

Chapter 2

National Native Title Tribunal Annual Report 2002-2003

The National Native Title Tribunal

2.1 The NNTT'S functions are set out in section 108 of the NT Act. These functions include: applications, inquiries, and determinations, mediation in Federal Court proceedings, providing assistance or mediation when requested and conducting research.

Formal reporting requirements

2.2 Under section 133 of the NT Act, the President of the NNTT is required to prepare and give to the Commonwealth Minister 'a report of the management of the administrative affairs of the Tribunal' as soon as practicable after 30 June each year. The report must include:

- financial statements under section 49 of the *Financial Management and Accountability Act 1997* (the FMA Act); and
- an audit of those statements under section 57 of the FMA Act.

2.3 The NNTT is a Statutory Authority which, as a matter of policy, complies with the Requirements for Annual Reports (the Requirements) prepared by the Department of the Prime Minister and Cabinet.¹

2.4 The Requirements note that their purpose is 'accountability, in particular to the Parliament'.² They set five core items of compulsory information together with other mandatory information from specific statutory provisions. Reports must also include a letter of transmittal.

2.5 The core items of information prescribed by the Requirements are:

- review by Departmental Secretary (or equivalent);
- departmental overview;
- report on performance;

1 *Requirements for Annual Reports*, approved by the Joint Committee of Public Accounts and audit under subsections 63(2) and 70(2) of the *Public Service Act 1999*. Department of the Prime Minister and Cabinet, June 2003.

2 *Requirements for Annual Reports*, p. 3

- management and accountability;
- financial statements; and
- other mandatory information.

2.6 In addition the annual report must include a letter of transmittal and aids to access – such as a glossary, index, table of contents and contact details.³ The NNTT’s compliance is set out below.

Compliance with formal requirements

President’s overview

2.7 The President’s report notes that the work of the tribunal was significantly affected by the High Court decisions in *Western Australia v Ward*,⁴ *Wilson v Anderson*⁵ and *Members of the Yorta Yorta Aboriginal Community v Victoria*.⁶ As a result of these judgements, the Tribunal and the parties which use it were compelled to reassess aspects of Native Title law and practice.⁷ In evidence to the Committee, the President of the Tribunal explained that:

... the cumulative effect of those judgements was to slow down a number of processes under the Act, including the resolution by agreement of claimant applications. Suddenly we had to find out which areas of land were still susceptible to claim.⁸

2.8 The Committee notes the impact of these decisions and in this report observes the effect they have had on the Tribunal’s predicted workloads.

2.9 In its report on the NNTT Annual Report for the year 2001-2002,⁹ the Committee noted that more detailed information on the Tribunal’s future prospects and trends would be more informative. The Committee is pleased that this detail has been provided this year. The President’s report identifies eleven trends, including the

3 *Requirements for Annual Reports*, p. 5

4 (2002) 191 ALR 1

5 (2002) 191 ALR 191

6 (2002) 194 ALR 538

7 NNTT Annual Report 2002-2003, p. 1

8 *Committee Hansard* 12 February 2004, p. 23

9 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Report on the Annual Report of the National Native Title Tribunal and the Aboriginal and Torres Strait Islander Land Fund 2001-2002*, p. 6

increasing clarity of the law on native title; an increase in the volume of native title work; an emergence of agreement making as the usual method of resolving native title issues; reduction in timeframes, and the effect on the quality of agreement making of the available resources. This allows the Committee to better gauge the Tribunal's progress from year to year.

2.10 In the last Report on the Annual Report, the Committee also noted that there was no mention of the financial performance of the Tribunal in the President's review.¹⁰ This has occurred again in this year's Annual Report.

2.11 While this is clearly dealt with in depth elsewhere in the Report, the Committee believes that there should be a statement about the general financial trends of the Tribunal from the President. The Committee would like to see this in future Annual Reports.

Tribunal Overview

2.12 The Tribunal retains its single outcome: the recognition and protection of native title. The overview complies with the requirements in setting out the organisational structure, as well as the role and function of the Tribunal. The section of the report which deals with Tribunal members has been moved – appropriately in the Committee's view – to the 'Overview' section of the Annual Report rather than being reported under 'Corporate governance'.

2.13 The four output groups for the Tribunal are: registrations, agreement-making, arbitration and assistance, and notification and reporting. They remain unchanged from the previous annual report.

