the opening two paragraphs provide:

> 1.1 It is essential to the success of the Tribunal that it be and be seen to be independent, impartial and professional in the discharge of its functions under the *Native Title Act 1993*.
>
> 1.2 Members and staff of the Tribunal are expected to accept that the purpose of the Tribunal is to advance the recognition and protection of Native Title.

2.15 Although paragraph 1.1 of the conflict of interest policy stresses independence and impartiality, paragraph 1.2 suggests that the Tribunal has to some extent a positive, rather than a strictly neutral, role in relation to native title interests. The perceived source of this role is identified in Chapter 1 of the annual report (p.1). There it is noted that s.3 of the Native Title Act provides that the main objects of the Act are:

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33 *National Native Title Tribunal Annual Report 1994/95*, p.22

> (a) to provide for the recognition and protection of native title; and
>
> (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
>
> (c) to establish a mechanism for determining claims to native title; and
>
> (d) to provide for, or permit, the validation of past acts invalidated because of the existence of native title.

2.16 Significantly, the annual report then comments that the Tribunal's role as a mechanism for determining native title claims at 3(c) *serves the higher objective of providing for the recognition of native title* at 3(a). Part 6 of the Native Title Act, which establishes the Tribunal and sets out how it is to be staffed and operated, does not assist the Tribunal in determining the rationale for its operations. The Tribunal, however, has clearly adopted a proactive approach to its activities so as to '*advance* the recognition and protection of native title'. In the process of providing indigenous claimants with all appropriate assistance consistent with s.78 of the Act, the Tribunal needs to be sensitive to the possibility of progressing beyond the objects of the Act in this regard.[34] The term 'facilitate', employed in the mission statement, is probably preferable to 'advance', used in the conflict of interest policy. Of course, it is also desirable that those two statements be consistent.

2.17 Indigenous people have held high expectations of the Native Title Act and the Tribunal. These hopes may have been encouraged by the Tribunal's interpretation of its role. The Tribunal's application of the existing law to such matters as acceptance decisions has led to disappointment, most notably in the case of the

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34 Notably, at s.202(4) the *Native Title Act 1993* provides for representative bodies to *facilitate* the preparation of claims and assist in negotiations.

Waanyi acceptance decision. The Executive Director of the New South Wales Aboriginal Land Council, Mr Aden Ridgeway, has said:

> . . . I think that what the legislation provided for was, given that there was an implied consent on the part of Aboriginal people, that native title was to be extinguished in some form across the country. . . [t]here was an expectation that there would be a process put in place that led to negotiations and agreements being reached.
>
> Clearly, the role of the Tribunal is, not so much to try and reconcile the interest, but to look at reconciling the legal concepts of native title against the bureaucratic procedures under which they operate and the interests of business itself. *It's certainly there to provide an incentive for negotiations to occur and it doesn't seem to me that it's providing that incentive at all.*[35] (emphasis added)

2.18 Likewise, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Michael Dodson, has reported:

> Justice French has identified a clear objective of the Tribunal to be the recognition and protection of native title. The legitimacy of that objective must be a cornerstone of the operation of the Tribunal. The centrality of 'country' to the native title process has also been recognised by the President. There has been a shift in perspective between these views expressed by Justice French and the procedures growing up around the acceptance process.[36]

2.19 These comments by Mr Ridgeway and the Social Justice Commissioner (made prior to the High Court's decision concerning *Waanyi*) argue that, in the example of the acceptance test, the Tribunal should have exhibited a greater predisposition in favour of acceptance - acceptance of an application being the

35 ABC *Lateline*, 23 November 1995

36 Dodson M, *Native Title Report January-June 1994* p.132

gateway to mediation[37] and to a continued right to negotiate under s.26 to 44. Clearly the Tribunal operates in a highly charged political environment. In these circumstances occasional disaffection with its decisions was inevitable. With its apparent role as a promoter of native title interests, however, the Tribunal has found itself pressured by expectations and criticisms which a more overtly neutral body may have avoided.

Recommendation 1

- That the NNTT revise its conflict of interest policy to be consistent with its mission statement; that both statements refer to the NNTT's responsibility to *facilitate* rather than *advance* native title.

37 s.72.

CHAPTER 3

Potential for Conflict Between the Roles

The Determinative and Mediation Roles

3.1 There is a number of arguments against the participation of a judge or decisionmaker in mediation[38]:

- By acting as a mediator, a decisionmaker may diminish the *gravitas* and perceived impartiality of the relevant court or tribunal, undermining confidence in its decisions.

