

CHAPTER 2

National Native Title Tribunal Annual Report 1999-2000

The National Native Title Tribunal

2.1 The National Native Title Tribunal (the Tribunal) is established pursuant to s.107 of the *Native Title Act 1993* (the Act). The Tribunal has functions in relation to applications, inquiries and determinations under the Act, mediation for Federal Court proceedings, providing assistance or mediation when requested under the Act, and the carrying out of research for the purpose of performing its functions.¹

The 1999-2000 Report: Presentation and Style

Presentation

2.2 The Tribunal Annual Report comprises: a letter of transmission, a list of figures and a list of tables (pp.iii-x); the President's overview (pp.1-28); a Tribunal overview (pp.29-34); management and accountability (pp.35-56); report on performance (pp.57-120); 12 appendixes containing information on the corporate directory, total resources for outcome 2000-2001, consultants, judicial decisions, regulation changes and developing legal and procedural issues, staffing, freedom of information, main steps in the native title application process, publications and papers, background reports, information products and activities, audit report and notes to the financial statements, a glossary and an index (pp.121-197).

Style

2.3 The Committee has given some attention to the style of the Tribunal's previous reports. The 1999-2000 annual report continues improvements to the style of previous reports. The updated format (including wider margins and clearer headings) improves the accessibility of the report for the reader. The tables used in the report are clearer and easier to read than in previous reports. The 1999-2000

¹ *Native Title Act 1993*, s.108.

annual report appears to confirm the Tribunal's commitment to improving access to, and use of, its annual report.

Formal Requirements and Compliance

Requirements

2.4 The Tribunal is required to prepare and give to the Commonwealth Minister a report of the 'management of the administrative affairs of the Tribunal during the year'.² The report must include financial statements required by s.49 of the *Financial Management and Accountability Act 1997* (the FMA Act), and an audit on those statements under s.57 of the FMA Act.³

2.5 While being a statutory authority, the Tribunal has chosen (as it is entitled) to observe the annual reporting requirements for government departments. Those requirements, updated in May 2000, apply to a prescribed agency under s.5 of the FMA Act. The National Native Title Registry is a prescribed agency for the purposes of s.5 of the FMA Act. The requirements may be itemised as follows:

(1)

- (a) Review by departmental Secretary (ie: Tribunal President)
- (b) Departmental (ie: Tribunal) overview
- (c) Report on performance
- (d) Management and accountability
- (e) Financial statements
- (f) Other mandatory information

(2)

Attachment A

- (a) Letter of transmittal
- (b) Aids to access

Attachment B: Information on specific statutory provisions relating to annual reports

- (a) Occupational health and safety
- (b) Freedom of information
- (c) Advertising and market research

² *Native Title Act 1993*, s.133(1).

³ *Native Title Act 1993*, s.133(2).

Attachment C
(a) Consultancy services

Attachment D
(a) Resources for outcomes

Compliance

2.6 In its annual report for 1999-2000 the Tribunal has fulfilled the reporting requirements in the following manner.

Letter of transmission

2.7 The President's letter to the Attorney-General was dated 2 October 2000. The report was tabled in the Senate on 30 October 2000 and in the House of Representatives on 31 October 2000; this was within 15 sitting days of the day on which the Minister received it, and satisfies the requirement.

Aids to access

2.8 The Tribunal report provides:

- Table of contents (pp.v-viii)
- Glossary (Appendix XII, pp.189-192)
- Index (pp.193-197)
- Contact officer (p.ii)
- Tribunal internet homepage address (p.ii)
- Annual report internet address (p.ii)

2.9 Accordingly, the Tribunal has adequately set out aids which allow proper access to the document.

Review by President

2.10 The President's overview provides an account of the following matters:

- Introduction (p.2); change and transitional trends within the Tribunal (pp.2-9); external changes and transitional trends affecting the Tribunal (pp.10-22); future prospects (pp.22-28) and conclusion (p.28).

Tribunal overview

2.11 The Tribunal overview provides information about the role and function of the Tribunal, its organisational structure and information on outcome and output structure.

Report on performance

2.12 The report on performance outlines the following matters:

Outcome and output performance (p.58); summary for outcome information (p.59); performance against customer service charter (p.60); output group 1.1 registration (pp.62-73); output group 1.2 agreements (pp.74-92); output group 1.3 arbitration (pp.93-100); output group 1.4 assistance and information (pp.101-120).

