

Chapter 1

Introduction

Inquiry History

1.1 The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (the Committee) is established by the *Native Title Act 1993* (the Act) and has a number of statutory responsibilities. The Act requires the Committee, amongst other duties, to consult extensively with those who have interests in the area of native title and to report to Parliament on the implementation and operation of the Act. It also sets out a number of areas for specific inquiry by the Committee. One of these areas of inquiry is the effectiveness of the National Native Title Tribunal (NNTT). This inquiry has been undertaken pursuant to this statutory requirement and this report has been prepared in accordance with subparagraph 206(d)(i) of the Act.

1.2 In 1999 the Committee's predecessor tabled a report (the Fifteenth Report) addressing all the areas for inquiry outlined under paragraph 206(d) of the Act. That report included the proceedings of a Conference held in March 1999 at the commencement of that committee's inquiry. In the report, it indicated that the Act, prior to the 1998 amendments, had specified that an inquiry into the matters listed under paragraph 206(d) should be undertaken by the committee two years after the Act's enactment. The report details the reasons for the delay¹, as well as indicating the committee's proposals for an inquiry into the effectiveness of the NNTT².

1.3 The March 1999 Conference was also the starting point for a second inquiry by that committee and another report - Indigenous Land Use Agreements. In that report the committee indicated that any inquiry to be completed pursuant to paragraph 206(d) would be extensive and that a number of separate inquiries into "the most significant matters relevant to s.206(d)" would be completed.³

1.4 The inquiry into the effectiveness of the NNTT was commenced in August 2001 when the Committee's predecessor agreed to advertise the inquiry. Advertisements announcing the inquiry and calling for submissions were placed in *The Australian Financial Review*, *The Weekend Australian* and the *Koori Mail* on the 7 September 2001, 8 September 2001 and 19 September 2001, respectively. Shortly

1 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJC on Native Title), Fifteenth Report Interim Report for s.206(d) Inquiry Proceedings of Conference on 12 March 1999, dated September 1999, pp 1 and 2.

2 PJC on Native Title, Fifteenth Report, pp 6 and 7.

3 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJC on Native Title) Nineteenth Report Second Interim Report for the s.206(d) Inquiry Indigenous Land use Agreements, dated September 2002, p 2.

after the advertisements were placed, that committee (on 24 September 2001) agreed to postpone the inquiry, pending a Commonwealth election. Submitters were notified accordingly.

1.5 Following the election and under the terms of the Act a new Committee was appointed in February 2002. The newly appointed Committee recommenced the work of its predecessor on this inquiry.

The Committee Inquiry

Conduct of inquiry

1.6 At the conclusion of the inquiry the Committee had received 39 submissions (Appendix 1 lists the submissions received). The majority (30) of these were provided following the Committee's decision in August 2002 to re-advertise the inquiry. The inquiry was advertised in the press and those that the Committee considered the NNTT's clients (such as State and Territory Governments, Native Title Representative Bodies (NTRB), and industry organisations) were invited to make submissions.

1.7 Initially, the Committee agreed that the deadline for submissions would be mid-October 2002 but this date was extended as a number of submitters, including the NNTT, requested extensions. In February 2003, the Committee agreed to a further extension for the receipt of submissions indicating that submissions would be received until the Committee's public hearing program was completed (20 June 2003). Further extensions were provided at the request of the Yamatji Land and Sea Council, in relation to evidence provided at the public hearing in Perth on 12 June 2003 and the Office of Native Title in Western Australia. Despite the extension, the Office of Native Title in Western Australia was unable to provide a submission due to work commitments.

1.8 The Committee adopted a flexible approach to the deadline for the receipt of submissions so that it might also fulfil its statutory obligation to consult extensively about the operation of the Act. Although the specific inquiry being undertaken by the Committee relates to the effectiveness of the NNTT and the Committee has focused its attention on this matter, the Committee is of the view that as the duties of the NNTT are prescribed by the Act, there was also an opportunity during the inquiry to consult on the operation of the Act as it relates to the work of the NNTT.

1.9 The Committee's aim in extending the deadline was to enable as many organisations and individuals as possible who work in areas affected by native title issues to make comments to the inquiry. The Committee's public hearing program also reflects this approach.

1.10 The Committee's public hearing program commenced in Canberra on 27 March 2003, with the NNTT providing evidence. It concluded on 20 June 2003, again with the NNTT providing evidence. The Committee agreed in December 2002 that the NNTT, as the subject of the inquiry, should have a right of reply in relation to evidence taken at public hearings.