- Alternatively, the impression may arise that settlement along suggested terms is mandatory; mediation may be seen as a coercive process.

- Controversial and unpopular determinations by the tribunal might give rise to disaffection, impeding its subsequent role as mediator. Here it is relevant that determinations of the National Native Title Tribunal affect interested groups (indigenous, miners, pastoralists and governments) as well as individuals. A decision in relation to an

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38 French R S, *Discussion Paper on Proposed Changes to Native Title Act 1993*; Dodson M, *Native Title Report January - June 1994*, pp.127 to 132; Roberts S, 'Three Models of Family Mediation' in *Divorce Mediation and the Legal Process* (ed Dingwall R and Eekelaar J) p.148 as cited in Astor H and Chinkin C, *Dispute Resolution in Australia*, p. 48; Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation Discussion paper No 4: Methods of Dispute Resolution*, September 1991 par. 6.67.

individual party may set a precedent with ramifications for other members of a group.

3.2 Some of these difficulties have been reflected in the experience of the Native Title Tribunal. In the *Waanyi* acceptance decision the Tribunal held that two expired pastoral leases, neither of which the Tribunal considered contained a reservation in favour of Aboriginal access, extinguished native title.[39] On that basis it was considered that the application did not satisfy the requirements of the s.63 *prima facie* test, and the application was not accepted. As a result, the Waanyi did not qualify for the right to negotiate in relation to mining activities proposed on the relevant land. And reaction to the *Waanyi* decision ranged beyond the parties to that matter. Mr Noel Pearson of the Cape York Land Council said:

> My opinion of Justice French's original decision in *Waanyi* was that it was appalling. It was very clear that it was open to French not to invite CRA in Queensland [which had an interest in the relevant land] to kind of bog the whole process down in litigation so early in the piece thereby denying the Waanyi the opportunity of registering their claim and going through the right to negotiate process. . . . They have dealt themselves out of the question of Aboriginal interests and pastoral interests being reconciled in some way or another.[40]

3.3 Other statements by Mr Pearson reported in the media confirmed the impression that he was alleging the Tribunal's *Waanyi* decision not only prevented it from mediating that particular claim but also from mediating disputes generally in the

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39 The decision was upheld by the Full Court of the Federal Court on 1 November 1995, although the Federal Court found that one of the leases arguably contained a reservation in favour of Aboriginal access. An appeal against the Federal Court decision was upheld in the High Court on 8 February 1996.

40 ABC *Lateline*, 23 November 1995.

Cape York/Gulf of Carpentaria region.[41] Mr Pearson's suggestion that the Tribunal had 'dealt itself out' was challenged by the President in an article for *Land Rights Queensland.* In that article, the President pointed out that the Tribunal rarely determined not to accept an application and, at that time, had only done so on six occasions.[42] However, reaction to the *Waanyi* decision is illustrative of the difficulties that can arise where the same body is charged with both mediation and important decisionmaking functions such as the acceptance of applications.

3.4 The Committee has also heard some evidence of miners' apprehensions that the acceptance test is, or might be, administered unfairly in favour of indigenous interests.[43] And Appendix A of the Tribunal's 1994-95 annual report (pp.119 - 121) lists four applications under the Administrative Decisions (Judicial Review) Act for the review of decisions by the Tribunal to accept claims. (The best known of these is *Northern Territory v. Lane,* in relation to which important decisions were made by Justice O'Loughlin of the Federal Court on 24 August 1995.)

3.5 Concern about potential for the Tribunal's roles to be perceived to be in conflict has been summed up by Mr P.W. Johnston of the University of Western Australia who told the Committee on 24 November 1994 in Perth that:

> [The Tribunal] has got to say that we will allow this application as one that complies or substantially complies or it says it does not. In opting for the latter there is this misunderstanding by the Aboriginal community saying, 'Well, this is favouring one side'.

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41 'NNTT rules itself out', *The Bulletin,* 12 December 1995 p.24.