Staffing overview

2.13 The annual report provides details of Tribunal staffing for the reporting period on page 142. The table lists staff by location and gender. Details about the number of employees who identify themselves as being either Aboriginal or Torres Strait Islander, having a disability or being from a linguistically diverse background are provided elsewhere in the report (p.50).

2.14 The Tribunal's annual report does not provide background information about members of the executive. While the Committee does not suggest that such information is essential, a description of the qualifications and experience of members of the executive of the Tribunal might improve the reader's understanding of the Tribunal's capacity.

Financial statements

2.15 Appendix XI provides the financial statements (pp.163-188); the statements received an unqualified audit.

Occupational health and safety

2.16 Occupational health and safety is referred to at page 51.

Freedom of information

2.17 Freedom of information is mentioned at page 49. As in 1998-1999, no formal freedom of information requests were received during the reporting period. By comparison, there were four formal requests in 1997-1998.

Advertising and market research

2.18 Use of advertising is referred to on pages 56 and 108, and market research is referred to on page 56.

Summary

2.19 Together with the President's overview (pp.1-28), the Tribunal has covered the subjects required to be addressed by the compliance criteria. The extent to which the report is satisfactory in addressing these matters is addressed in the following section of this report.

The 1999-2000 Report: Issues

Response to the Committee's Seventeenth Report

2.20 The role of the Parliamentary Committee, both in terms of scrutiny and reporting, has been properly acknowledged by the Tribunal in the 1999-2000 annual report. The Committee has previously considered issues such as Tribunal impartiality; workload; consultants; public information and media; and budget and running costs. Several of these issues continue to be relevant in the current reporting period.

Tribunal impartiality

2.21 Tribunal impartiality has been an issue of ongoing interest for the Committee and was reported on in some detail in its fourteenth report. In that report, the Committee indicated that it would continue to monitor the matter.

2.22 The Committee is pleased to note that no new issues in relation to the impartiality of the Tribunal or its members have arisen in the reporting period. Given the critical importance of the Tribunal operating impartially in the exercise of all of its powers and functions, the Committee will continue to monitor this subject closely.

Tribunal workload

2.23 In its thirteenth report (pp.10,11), the Committee examined the question of the Tribunal's workload and advised that it would continue to monitor this issue.

2.24 The Tribunal reports (p.59) that there was a shift in workload from claim registration testing to mediation, notification and indigenous land use agreement (ILUA) assistance during the reporting period. There were 317 registration test decisions made by the Tribunal in that time (p.64). Some 238 of those decisions were made under the old Act, and 79 under the new Act. 197 applications satisfied the registration test (p.3).

2.25 At 30 June 2000, there were 539 claimant applications requiring resolution. During 1999-2000, 241 claimant applications were discontinued or combined with other applications. 86 new claimant applications were lodged (p.6). The Tribunal indicates in its report that reduction in the volume of registration work will allow more resources of both the Tribunal and native title representative bodies to be directed towards the mediation of claimant applications (p.7). The Committee welcomes this advice.

2.26 No consent determinations of native title were made during the reporting period. The Tribunal reports that 132 agreements were made during the course of mediation and that it assisted directly in relation to 51 of these agreements (p.81). This was far below the number of agreements for which the Tribunal estimated that it would provide assistance during the reporting period (p.82).

2.27 During the reporting period 3,437 s.29 notices were issued. This is more than twice the number lodged during the 1998-1999 year (p.105). The Tribunal reports (p.98) that the majority of these notices were issued in Western Australia. The Tribunal assisted with the mediation of 73 future act negotiations during the reporting period; 43 of these matters were still in mediation at the conclusion of the reporting period (pp.85-86). The Tribunal received fewer applications for determination in relation to future acts than anticipated due to parties choosing to continue negotiations rather than seeking arbitration by the Tribunal (pp. 93-94).

2.28 3,048 future act notices asserted that the expedited procedure applied. All of these notices were lodged in Western Australia (pp.97-98). 1,150 objections to application of the expedited procedure were received. 936 objection applications were resolved during the reporting period. This included 103 objection applications lodged during the previous reporting period (p.99).

