Chapter 3

Fair and Just and Culturally Sensitive?

Introduction

3.1 The Committee has agreed that its basis for assessing the effectiveness of the National Native Title Tribunal (NNTT) is those objectives that are set out in the *Native Title Act 1993* (the Act) as the manner in which the Tribunal must carry out its functions. The first of these require the Tribunal to act in "a fair, just, economical and prompt way"[1]. The second indicates to the Tribunal that it "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."[2].

3.2 In this chapter, the Committee examines whether the NNTT, in conducting its duties, has done so in a fair and just way, taking into account the cultural and customary concerns of the indigenous people in a manner that has not disadvantaged other parties to the proceedings. In combining the two, the Committee does not suggest that for the NNTT to act in a fair and just way it is required only to consider the cultural and customary concerns of the Aboriginal and Torres Strait Islanders. Rather the concept of fairness and justness applies to all parties and that is encapsulated in the phrase "but not so as to prejudice unduly any party to any proceeding that may be involved". However, the NNTT, under the Act, has a responsibility to balance these considerations so as not to disadvantage native title claimants.

3.3 The issues that emerged during the inquiry relating to this measure are explored in this chapter and include the application of the registration test and the conduct of mediation, the notification process and assistance provided by the NNTT.

Fair and Just?

Registration Tests

3.4 Entry into the native title process for claimants begins with an application for a determination of native title. An application is generally filed by a group or individuals making a claim to certain native title rights to a specified area of land. Such applicants are known as native title claimants. Applications are filed with the Federal Court and are referred to the Registrar of the NNTT.

3.5 A major concern prior to the 1998 amendments to the Act was the number of overlapping claims. Overlapping claims are made when more than one claimant group

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1 The *Native Title Act 1993* (the Act), subsection 109(1).

2 The Act, subsection 109(2).

makes a claim in relation to the same land. The number of overlapping claims was significant and was impeding the processing of claims. These claims are regarded as impacting on the success of mediations and negotiations of agreements. Rio Tinto Pty Ltd indicated that:

> The added cost, complexity and delay associated with negotiation with multiple, competing native title parties is a significant inhibiter of agreements[3].

3.6 There were also suggestions that the native title process was divisive to indigenous communities and the intra-indigenous disputes resulting from overlapping claims was contributing to these problems – "overlapping claims have been the bugbear of the native title system since day one."[4]

3.7 In evidence before the Committee, Rio Tinto claimed that the 1998 amendments introduced "the registration test", to reduce the number of overlapping claims[5]. The registration test requires the Registrar to ensure that certain statutory conditions are satisfied prior to registering the claim. With registration, the claim is entered on the Register of native title claims which is a publicly accessible document. Registration also opens the "right to negotiate" to claimants.

3.8 In evidence, the representative from the Western Australian Aboriginal Native Title Working Group (WAANTWG) claimed that the application of the registration test has decreased the number of overlapping claims[6]. However, overlapping claims continue to be made and the associated problems continue to be experienced. Under section 203BF, of the Act Native Title Representative Bodies (NTRB) have a role in dispute resolution. Rio Tinto recommends a scheme for reducing overlapping claims whereby the NNTT would mediate to reduce the claims to one. Rio Tinto also proposed deadlines on the mediation[7].

3.9 The Committee notes that the nature of native title and the statutory provisions are such that it may well be that more than one group has claim over a particular area. The 2002 Martu[8] determination clearly illustrates that more than one claim may be legitimate. Therefore, it is reasonable to assume that overlapping claims will continue to be made whatever regime is operative.

3.10 However, the Committee did explore Rio Tinto's proposal that the NNTT become responsible for the mediation of overlapping claims. It was made clear to the Committee that NTRB regard the mediation of overlapping claims as part of their

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3 Submission No 17, p 10, paragraph 3.1.