42 French R S, 'Native Title - Gateway to Country', in *Land Rights Queensland*, December 1995/January 1996.

43 Coyle M, New South Wales Chamber of Mines, *Evidence* pp.139 to 140.

> . . . [T]he tribunal is in a situation betwixt the devil and the deep blue sea. Whichever way it opts it would seem to favour one group over the other.[44]

3.6 Nevertheless, a pragmatic view suggests that judicial participation in mediation (again bearing in mind the similarities between the Tribunal and a court) may not only be of benefit in individual cases but also convey an important message. Thus in 1991, before taking up his current appointment, the Tribunal President wrote:

> In my opinion selective judicial participation in mediation in appropriate cases is warranted, not only for the benefits that it may bring in those cases but also for the important message that it sends to the community about the concerns of judges that disputes before the court should be resolved as cheaply and expeditiously as possible, provided that resolution is fairly reached and reflects a just result.[45]

3.7 Of course, 'selective judicial participation in mediation in appropriate cases' contrasts with the scheme in the Native Title Act whereby the Tribunal must mediate opposed claims and must mediate future act matters where requested to do so by the parties. In his discussion paper dated 14 March 1995[46], the President argued that there was a tension between the Tribunal's roles as decisionmaker and mediator. In that paper Justice French made a proposal which had the objective of removing the conflict between the Tribunal's determinative and mediating functions, avoiding any uncertainty arising from the *Brandy* decision and improving procedures for dealing with applications under the Native Title Act. Justice French proposed:

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44 *Evidence*, pp. 681 and 682.

45 French R S, 'Hands-On Judges and User-Friendly Justice', *Australian Dispute Resolution Journal*, May 1991, pp.82 - 83.

46 French R S, *Discussion Paper on Proposed Changes to Native Title Act 1993*, 14 March 1995.

- The Tribunal should cease to have any determinative function in relation to the acceptance of applications, decisions as to who can or cannot be a party and decisions to make or not make determinations.

- The Tribunal's role in relation to future act matters requires further consideration. The question of whether the expedited procedure applies in relation to future act proposals could be determined by suitably qualified judicial registrars. But it might not be appropriate for a court proper to determine whether, and if so upon what terms, a future act such as the issue of a mining licence should proceed, because the Act provides that such a determination is subject to Ministerial override.

- The Tribunal should operate as a mediation service and its mediating function should be expanded. To avoid any continuing confusion as to its role, it should be redesignated by some name other than the word 'Tribunal'. Possibly, a title such as National Native Title Mediation Service would be appropriate.[47]

3.8 The President's suggestions, reflected in the Keating Government's Amendment Bill (now lapsed), are significant: of the ten decisionmaking functions identified by the President as allocated to the Tribunal, several would not remain. Under the Bill's amendments, the acceptance test (renamed as a registration test) would have been applied by the Tribunal although the Federal Court would determine which applications were subsequently struck out. The Court would determine in contested cases whether a person should be a party to an application,

47 op. cit. pp.10-16.

and the Tribunal could continue to determine future act matters. Specifically, the Tribunal's remaining decisionmaking functions could include:

- The decision of the President to direct a mediation conference.

- The decision to terminate a mediation and referral of an application to the Federal Court by the Registrar.

- The decision of the Tribunal as an arbitral body on whether a proposed future act is an act attracting the expedited procedure.

- The decision of the Tribunal as an arbitral body in deciding whether or not a future act can be done and, if so, subject to what conditions.

3.9 Importantly, the Minchin Outline Paper entitled *Towards a More Workable Native Title Act* advises (p.33) that the Coalition Government will adopt the proposals for amending the Tribunal and Federal Court processes that were contained in the previous government's 1995 Amendment Bill. Those elements include:

- lodgement of claims in the Federal Court;

- registration test applied by the Tribunal;

- improved notification procedures;

- Federal Court to determine parties;

- mediation by the Tribunal;

- non-judges may be Tribunal presidential members; and

- determinations by the Federal Court concerning claimant applications.

The Committee endorses these steps towards a Tribunal that functions more fully as a mediation service and less as a decisionmaker.

Recommendation 2

- That, consistent with Justice French's proposal in March 1995, the National Native Title Tribunal no longer have determinative functions in relation to the acceptance of applications, decisions as to who can or cannot be a party and decisions to make or not make determinations; that the Act be amended accordingly.

CHAPTER 4

Criticism of Joint Committee's Second Report

4.1 In discussing its assistance to applicants, the Tribunal in Chapter 5 referred to its practice of providing land tenure information prior to an acceptance decision:

> This material may be adverse to the applicant's interest in having the application accepted and may form the basis for an amendment by the applicant. The information may take the form of tenure history searches or submissions by persons with an interest in land subject to an application who may contend that the application should not be accepted.