2.29 The Tribunal's response to the expected increase in work flowing directly from the Northern Territory Government's decision to manage its backlog of exploration and mining tenement applications by issuing s.29 notices at the rate of 16-20 notices each fortnight, was to appoint additional staff for the Tribunal's Northern Territory office. The Registrar of the Tribunal, Mr Christopher Doepel gave evidence at the public hearing on 3 April 2001 that:

We took a bit of gamble at the end of the last financial year as to when the Territory government would start its processing, but we decided to increase office space and start recruiting before 30 June. Staffing has gone up in steps, from five to nine, and more recently, to 12, I think, and it is about to go to 15. By the end of this calendar year, I would expect that the Northern Territory office will be our third largest regional office; at the moment, Sydney is just ahead. It will rapidly become our third largest operational centre.⁴

2.30 As the s.29 notices issued by the Northern Territory Government relate to pastoral lease land in relation to which no native title applications have been made, indigenous people seeking the right to negotiate in relation to those tenements are required to lodge a native title application. This directly impacts upon the workload of the Tribunal, which has the statutory role of determining whether the registration test is satisfied in relation to those applications for native title (p.69). The Tribunal outlined the effect of this for its budget at the public hearing before the Committee:

The practical consequence of this expansion in work was that the budget allocation we received last May was not sufficient. As a matter of public record, we went back through the additional estimates process late last year and sought additional funding for the future act and related works — not just future act work, because we have not only the future act work but also the claimant application registration and all the other handling work that results when claims are lodged, ultimately going through to the president and members

⁴ Evidence 3 April 2001, p.NT70.

for mediation once we have done registration, notification and the court has settled the party lists.

We asked for an additional \$3.7 million to pick up the extra work in the Northern Territory and anticipated additional work coming out of Queensland with the establishment of the Land and Resources Tribunal—some of that work has started to come through—and also other increases in future act work throughout the remainder of the native title system, although not at the same level anticipated in the Northern Territory.⁵

2.31 The Committee questioned the Tribunal during its public hearing about the approximate amount of additional funding that the Tribunal requested in relation to the anticipated workload for the Northern Territory. The Tribunal has informed the Committee that in 1999-2000, the total amount of expenditure for the Darwin Registry was \$700,000. For 2000-2001, the projected expenditure requested by the Tribunal was \$2.6 million, which includes corporate overheads.⁶

Consultants

2.32 The Tribunal's report advises that during the reporting period, the Tribunal engaged 49 consultants with a total expenditure of \$1,857,014. This represents an increase of 12 consultants and \$849,796 in expenditure over the previous reporting period. The Committee notes the significant increase that this represents.

2.33 The Tribunal advised (p.54) that 12 of the 20 consultancies that were entered into under s.131A of the Act during the reporting period were awarded to former members of the Tribunal. Five former members of the Tribunal were engaged to undertake those consultancies.⁷ During the public hearing by the Committee, the President of the Tribunal, Mr Graham Neate, made the following comments:

... towards the end of 1999, we had a diminishing number of members. At that stage, we had a total strength of nine members, compared with 12 at the start of that financial year and many more in

⁵ Evidence 3 April 2001, p.NT71.

⁶ Submission No 5.

⁷ The former members are D Smith, S McLaughlin, R Farley, K Wilson, and M McDaniel, *National Native Title Tribunal Annual Report 1999-2000*, pp.125-129.

the previous year. There was no immediate prospect of new members being appointed, and indeed new members did not take up their positions until February and March 2000. Consequently, we had a period when it was appropriate for some former members to continue those matters which needed active attention to continue to another stage the work that they were involved in.

I stress that this did not involve former members doing every matter that they previously had done, but only those that were targeted as ones which needed immediate attention and for which they were the most suitable people at the time. ... I can also report to the committee that, as I think I foreshadowed at this time last year, those contracts included provisions for the devolution of responsibility to incoming members, and in every case the consultancy has now expired and the person responsible for the matters for which we had engaged the consultant is a newly appointed member.⁸

2.34 The Committee continues to note its commitment to the principle that Tribunal members should be engaged to do the work of members, and that where there is a shortage of members to address the Tribunal's workload, that should be the subject of advice from the President to the Commonwealth Government, and an adequate number of members appointed. The Committee is pleased to note that all 12 of the contracts awarded to former members have now expired. This is a matter that the Committee will continue to monitor.