1.11 During the public hearing program which was held in the first half of 2003, the Committee visited the following locations in Queensland, New South Wales, the Northern Territory and Western Australia:

- Cairns (14 April)
- Brisbane (15 April)
- Byron Bay (16 April)
- Darwin (10 June)
- Broome (11 June) and
- Perth (12 June).

The Committee also heard evidence in the inquiry in Canberra on 28 March 2003 and had a private briefing from the Minister for Immigration and Multicultural and Indigenous Affairs on 16 June 2003 on the question of funding to NTRB. A list of witnesses who provided evidence at the public hearings is provided at Appendix 2.

1.12 During their visit to Byron Bay and Darwin the Committee took the opportunity to visit the country of the Arakwal and Larrakia people respectively. The Committee was honoured by the invitation to see their country and learn of the plans and achievements of both groups of people.

1.13 The Committee appreciates the time and work of all persons who provided oral and written submissions to the inquiry.

Scope of the Inquiry

1.14 In setting the scope of the inquiry the Committee, prompted by a letter from the NNTT dated 11 July 2002, considered the period under review. It noted that such a review was initially envisaged as occurring within a relatively short period of the commencement of the Act (see paragraph 1.2), together with the fact that the 1998 amendments to the Act resulted in a significant shift in the responsibilities and therefore the workload of the NNTT. The Committee considered the work of the NNTT over the period since its establishment should fall within the parameters of the inquiry. However, the Committee also accepts the view expressed by the President of the Tribunal at the public hearing of 27 March 2003:

In our view, each annual report provides the basis for assessing the effectiveness of the tribunal for that reporting period.⁴

This Committee and its predecessors have routinely met their statutory obligations to report on the NNTT's annual report and the NNTT has been responsive to comment made in these reports. Thus, while not excluding evidence taken in relation to matters over the period of the NNTT's history, this report focuses on the period after the 1998 amendments to the Act.

4 *Committee Hansard*, 27 March 2003, p 3.

1.15 The Committee also acknowledges other comments made by the President at that hearing relating to the work of the NNTT and its context within the native title process generally. The Committee accepts that the NNTT “has a key role in many but not all aspects of the native title system.”⁵ and limited the inquiry to those aspects of the Act that define the functions and responsibilities of the NNTT. In doing so it has examined not only the work of the Tribunal as constituted by the President, deputy presidents and other members but also work of the Registrar. The Registrar and the bureaucracy that the Registrar administers, has powers under the Act not only in relation to applications to the Tribunal and the keeping of registers, but also assisting the President in the administration of the Tribunal (Chapter 2 outlines their respective duties).

1.16 In the course of the inquiry, the Committee received a number of submissions which raised matters concerning the work of the NNTT in its dealings with the submitter. However, the Committee has no statutory role to arbitrate any matter. While these submissions have been considered by the Committee and have informed it in the conduct of its inquiry generally and in the public hearings program particularly, it has not sought in any way to determine any outcome for the issues raised. Rather, the Committee’s concern has been to understand whether these matters were symptoms of generic issues in the NNTT’s conduct of its duties.

Effectiveness – meaning and criteria

1.17 The Committee also sought to establish a working definition of “effectiveness” for the inquiry. A report by this Committee’s predecessor (the Fifteenth Report) indicated that making any determination as to the NNTT’s effectiveness would be difficult, for although the Tribunal’s functions and methods of operation are determined by the Act,

... the core function of the Tribunal is to provide mediation services to help resolve native title claims. Measuring the effectiveness of mediation is problematic, however, given that a Tribunal mediator has no power or authority to determine an outcome, ...⁶

1.18 That Committee continued by indicating that an inquiry into the effectiveness should compare the functions and operations specified in the Act with those conducted by the NNTT as a means of determining its effectiveness. This Committee does not underestimate the difficulty of the task.

1.19 The NNTT’s submission and opening remarks at the 27 March 2003 hearing, interpreted “effectiveness” to mean “the capacity to produce expected or intended

5 *Committee Hansard*, 27 March 2003, p 1.

6 PJC on Native Title, Fifteenth Report, p 6.

outcomes”⁷. The NNTT equated the intended outcomes to the performance of their statutory duties⁸.