The Tribunal proceeded to assert that:

> This has been described in the second report of the Parliamentary Joint Committee on Native Title, published in March 1995, as engaging in 'mediation' of an application prior to acceptance. The Tribunal takes the view that there is no mediation involved in this practice.[48]

4.2 The Tribunal has not provided a page reference to the Committee's second report to indicate where it considers this view about mediation to have been expressed. It seems to be referring to *The Prima Facie Test* section and in particular to paragraphs 3.6 and 3.7. However, the Committee's report does not 'describe' the Tribunal as engaging in mediation. Rather, the report *cautions* that:

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48 *National Native Title Tribunal Annual Report 1994/95*, p.35.

> care is required to ensure that such pre-acceptance consultations are confined to the securing of information and do not amount to mediation between parties. (para 3.7)

The same advice was offered in the report's conclusion where it was stated that:

> There is a need, however, for the Tribunal to ensure that pre-acceptance consultation is confined to questions of a factual nature and does not amount to mediation or negotiation with parties. (para 5.1)

4.3 The Committee, then, has not suggested that the Tribunal has actually engaged in mediation in the pre-acceptance process; it has cautioned against that practice. More importantly, however, the Committee welcomes the Tribunal's confirmation that no mediation has taken place in such contexts.

CHAPTER 5

The 1994-95 Report Style

5.1 The second annual report of the National Native Title Tribunal was tabled in the House of Representatives on 26 October and in the Senate on 13 November 1995.

5.2 The first report, of some twenty-two pages plus financial statements and twelve appendixes, had covered a period of six months of operation of the Tribunal and only two months of office of the second President, Justice French. In comparison, the second annual report including the President's Overview exceeds ninety pages plus financial statements together with twenty-three appendixes. The total length of the second report is more than 300 pages. Some comment is justified on the fact that the annual report has expanded by a factor of four.

Publication of Information

5.3 The Tribunal needs to address the question whether the annual report is the best place in which to publish a wide range of documentation. While appendixes detailing Registry addresses, organisation charts and compliance with annual report guidelines are necessary, many others included by the Tribunal in this annual report may be better published elsewhere. For instance, annual reports are not normally the place to publish routine information to assist clients. In particular, while it is most desirable to publish documents including, for example, *General Procedures for Applications for Native Title Determination and Compensation* (Appendix F), *Draft Mediation Strategy* (Appendix G) and *Procedures Under the Right to Negotiate System* (Appendix H), the Tribunal's annual report is not the appropriate vehicle for such publication. The Tribunal's clients are likely to find these documents to be

more accessible when published separately, as they have been, for example, in the case of Appendixes F and H.

5.4 According to the *Requirements for Departmental Annual Reports* issued by the Department of Prime Minister and Cabinet, annual reports are one of the principal formal accountability mechanisms to the portfolio minister. Annual reports are to provide sufficient information for the Parliament to make a fully informed judgement on performance while avoiding excessive detail. To utilise an annual report for publishing guidance for clients in most cases detracts from this central objective.

Length

5.5 In its introduction to the annual reporting requirements, the Department of the Prime Minister and Cabinet stresses that:

> These annual reporting requirements have been designed, in particular, to emphasise program performance and the achievement of program objectives - ie a focus on results. They are intended to provide sufficient information for the Parliament to make a fully informed judgement on departmental performance, *while avoiding excessive and extraneous detail* (emphasis added).
>
> The annual reporting requirements have also been designed in recognition of, and so as not to exacerbate, the information overload placed on modern parliamentarians and their staff, thereby strengthening accountability to the Parliament for the performance of the Government's programs.[49]

49 *Requirements for Departmental Annual Reports*, Canberra, Department of the Prime Minister and Cabinet, March 1994 (henceforth *Requirements*): tabled in the Senate 25 August 1994.

5.6 Although the Tribunal provides a comprehensive description of its operations in the President's Overview and Chapters 1-9, the addition of such a large section of appendixes (194pp) results in a document that seems to provide 'excessive and extraneous detail'. Much of the material contained in these appendixes need not have been included in an annual report. It is obtainable from the Tribunal regularly in up-to-date form. The deletion of this material could have reduced the length of the report by some 50 pages. Appendixes which deal with Tribunal policies, procedures and guidelines as well as details of native title applications, could be deleted where the documentation reproduced in them is available from the Tribunal on a regular basis.