4 North Queensland Aboriginal Land Council, *Committee Hansard*, 14 April 2003, p 107.

5 Submission No 17, p 11, paragraph 3.2.

6 WAANTWG, *Committee Hansard*, 12 June 2003, p 374.

7 Submission No 17, p 11-12, paragraph 3.6.

8 *James on behalf of the Martu People v State of Western Australia [2002]*, FCA 731

responsibilities. Resolution is actively pursued with resources being dedicated to the task. There seems to be general agreement that resolution demands significant work and an open process.[9] The significance of the task for representative bodies is illustrated in the policy of one representative body to have no overlapping claims.[10]

3.11 ATSIC indicated that the NTRBs hold the view that intra-indigenous dispute resolution is their responsibility and that the NNTT should only be involved with the agreement of all the parties[11]. The NTRBs were in the best position to understand the cultural sensitivities and local issues within an area. Individual representative bodies also expressed views concerning the NNTT involvement suggesting that the NNTT was not well placed to mediate these issues.

> A mediated decision may well be very ably constructed by a skilful mediator, but it is the permanence of that kind of solution that makes us tentative about going to the tribunal in the first instance.[12]

3.12 While the Committee notes the concern that prompts Rio Tinto's proposal, it accepts the view put by ATSIC. The work currently being undertaken by representative bodies in relation to overlapping claims assists the NNTT to achieve fair and just registrations.

3.13 The question of the Registrar applying the registration test in a fair and just way was also considered by the Committee. During the inquiry, the Committee became aware of two principal issues in relation to these criteria. The Committee is concerned that there are claimant applications made by groups operating outside the representative body structure being registered, while the representative body is seeking to mediate overlaps within the claim area. The second area of concern was the potential for inconsistency in the application of the registration test, in particular the authorisation of the group as required by subparagraph 190C(4)(b).

3.14 Applications for native title claims made with a certification by the NTRB are, under the Act, sufficient to meet the requirement under the registration test and the NNTT correctly accepts the certification.

3.15 Under paragraph 190C (4) (b), applications that are lodged outside the representative body framework are subject to examination by the Registrar or his delegate to establish if the claimants are authorised to make the claim. In meeting the terms of the legislation there is the inherent potential for the NNTT to operate in a manner that is contradictory to the requirements to be fair and just.

3.16 The claim registered to the Bar-Barrum people, which is disputed by the Dyirbal people illustrates the Committee's first area of concern. The Dyirbal people

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9 See, for example, *Committee Hansard*, 10 June 2003, pp 257-259 and 12 June 2003, p 374.

10 North Queensland Aboriginal Land Council, *Committee Hansard*, 14 April 2003, p 102.

11 Submission No 29, p 10, paragraph 53.

12 North Queensland Aboriginal Land Council, *Committee Hansard*, 14 April 2003, p 107.

have worked within the policies of the representative body. While the Bar-Barrum initially worked within the representative body framework, more recent claims have been independent of the relevant representative body – the North Queensland Aboriginal Land Council.

3.17 Briefly, the Dyirbal contend that the Bar-Barrum people have lodged claims over country that is that of the Dyirbal and other neighbours. In outlining the history of the disagreement evidence is provided which clearly indicates that the NNTT was aware of the dispute[13]. Although the North Queensland Aboriginal Land Council is not involved in the Bar-Barrum people's claim they informed the Committee that they had set in place dialogue "between the two groups"[14].

3.18 While the discussions are on-going, the Dyirbal contends that the NNTT registered the Bar-Barrum's claim which included Dyirbal land – "The Dyirbal believe this is a primary example of the ineffectiveness of the Tribunal to register claims from an informed position."[15].

3.19 That statement highlights the second of the Committee's concerns. Mr John Tapp indicates that a native title claimant group had an ILUA registered which was authorised at a community meeting of 30 traditional owners. This was regarded as setting a precedent as to a level of acceptance by the NNTT. However, a subsequent meeting of 80 to 100 traditional owners was regarded by the NNTT as a small representation of the claimant group and unrepresentative[16].

3.20 The question of how the NNTT assesses the claimant group authorisation of the application is also important. Under the provisions of the Act it should be conducted in a culturally sensitive manner. The representative of the Eastern Yugambeh Native Title Group accused the NNTT of ethnocentricity in the way it examined the authorisation provided for under paragraph 190C (4) (b).