2.35 The report sets out details of the changes in membership of the Tribunal, and provides useful background information about new members of the Tribunal (pp.8-9). The Committee notes that the Tribunal has decided to omit the table that it had included in the 1997-1998 (p.147) and 1998-1999 (p.169) annual reports, listing each member of the Tribunal, the term of the member's appointment and the member's location. Such a list provides a useful overview of the members of the Tribunal and should be included in future annual reports as a matter of course.

Public information and media

2.36 The Tribunal continues to take a leading role in the dissemination of public information about native title. The annual report (p.115) confirms that the Tribunal sponsored 49 seminars and workshops, either wholly or with other groups. The

⁸ Evidence 3 April 2001, p.NT52.

Tribunal has in the reporting period, made creative use of various mediums to convey information to its client groups about native title – including booklets, a native title bulletin, various guides on different subjects about native title, an audio tape entitled *Yarning about ILUAs*, a native title news radio program and electronic versions of all printed information products on its website. Such an approach will ensure that information about native title is disseminated to the client groups of the Tribunal in a timely and effective way, having regard to differing needs of various client groups.

2.37 The Tribunal has made the following comment about its educative role:

... nobody in Australia has an institutional obligation or clear function to educate the broader community about native title matters. We have, by force of circumstances, assumed that role, essentially in order to facilitate an informed discussion in the mediation of claimant applications as well as future acts and other matters.⁹

The Committee is on record as having commended the Tribunal for the invaluable role that it plays in this regard.

Budget and running costs

2.38 The estimated expenditure for the Tribunal for the reporting period, which appeared in the Attorney-General's portfolio budget statement (PBS) was \$24.63 million. The actual expenditure of the Tribunal for the reporting period was \$23.60 million; an amount of \$1.03 million was underspent (p.58).

2.39 The Tribunal's annual report notes (p.58) that \$5.68 million was underspent on registration of claimant applications and ILUAs. This was due partly to the 33 fewer than expected claimant applications registered during the reporting period, and 43 fewer than anticipated ILUAs that were registered. The Tribunal also notes (p.58) that the cost per registration of claimant application was less than anticipated. The savings of \$4.35 million that was made was absorbed by overall increases in activity in agreements, arbitration, and assistance and information (p.58).

⁹ Evidence 3 April 2001, p.NT76.

Other matters

Comments on amendments to the Native Title Act

2.40 Most amendments to the Act commenced in September 1998. However, the provisions relating to Representative Aboriginal and Torres Strait Islander Bodies commenced on 1 July 2000.

2.41 The Tribunal notes in the report that during the reporting period, the invitation and re-recognition process for Representative Aboriginal and Torres Strait Islander Bodies focused the resources of those bodies to securing recognition under the revised regime, and away from their principal functions (p.21).

The Tribunal and other parties to native title proceedings or negotiations benefit from properly functioning bodies which assist in dealing with and resolving a range of native title issues. ... In those areas where there are no representative bodies, the ongoing recognition process, and the legal constraints on the powers of continuing bodies which are funded to perform particular functions, may inhibit some of the progress that might otherwise have been made (p.22).

Indigenous land use agreements (ILUAs)

2.42 During the reporting period, the Tribunal received seven applications for the registration of ILUAs and another seven were partially processed (p.70). The Tribunal assisted with 16 ILUA-related negotiations that at the time of reporting had not yet been lodged for registration (p.75).

2.43 The Tribunal's functions in relation to ILUAs include assisting parties to negotiate ILUAs (ss24BF, 24CF and 24DG of the Act); providing information to assist parties understand the legal requirements for registration of ILUAs; the processing of applications; and the eventual registration of ILUAs. Processing of applications involves ensuring that the parties to the ILUA have complied with the Act, notifying individuals and organisations, and mediating or inquiring into objections to registration in some situations (p.70).

2.44 Resources produced by the Tribunal include an audiotape entitled *Yarning about ILUAs* and various brochures providing guidance on registration of ILUAs, and

information about the application requirements for the three different types of ILUAs under the Act. The Tribunal also produced a guide about the registration of ILUAs, available on line on the Tribunal's website.