5.7 Further, Appendixes B, K, P, R could have been reduced in length considerably. The inclusion at the front of the report of the address of the Principal Registry and the name of the annual report contact officer (that is, the head of the Tribunal's Community Liaison Section who is responsible for the report's production) would have made it possible to dispense with Appendix B. The inclusion of a prose summary of Appendix K relating to Tribunal Community Liaison activity in the main body of the report would have been sufficient, instead of the lengthy appendix provided. The omission of the tables in Appendix P dealing with Future Act Notices and the inclusion in the text of the report of a brief summary of the dot point statistics on p.262 would have resulted in a more concise description of Future Act developments. The eight organisation charts contained in Appendix R could have been reduced in number and complexity and transferred to the text (eg Chapter 7, 'Administration of the Tribunal', pp. 63-82).

5.8 Seven appendixes should be retained in future reports: (M, Q, S, T, U, V and W) - they deal succinctly with Tribunal operations and administration: native title applications (M); the geographical location of claimant applications (Q); staffing (S); EEO statistics (T); Freedom of Information policies (U); the history of native title in Australia (V); and Compliance with Annual Reporting Guidelines (W). Further, Appendix L ('Details of Applications in Mediation', pp. 236-243) is a particularly

valuable document. Its production on a monthly, fortnightly, or, resources permitting, weekly basis, perhaps in conjunction with the weekly 'Timeline Document' (Appendix M, pp. 244-255) would be of considerable assistance to parties involved in the native title process.

CHAPTER 6

Compliance and Presentation

6.1 The 1994-95 annual report of the National Native Title Tribunal is almost four times the length of its predecessor (305pp/80pp). It consists of the President's Overview (pp. i-vii) which is a survey of Tribunal operations as well as developments in the native title process during the year under review; Chapters 1-8 (pp. 1-86), which provide a detailed outline of the activity of the Tribunal; Chapter 9 (pp. 87-111) setting out the NNTT's Financial Statements; and Chapter 10 (pp. 112-305), which comprises 23 appendixes (A-W) containing detailed statistical and historical information concerning native title as well as guidelines relating to the work of the Tribunal. The report generally satisfies the requirements governing accountability through the annual reporting process, but it is hampered by some deficiencies in compliance.

Compliance

6.2 While being a statutory authority the Tribunal has elected to follow the annual reporting requirements for government departments. The requirements consist of four parts and this chapter proceeds to comment on the Tribunal's annual report under those headings:

(i) *Annual Report Requirements*
Letter of Transmission
Aids to Access
Portfolio and Corporate Overview
Program Performance
Reporting
Staffing Overview
Financial Statements *(compliance mandatory)*

(ii) *Attachment 1: Information on Specific Statutory Provisions Relating to Annual Reports*
Industrial Democracy
Occupational Health and Safety
Freedom of Information,
Advertising and Market Research (*compliance mandatory*);

(iii) *Attachment 2: Program Financial and Staffing Resources Summary and Appropriations to Programs Reconciliation Proformas* (*guidance document only*); and

(iv) *Attachment 3: Information Available to Members of Parliament and Senators on Request*
Social Justice and Equity
Staffing Matters
Financial Matters
Internal and External Scrutiny
Privacy
Environmental Matters
Other Matters (*material to be available but inclusion in annual report not mandatory*).

Annual Report Requirements

. Letter of Transmission

6.3 The letter, dated 20 September 1995, from the President of the Tribunal to the responsible Minister (the Attorney-General), satisfies the reporting requirements. And the report was tabled in each House of the Parliament within the prescribed period of 15 sitting days after the day on which the Minister received it (s.133(4) *Native Title Act 1993*).

. Aids to Access

6.4 Compliance in this category is generally satisfactory. The glossary on pp.108-111 relating to the financial statements is a useful adjunct to Chapter 9, although the separate table of contents for this chapter on p.87 would have been improved by the inclusion of page numbers. A reference in the report's main table of

contents to a contact officer responsible for its production is a notable omission; the listing of the Principal Registry (on p.123) referred to in the compliance table (on p.305) does not fulfil the requirement to name the contact officer.

. Portfolio and Corporate Overview

6.5 The President's Overview (pp.i-vii) and the sections of the report dealing with social justice and equity considerations, as well as internal and external scrutiny of the Tribunal's operations, satisfy the compliance criteria.