Performance

Financial performance

2.14 For the third year in succession, the Committee notes that there were 'lower than expected activity levels'¹¹ this year, which resulted in an underspend of the allocated \$29.632m by \$1.977m. There are underspent items which are common to this annual report and that for 2001-2002. They include:

- output 1.1.2, Native Title Determinations;
- output 1.2.1, Indigenous Land Use Agreements; and
- output 1.3.1, Future Act Determinations.

10 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Examination of ILC Annual Report for 2001-2002*, p. 6

11 NNTT Annual Report 2002-2003, p. 35; NNTT Annual Report 2001-2002, p. 30; NNTT Annual Report 2000-2001, p. 42

2.15 In evidence, the Tribunal confirmed that the surplus has been repaid to consolidated revenue. The Registrar told the Committee:

We are coming into the last year in 2004-05 of the current estimates cycle. There is a funding figure roughly equivalent to this year ... set down for the final year. We then come into a new estimates cycle, and there would have to be a rebasing of the tribunal's budget for the estimates cycle beginning from 2005-06.¹²

2.16 The Committee therefore expects that based on the current estimates cycle that there may also be a surplus next financial year, but that a more realistic set of estimates of expenditure and outputs will come into operation thereafter.

Outcome and output performance

2.17 As with the previous annual reports, the Tribunal provides 'performance at a glance' tables which show the unit cost as well as the total cost of each output, against the estimates for each output.

2.18 The Tribunal annual report indicates that its budget planning is consistent with the statutory requirements. The annual report also reproduces its comments from 2001-2002 regarding the difficulty of benchmarking, in the light of the nature of the Tribunal's work.

2.19 The Committee acknowledges that there may be some distinct variation in the work of the Tribunal from year to year, and also acknowledges the comments made by the President in evidence:

In the year covered by this report, the High Court and the Federal Court delivered landmark decisions that affected a range of activities, including the registration and testing of claimant applications, the mediation and settlement of claimant applications, the areas over which native title might or might not be found to exist and hence the areas where procedural rights under the Native Title Act may or may not be exercised. One consequence of those decisions was a slowing down of some activities and some lower than expected outputs.¹³

2.20 However the resource usage also indicates that although the allocated funds are underspent, the unit cost exceeds the estimated cost, frequently by a considerable amount. As with previous years, the Committee remains concerned at this trend.

2.21 The Tribunal has now been in existence for over ten years, and the Committee considers that some analysis of the directions the Tribunal has taken over that period should be undertaken in order to predict trends in the future, and provide a contextual

12 *Committee Hansard*, 12 February 2004, p. 7

13 *Committee Hansard*, 12 February 2004, p. 1

view of the Tribunal's performance in relation to other Tribunals and similar quasi-judicial bodies.

Management and accountability

2.22 The Annual Report complies with the requirements for this part. In its previous report, the Committee noted the importance of the policy development groups, in particular work of the agreement-making strategy group, which has developed an agreement-making model in accordance with best practice.¹⁴ The Committee notes that this work has progressed with the model being the subject of training and implementation by the agreement-making strategy group.¹⁵

Employment

2.23 The Committee noted that the Tribunal reported the resignation of 27 employees, representing 9.85 per cent of the workforce. In the previous reporting period this figure was 7.02 per cent. The Tribunal told the Committee that this was due to a combination of factors, including the length of time the Tribunal has been operational and the consequent moving of experienced and well-trained staff into related but non-Tribunal areas.

2.24 Indigenous employment increased over the period, and the Committee notes that its request for more information on indigenous employees has been provided this year. In particular, the Tribunal focused on training and career development, and over several days held a workshop for indigenous employees which covered such issues as:

- the role of the indigenous employee in an organisation such as the Tribunal;
- responding to family and community about the nature of their work, and what they can achieve as indigenous tribunal employees; and
- the ways in which the indigenous employees could contribute to the administration and policy setting for the Tribunal.¹⁶

2.25 A report and strategy paper were provided to the Tribunal at the end of the conference.

2.26 The Tribunal observed that some of the Indigenous employees who have left may have done so through disappointment with the work of the Tribunal, due to the limitations inherent in its statutory basis and the associated distance from advocacy or

14 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Examination of ILC Annual Report for 2001-2002*, p. 8

15 NNTT Annual Report 2002-2003, p. 104

16 *Committee Hansard*, 12 February 2004, p. 9

community work. In evidence, the Registrar noted that some indigenous employees have interests in these areas and have returned to assist their communities.¹⁷

2.27 However, the Committee also notes that former Indigenous staff often continue to contribute to the agreement making process in other capacities, and so the experience gained from the Tribunal is not lost to the overall native title system.