1.20 The Committee agrees that “effectiveness” could best be described as the capacity to produce an expected outcome and that the Act should be the starting point for establishing the nature of that outcome. The Committee explored whether the objectives of the Act as set out in section 3 should be considered as the outcomes for assessing the effectiveness of the NNTT. In particular, the Committee considered paragraph 3(a) of the Act which forms the basis of the NNTT’s sole budgetary outcome - “the recognition and protection of native title”⁹.

1.21 In assessing the appropriateness or otherwise of the Tribunal’s stated outcome, the Committee questioned whether the NNTT would be able to achieve this outcome solely by the efficient and effective conduct of its functions. The Committee sought to establish whether or not there were other factors which could affect the outcome.

1.22 Some submissions commented on the suitability of the NNTT’s outcome. The comments made by the Aboriginal and Torres Strait Islander Social Justice Commissioner in the Native Title Report 2001 were endorsed in the submissions of ATSIC and the Western Australian Aboriginal Native Title Working Group (WAANTWG)¹⁰. Further, Rio Tinto in its submission makes the point that

The functions of the NNTT are predominantly that of a facilitator of processes which are driven by governments, Representative Bodies, proponents and where the mediation of native title applications is concerned, also the Federal Court.¹¹

Neither the recognition nor the protection of native title can be secured solely by the NNTT.

1.23 The Committee therefore concurs with the view expressed in the Fifteenth Report that a more reasonable assessment of the NNTT’s effectiveness would consider whether the NNTT is discharging its statutory duties and if it is doing so in accordance with the objectives set out in section 109 of the Act. Section 109 states:

Objectives

- (1) The Tribunal must pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way.

7 Submission No 22, p 3.

8 *Committee Hansard*, 27 March 2003, p 2.

9 NNTT Annual Report 2001-2002, p 28.

10 ATSIC Submission No 29, p 8 and Western Australian Aboriginal Native Title Working Group (WAANTWG) Submission No 19, p 2.

11 Rio Tinto Pty Ltd Submission No 19, p 5.

Concerns of Aboriginal peoples and Torres Strait Islanders

- (2) The Tribunal, in carrying out its functions, may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any party to any proceedings that may be involved.

Tribunal not bound by technicalities etc.

- (3) The Tribunal, in carrying out its functions, is not bound by technicalities, legal forms or rules of evidence.

1.24 The NNTT in their submission indicate that their understanding of the basis for the Committee's assessment

will have regard to:

- the Tribunal's discharge of its statutory functions; and
- the extent to which, when performing its functions, the Tribunal complies with s. 109.¹²

Structure of the Report

1.25 During the inquiry, the Committee became aware of the internal tensions that operate within the objectives that are set out in the Act. The pursuit of some of the objectives can, for some parties, create an environment that compromises the pursuit by the NNTT of other objectives. The Tribunal illustrated this tension in their submission:

In the future act context the relationship between promptness and fairness will vary depending on the parties and their circumstances. For proponents of future acts, being prompt is often the main issue affecting fairness, while for claimants and holders of native title the relatively short timeframes are often considered onerous and unfair.¹³

1.26 This chapter provides a general comment on the inquiry undertaken by the Committee, including its genesis and the issues the Committee considered relevant to any assessment it makes of effectiveness of the NNTT.

1.27 Chapter 2 provides the context of the inquiry, outlining the duties of the NNTT and the Tribunal, the "cultural" climate that was evident when the NNTT commenced operations and that in which they currently operate. It includes a brief outline of the landmark legal decisions that have shaped the current climate.

1.28 The requirement under the Act for the NNTT to pursue its duties in a fair and just way, together with the acknowledgement of the cultural considerations is explored in Chapter 3. The Committee makes an assessment as to how these criteria inform the

12 Submission No 22, p 3.

13 Submission No 22, p 90.

NNTT's work in the application of the registration test, mediation and in its notification and assistance functions.

1.29 Chapter 4 examines the work of the NNTT from an economic perspective. It canvasses the concerns raised during the inquiry relating to funding issues and considers whether the NNTT has pursued its functions in an economic manner.

1.30 The remaining requirements of the Act – that the NNTT pursue its tasks in an informal and prompt way and free of technicalities and rules of evidence – are considered in Chapter 5.

1.31 The Committee's final conclusions and forecasts for development in the future of the NNTT are discussed in Chapter 6, the concluding chapter.

Adoption of Report

1.32 The Committee considered the report at private meetings of 13 and 23 October, 24, 26 and 27 November 2003. It was adopted as the report of the Committee at a private meeting on 1 December 2003.