. Program Performance Reporting

6.6 This category of annual reporting requirement is not relevant to the operations of the Tribunal.

. Staffing Overview

6.7 The Tribunal provides a concise and valuable summary of its initiatives relating to employment and staffing (p.76) which is complemented by Appendix S (pp.276-279) setting out details of staff appointments. Although total expenditure on *external* training for staff and Tribunal Members is given, no figure is provided for *internal* training costs. An explanation for this could have been included or, alternatively, internal training expenditure figures supplied.

. Financial Statements

6.8 The NNTT Financial Statements 1994/95 (Chapter 9, pp.87-111), are comprehensive, accessible and in accordance with the *Guidelines for Financial Statements of Departments;* the Australian National Audit Office (pp.93-94) provided an unqualified audit.

Attachment 1: Information on Specific Statutory Provisions Relating to Annual Reports

6.9 The Native Title Tribunal, which has adopted the industrial democracy policies of the Administrative Appeals Tribunal, provides a brief but informative description of its industrial democracy initiatives (p.78). Useful statistics are also given in the report for the numbers of women employed by the Tribunal (p.75); this is supplemented by the identification of female employees in Appendixes S and T. The Native Title Tribunal's policies and programs relating to occupational health and safety are set out on p.78. The Tribunal refers to its intention to establish an Occupational Health and Safety Committee with trade union representation in 1995.

6.10 The report contains useful documentation on the Tribunal's activities in relation to Freedom of Information, including details of a significant application to examine documents concerning non-claimant native title determination applications (p.79). It also includes a statement setting out Tribunal Freedom of Information guidelines and procedures (Appendix U, pp.282-284). The Tribunal has commissioned a study of the categories of information maintained on its case management files.

6.11 While useful figures are provided for Tribunal expenditure on the advertising of native title applications, this information is neither as accessible nor as detailed as is necessary. The Compliance Index entry for "Advertising" (p.305) contains no reference to page 71, which features details of advertising costs for the year in review ($0.331m). More information should have been included about the categories of advertising expenditure. Reference is made to the 'considerable savings' achieved by altering the presentation and format of native title application advertisements, but no quantification of these estimated savings is provided (pp.46 and 69).

Attachment 2: Program Financial and Staffing Resources Summary and Appropriations to Programs Reconciliation Proformas

6.12 This document contains suggested formats for reporting on programs and sub-programs, which are intended primarily for annual reports on the operations of government departments. The Tribunal has chosen to devise and follow a format of its own more suited to its particular reporting needs.

Attachment 3: Information Available to Members of Parliament and Senators on Request

6.13 Although departments, statutory authorities and other government instrumentalities are not required to publish this information in their annual reports[50], organisations like the Tribunal have improved the value of such reports considerably by doing so. The Tribunal has addressed satisfactorily the compliance requirements relating to information to be made available to MPs, Senators and members of the public after an annual report has been tabled. Nevertheless some improvement in the content and presentation of this information could have been achieved. A number of compliance categories (Interchange Program, Claims and Losses, Payment of Accounts, Capital Works Management, Fraud Control, Reports by the Auditor-General (except for that on the Financial Statements) and Comments by the Ombudsman) are not discussed below because these matters have not arisen during 1994/95.

50 *Requirements*, Attachment 3, p.1

Social Justice and Equity

. EEO[51] in Appointments

6.14 In Appendix T of its report (pp.280-281) the Tribunal provides comprehensive statistical information on its performance in relation to Equal Employment Opportunity appointments.

. Access and Equity

6.15 The annual reporting requirements stress that 'the emphasis in A & E reporting is on outcomes, achievements and results rather than planning, intentions and inputs'.[52] The Tribunal has outlined clearly the results of its successful access and equity initiatives by describing, for example, the means by which access to Tribunal facilities and information has been improved through greater community liaison, brochure production, the provision of native title contact information, the creation of a Media Section in March 1995 and the work of Native Title Liaison Committees (pp. 58-62).

6.16 Reference is made on p.58 of the report to eight categories of publication sent regularly by the Tribunal's Community Liaison Section to organisations (like the Parliamentary Joint Committee) and individuals with an interest in native title. The Joint Committee has received all of these items. However, although the Joint Committee receives the Tribunal's *Guide to Native Title*, it has never received the updated, regularly published list of the latest addresses and telephone numbers of Aboriginal and Torres Strait Islander Representative Bodies, which is designed as an insert for inclusion in the *Guide* (pp. 59-60).