2.28 The Committee commends the Tribunal for taking providing this additional information, which was a positive inclusion in this year's Report. The Committee looks forward to an update on the implementation of conference initiatives in the 2003-2004 Annual Report.

Audit report and financial statements

2.29 These are set out at Appendix VII to the Report, and have been appropriately certified by the Auditor as giving a true and fair view of the financial position of the Tribunal as at 30 June 2003.

Other mandatory information

2.30 The Requirements stipulate that the report should include the following information:

- occupational health and safety performance;
- freedom of information;
- advertising and market research; and
- letter of transmission and aids to access.

2.31 The Committee notes that the Tribunal has complied with these requirements, and has also complied with the requirements for presentation to the Minister and for tabling.

The work of the NNTT

2.32 The Tribunal has one outcome: the recognition and protection of Native Title. There are four output groups which contribute to achieving this:

- registrations;
- agreement-making;
- arbitration; and

17 *Committee Hansard*, 12 February 2004, p. 11

- assistance, initiatives, notification and reporting.

2.33 The Tribunal notes that as was the case last year, there is considerable variation between estimates and the actual outcomes in any given output category.

2.34 The Tribunal attributes this to two main causes:¹⁸

- the number of significant court decisions affecting the claim mediations, and other processes in unpredictable ways; and
- delays occurring when parties and their representatives were either considering the consequences of a case or awaiting the outcome of one.

2.35 The Tribunal's report and evidence demonstrated this effect on the individual output categories within each group.

Output group 1.1 Registrations

2.36 In each output group there are subcategories. The Registrations group includes:

- claimant applications;
- Native Title determinations; and
- ILUAS.

2.37 As with previous Annual Reports the Committee finds the 'performance at a glance' tables, which are included in the output group reports, a concise and informative tool for interpreting the Annual Report.

2.38 In each category of Registration, the Committee notes the anticipated activity levels have not been realised, and the unit cost has been considerably more than anticipated. The following table illustrates this:

Output	Estimate number	Actual number	Estimate unit cost \$	Actual unit cost \$
Claimant applications	120	110	27,736	35,584
Native Title Determinations	20	3	21,283	32,666
ILUAS	55	36	25,589	31,046

18 NNTT Annual Report 2002-2003, pp. 37-38

2.39 The Committee notes in this output group that although the unit cost is more than anticipated, the overall cost is less, because of the reduced number of actual registrations received. The other output categories are in a similar position. This is comparable to the situation reported in the previous year.

Output group 1.2 Agreement making

2.40 The output group 'agreement making' includes:

- indigenous land use agreement making;
- claimant, non-claimant and compensation agreement making; and
- future act agreement making.

2.41 The effect of the slowing in activity attributed to the court decisions, referred to previously, is clearly seen in this output group. In Indigenous Land Use Agreement Making (output 1.2.1), the overall output cost was \$1.8m less than the estimate of \$3.77m. The Committee also notes the Tribunal's comment that in the case of ILUAS, it is not necessary for the Tribunal to be involved, and this makes predicting the cost and extent of that involvement difficult to estimate.

2.42 For claimant, non-claimant and compensation agreement-making (output 1.2.2), there were only claimant agreements made, (60 compared to an estimated 100) and the highest number was in Queensland. The Tribunal notes that the decisions in *Yorta Yorta*, *Ward*, *Wilson* and *De Rose* had the effect of delaying agreements while the parties assessed the consequences of the decision for them.¹⁹

2.43 Similarly, for output 1.2.3 – future act agreement-making – the Tribunal cannot influence the number of objection applications and future act determination applications lodged, although, once lodged, the process and therefore the number of conferences is to some extent within the Tribunal's control.²⁰ For this reporting year there were 55 agreements mediated by the Tribunal (compared to 60 last year).

Output Group 1.3 Arbitration

2.44 The two outputs are:

- future act determinations; and
- objections to expedited procedure.

2.45 The first output refers to the number of determinations made as to whether or not a future act may proceed. There were 56 determinations in the reporting year (90

19 NNTT Annual Report, p. 63

20 NNTT Annual Report, p. 71

were predicted) compared to 19 in the previous year. The Tribunal suggests this is partly a result of promoting future act consent determinations as a means of fast tracking agreements.