2.45 The amount of expenditure by the Tribunal on ILUAs during the reporting period was \$1.48 million. The amount spent on registration of ILUA applications was \$0.2 million (p.73). The actual expenditure was lower than anticipated due to the lower than expected number of ILUA applications lodged. The Tribunal attributes the fewer number of ILUAs registered to a lack of understanding by parties of the requirements of the Act in relation to ILUAs.

2.46 A number of ILUAs presented for registration did not comply with the Act, and the Tribunal cites the following reasons: incorrect parties to ILUAs, incorrect area descriptions, insufficient authorisation by native title parties, difficulties with certification of ILUAs by representative bodies, incomplete applications and failure to supply necessary accompanying information (p.71). In addition, the Tribunal notes that amendments to the *Native Title (Indigenous Land Use Agreements) Regulations* that occurred during the reporting period, as well as uncertainty about interpreting certain registration provisions in particular situations were additional factors that contributed to the low number of ILUAs registered during the reporting period (p.72).

2.47 The Committee observes that the Tribunal has put into place certain strategies to deal with the unique challenges that ILUAs create. Of note are the appointment of an employee to deal with ILUAs exclusively, the nomination by the President of a coordinating member for ILUAs and the allocation of members and employees to assist parties to negotiate ILUAs (p.72).

Impact of judicial decisions upon the work of the Tribunal

2.48 During the reporting period, the Tribunal's operations were affected by some court decisions further developing the law on native title (pp.10-11). The annual report (pp.133-140) notes court actions during the reporting period including:

- decisions which clarified the nature of native title rights and interests;
- actions for a review of Tribunal decisions regarding the registration test;
- and

- future act litigation.

Decisions which clarified the nature of native title

2.49 In the Full Federal Court decision in *Western Australia v Ward*¹⁰ the majority held that native title continued to exist in certain claimed areas. The majority held that native title had been extinguished in other areas by the enclosure or improvement of an area covered by a pastoral lease or by the granting of mining leases under the *Mining Act 1978 (WA)* (p.134). The decision takes a broader view of the acts that will produce the extinguishment of native title rights. At the time of publishing of this report, the High Court had heard an appeal from this decision but had not yet delivered its judgement.

2.50 In the *Commonwealth and others v Yarmirr*¹¹ (the Croker Island case), the Full Federal Court dismissed appeals by both the native title applicants and the Commonwealth. The applicants had argued that the native title rights determined by Justice Olney at first instance should have been determined to be exclusive to the native title holders and should have included a right to exclude others from the area. The Commonwealth argued that there was no basis for the offshore recognition of native title (p.134). The High Court appeal in this matter was heard from 6-9 February 2001; judgement is yet to be given.

2.51 *Hayes v Northern Territory of Australia*¹² involved a determination that the Arrernte applicants held native title rights to various areas of land in and near Alice Springs. Justice Olney held these native title rights did not include the right to exclusive possession, occupation, use and enjoyment of the areas concerned. The Tribunal notes the case has implications in relation to its mediation and registration functions (p.133).

¹⁰ [2000] FCA 611.

¹¹ (1999) 168 ALR 426.

¹² [1999] FCA 1248.

Decisions in relation to the registration test

2.52 The Federal Court held in *Western Australia v Native Title Registrar and others*¹³ that the Registrar had failed to accord procedural fairness to a State by not providing it with additional information provided by native title applicants for the purpose of satisfying the registration test. The Registrar has subsequently negotiated with States and Territories in relation to how confidential material provided by applicants can be provided to the relevant State or Territory (pp.5,46-47). No agreement has been reached with New South Wales or the Australian Capital Territory (p.47).

Future act litigation

2.53 The Federal Court handed down three decisions regarding the future act procedures during the reporting period. Of particular interest is the decision in *Coppin (on behalf of the Njamal People) v State of Western Australia and National Native Title Tribunal*¹⁴ where the Court confirmed that the Tribunal has no jurisdiction to arbitrate in relation to proposed future acts unless the parties have negotiated in good faith. The Tribunal notes that this meant that approximately 2000 applications for the Tribunal to arbitrate on matters could not be heard because the State had not negotiated in good faith (p.138). This was the case even where the application for arbitration was made by the native title party (p.138).

Summary

2.54 The presentation of the 1999-2000 annual report of the National Native Title Tribunal complies with the legislative and other formal requirements. The Tribunal has again produced an excellent report.

¹³ [1999] FCA 1591.

¹⁴ (1999) 164 ALR 270.