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51 Equal Employment Opportunity

52 *Requirements* p.6

Staffing Matters

. Performance Pay

6.17 The NNTT, which has adopted the Performance Management Program of the Administrative Appeals Tribunal, provides a succinct description of developments within the organisation in relation to performance pay for the year in review (p.75).

. Training

6.18 The Tribunal accords a high priority to the training of its members and staff, and the report contains valuable information regarding its professional development programs (p. 62 and pp. 76-78). Special attention is given in the report - although the relevant page numbers do not appear under 'Training' in the Compliance Index (p.305) - to the particular training needs necessitated by increased demands which are being made on the NNTT's Future Acts Section (pp. 55-56 and pp.73-74). The Tribunal intends to appoint a Staff Development Officer to coordinate training activities, while its Human Resources Section has undertaken to produce a Professional Development Program for staff and members to be implemented in 1995-96.

Financial Matters

6.19 The report contains (pp. 70-73) a concise outline in prose and pie chart form of the NNTT's financial situation during 1994-95. Although the Tribunal's financial operations are not yet based on accrual accounting, it is expected that full accrual accounting will be in place by the 1996-97 financial year.

. Purchasing

6.20 During the 1995/96 financial year the Tribunal proposes to place a priority on training senior staff in purchasing requirements (p.73).

. Consultancy Services

6.21 The Tribunal's Finance Section, which oversees the procurement of the Tribunal's consultancy services, proposes to formulate a policy on consultancy procedures as a priority for the 1995-96 financial year (p.73). Expenditure on consultants during 1994-95 was $0.116m (p.71). More detailed information about consultancies and costs for the period under review is provided on p.78 of the report. Work undertaken by the consultancy firms relating principally to the Tribunal's case management system is described in some detail (p.80).

Internal and External Scrutiny

. Inquiries by Parliamentary Committees

6.22 In its report the Tribunal discusses (p.35) aspects of the Parliamentary Joint Committee's report on the Tribunal's first annual report (1993-94). (The Tribunal appears to have misunderstood an aspect of the Joint Committee's report, a matter dealt with in Chapter 4 of this report.) It also describes the way in which submissions made to the Committee in the Northern Territory in April 1995 concerning the provision of information to indigenous people in a greater range of their traditional languages has led to a proposal to produce a video on native title which will be broadcast to remote Aboriginal communities through the Broadcasting in Remote Aboriginal Communities (BRACS) system. The video would be dubbed into indigenous languages and subtitled in English (p.69).

. Decisions of Courts and Tribunals

6.23 The Tribunal refers in its report to the effect of decisions by judicial and quasi-judicial bodies on its operations. In a paragraph dealing with the placement of native title applications, for instance, the Tribunal states that:

> During the reporting period, all applications were placed on a Tribunal Schedule of Applications Received until accepted. However, the decision of Justice O'Loughlin in Northern Territory v. Lane (24 August 1995) caused the Tribunal to alter its approach, and applications lodged after 1 September 1995 are placed directly on the Register of Native Title Claims (p.65).

Although the O'Loughlin decision occurred outside of the reporting period, it is also referred to in the first chapter of the report (pp. 4 and 6).

Privacy

6.24 During the period under review no reports by the Privacy Commissioner under s.30 of the Privacy Act were served on the Tribunal (p.79). The NNTT, given the nature of its role and functions, is highly sensitive to the privacy requirements of its clients. It is especially mindful of the privacy concerns of Aboriginal and Torres Strait Islanders during the mediation process (pp.44-45), as well as placing strong emphasis on confidentiality in relation to culturally sensitive information (pp.66-67):

> Case Managers maintain Tribunal files in relation to applications with due regard to considerations of privacy, confidentiality, and freedom of information legislation. The treatment of confidential information is particularly important (p.66).

Environmental Matters

. Buildings

6.25 Although the Tribunal provides a useful description of Tribunal office accommodation and property arrangements, it does not examine issues of energy consumption such as energy usage and energy savings in its premises, which is a reporting requirement.[53]

. Transport

6.26 In 1994/95 Tribunal expenditure on travel amounted to $0.696m (p.71); and an account of the Tribunal's travel activities is provided on p.45. Bearing in mind the extensive travel demands made on Tribunal personnel, however, a more comprehensive description of how these costs were incurred and an outline of Tribunal attempts to restrain travel expenditure would have been of assistance.