2.46 The unit cost (\$18,051) was a little less than that predicted (\$18,850), and much less than the cost last year (\$54,996).

2.47 For the second output, the actual number (917) was similar to last year (909), and the unit cost \$500 less than the estimate of \$3416.

Output group 1.4 Assistance, notification and reporting

2.48 There are three parts to this group:

- assistance to applicants and other persons;
- notification; and
- reports to the Federal Court.

2.49 The first output has been separated into contacts, events (including specific research projects, and educational programs and seminars) and initiatives, which includes capacity building projects for native title participants, and is a new category included in this report. The Tribunal includes a comprehensive account of the type of assistance (for example: information on preparation of applications, notifications, application/registration information) provided to applicants and other persons as well as the information about the states in which it is given. The state recording the most assistance was Queensland followed by NSW and Western Australia, and the area of greatest assistance was application/registration information, including searches.

2.50 The Tribunal explains that there was a greater need for assistance resulting from the Court decisions mentioned previously, as parties endeavoured to understand the implications of the decisions.²¹

2.51 In the area of notification, the Committee notes that the results were similar to last year in both overall cost and volume.

2.52 There were fewer than anticipated Federal Court notifications, and the Committee notes that the overall cost was less than estimated, but that the unit cost was more. The Tribunal notes the effect of the High Court cases on activity as the expected level of Federal Court reporting was not achieved because the court did not request the number of reports anticipated.

21 NNTT Annual Report 2002–2003, p. 101

Comment

2.53 The Committee again raised the issue of performance estimates and costings with the Tribunal at this year's hearing. The Committee heard that this is the third year that the Tribunal has had to report in this way: that is, through estimating performance against a set of indicators, and then responding to the results.²²

2.54 The comprehensive nature of the information provided by the Tribunal expands the Committee's understanding of the Tribunal's work. In evidence, the President said:

The documents start as documents which have to comply with various government requirements. We are more than happy to be transparent in that sense so long as the readers including this committee, appreciate that there is much more to it than that. Hence in my overview I try to give at least some allusion to the underlying human elements which really drive the process and, ... motivate us in our work.²³

2.55 The Committee notes that the performance of the work of the Tribunal as described within the parameters required of Commonwealth organisations may not necessarily be complete when viewed merely in terms of unit cost or the number of units achieved. The nature of the processes involved are inherently unpredictable, and one arbitration may be concluded in a short time, and others take much longer – yet each is a unit to which must be ascribed a cost.

2.56 The Committee believes that there is a need to bring the performance figures closer to the estimates, and was told in evidence that there will be a rebasing of the Tribunal's budget for the estimates cycle beginning 2005-06.

Consultants

2.57 There was an increase in the expenditure on consultants in 2002-2003. The amount increased from \$1,342,302 to \$1,808,355. Most of this is accounted for in the area of IT expenditure. The Tribunal indicated in the annual report, that as a result of the consultant's report some of its IT requirements will be undertaken in-house.²⁴

2.58 Included in the IT strategy is the Geospatial and Mapping unit. While acknowledging the important contribution of this unit, the Committee was concerned that the unit is not given discrete treatment in the report, and the associated cost is not clear.

22 *Committee Hansard*, 12 February 2004, p. 3

23 *Committee Hansard*, 12 February 2004, p. 3

24 NNTT Annual Report, 2002–2003, p. 123

2.59 The Registrar indicated that the geospatial work of the Tribunal will be reported upon more fully in the coming year.²⁵

Client Survey

2.60 During the year the Tribunal undertook a survey of client satisfaction, which demonstrated 65 per cent overall satisfaction with all output areas. The Tribunal reports that the results will be used to determine whether changes to practice, business processes or strategies are required.²⁶

2.61 The Committee looks forward to receiving information regarding these strategies in the next annual report.

Conclusion

2.62 As indicated, the Committee considers this report to be informative beyond the basic requirements for Commonwealth Departments and agencies.

2.63 The Committee's concern is the estimating process for both the volume of work and associated expenditure. The Committee appreciates the unpredictability of some of the factors which affect these outcomes and it may be the case, as has been suggested, that in its current form the Annual Report is not the most comprehensive way to reflect the work of the Tribunal. The rebasing budgetary process for 2005–2006 may assist the Tribunal in its reporting.

25 *Committee Hansard*, 12 Feb 2004, p. 19

26 NNTT Annual Report, 2002–2003