. Equipment

6.27 The Tribunal spent $0.249m on office equipment during the year in review (p.71). No extensive attempt is made in the report to address the issues of energy consumption, efficiency and conservation in the context of equipment purchasing, as required by the reporting requirements, although this does occur in relation to the Tribunal's information systems (pp. 79-81).

53 *Requirements* p.22

Other Matters

. Property Usage

6.28 The report contains a succinct and valuable description of property use issues and their implications for Tribunal operations during 1994-95 (pp. 72-73). Property operating expenses for the year in review are set out in pie chart form on p.73 of the report. As is made clear in its report, fresh property issues will arise as the Tribunal's workload expands in regional centres, which may result in the establishment of Tribunal offices in centres like Cairns and Broome (p.72).

Presentation

6.29 Four significant shortcomings can be identified in relation to the report's production standards. Two relate to structure: the location of Chapter 8 and a related appendix reduces their impact considerably; and the Compliance Schedule could have been more detailed and therefore of greater assistance to readers. The other two shortcomings concern the confusion which arises from inadequate proofreading and various stylistic difficulties associated with the repetition of material; in some instances paragraphs were reproduced verbatim from the 1993-94 annual report.

Order of Chapters

6.30 In organising its material for the report, the Tribunal left some of the most interesting until the last descriptive chapter, Chapter 8. That chapter, entitled 'Historical Context to Native Title Applications' (pp. 83-86), and Part 1 of Appendix V ('History of Accepted Claimant Applications, pp. 285-298) provide a valuable account of the history of native title applications. The bibliography of native title included as Part 2 of Appendix V (pp. 299-303) is a useful research tool for individuals and organisations involved in the native title process. However, a more

appropriate location for Chapter 8 would have been towards the beginning of the report, notably between the 'President's Overview' and Chapter 1. The insertion of historical background material early in the report, immediately preceding chapters dealing with the *Native Title Act 1993* and the make-up of the Tribunal would have made possible a more logical, chronologically coherent report. Chapters on the statutory framework and the Tribunal's establishment would then have proceeded from a wider and more interesting base.

Compliance Schedule

6.31 The annual report requirements compliance schedule (p.305) could have been reduced in size while a more comprehensive system of indexing within each category would have better reflected the Tribunal's ambitious and generally successful attempts to satisfy the compliance criteria.

6.32 The six compliance categories warrant inclusion in the other five as follows:

- Industrial Democracy → Social Justice and Equity
- Occupational Health and Safety → Staffing Overview
- Financial Statements → Corporate Overview
- Contact Officer (Principal Registry) → Social Justice and Equity
- Advertising → Internal and External
- Freedom of Information Statement → Internal and External

Such a reduction in categories, combined with more intensive compliance indexing (eg p.62 should appear next to "Staff Appointments" and pp.55-56 and pp.73-74 next to "Training" in the compliance schedule), would have increased the report's usefulness.

Proofreading

6.33 As with all reports of this kind, it is difficult to avoid minor proofreading errors. For the sake of the Tribunal report's readers two mistakes worth noting are:

- the seven stage application process list where Acceptance is listed *after* Notification (p.34); and

- the statement 'There are two principal categories of future acts that are permissible. These are permissible future acts and impermissible acts' (p.49).

Inadequate proofreading has also resulted in the omission of words (pp.4, 42 and 49); misspelling (pp.41, 52 and 305); inconsistencies between the titles of a chapter and two appendixes in the Table of Contents and the chapter and appendix headings themselves (Chapter 9, and Appendices A and F); the incorrect use of words ('whom' for 'who', p.ii) page break errors (pp. 161 and 171) and a reference to an appendix without specifying which one (p.56, footnote 6). Future reports would benefit from a more rigorous final proofreading, which may also detect deficiencies in layout (unnecessary spaces, p.106, notes 17 and 19) and the inclusion of unnecessary words (p.49).

Repetition

6.34 Apart from the addition of one sub-heading and three references to sections of the Native Title Act, the first and second paragraphs dealing with the organisation of the Tribunal in the report (p.10) are identical to those in the first report (p.5). The report nevertheless contains several examples of innovative presentation; for example, the section in the first report relating to the acceptance and processing of native title applications (pp.9-11) has been effectively rewritten and expanded in the second report (pp.3-9).

Recommendation 3

- That Appendix L of the report, 'Details of Applications in Mediation' (pp.236-244) be circulated with Appendix M, the 'Timeline Document' (pp.244-256) to interested parties.

Senator Eric Abetz
Committee Chair