> We got the impression that the delegate of the tribunal … would have preferred it if we had had an authorisation meeting in the same way as a whole stack of other people do and that a simple showing of hands would have been much easier than some sort of lengthy description about barbecues, picnics and family get-togethers.[17]

3.21 The NNTT in their response to the submission does not address the particulars, but makes general points about the broader issues concerned with the registration of the later Bar Barrum claims. The key issue addressed was the NNTT registration of the disputed claim when the NNTT had been advised of the dispute.

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13 Dyirbal Native Title Working Group Submission No 36, pp 5-7.

14 *Committee Hansard*, 14 April 2003, p 102.

15 Dyirbal Native Title Working Group Submission No 36, p 7.

16 Mr John Tapp Submission No 5.

17 *Committee Hansard*, 15 April 2003, p 165 - 166

3.22 The Committee was informed that the NNTT has a policy that separates the application of the registration test from the mediation functions. In the application of the test no regard is taken of the mediation files. The NNTT said that the process of mediation is to deal with competing views and to consider these during the registration would preempt mediation.[18]

3.23 In evidence the President indicated:

> The registration test is very important, but it does not finally determine where native title is and who has got it. The registration test is a procedural, administrative test which leads to really one outcome – that is, it gives those groups who pass the registration test certain procedural rights until their claim is finally determined.[19]

3.24 The Registrar indicated that the registration test is essentially a series of 11 sets of administrative criteria. One of these sets of criteria relates to the identification of the native title claimant group and the authorisation of the claim group.

> Following Risk, the task of the registrar or the registrar's delegate includes the task of examining and deciding who, in accordance with traditional law and custom, comprises the native title claim group. So there is a duty on us to inquire further than we were prior to the year 2000.[20]

3.25 Clearly as a body of case law and determinations grows, both the interpretation of the Act and the practical application of it by the Registrar develops. These developments may well cast a set of facts in a different light that will result in a decision other than that anticipated being delivered. Such decisions may be misunderstood by those who had particular expectations of the process.

3.26 The Committee is of the view that the Registrar has a responsibility to manage these expectations of the process and disappointments at a micro as well as macro level. It recognises the work the NNTT does in terms of providing information about how to register a claim at the macro level. It notes that the Registrar does give written reasons as to the decisions taken. The focus of the written reasons seems to be to address matters of law rather than provide explanations of the decision making process. At this micro level the Committee is of the view that the Registrar, in only addressing matters of law, does not provide any context for the native title applicants to understand the decision taken. In cases where an application has not been registered, it would assist claimants to make further decisions about their claim, if the Registrar provided information about the process and what it can be expected to deliver.

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18 NNTT responses to specific issues in Submissions to PJC inquiry into the effectivenss of the NNTT, 1 August 2003, p 4.

19 *Committee Hansard*, 20 June 2003, p 392.

20 *Committee Hansard*, 20 June 2003, p 386.

Recommendation 1

The Committee recommends that the Registrar or his delegate, in the written reasons for decisions taken in the registration tests include for unsuccessful applications, a brief plain English explanation as to the decision making process for the application.

3.27 The Committee also notes the NNTT's view that the registration test is an administrative decision. There is no dispute with this statement, yet on occasions significant benefits flow from it, not just in terms of the provisions of the Act. The cultural power of having a claim registered should not be underestimated. The submission from the Dyirbal indicated that the registration provided:

> Them with additional kudos to which they are not entitled and further disenfranchising Dyirbal people.[21]

3.28 While the Committee would not suggest that the NNTT has operated in manner that contravenes the provisions of section 109, it is of the view that more flexibility in the process could be displayed to ensure that fairness and justice are served.

Notification

3.29 The NNTT's statutory role requires it to give notice to the general public, as well as those affected by those claims. The method of doing so is sometimes specified by the Act. Notice must also be given of compensation applications and applications to register an ILUA or amend a native title claim. The Committee received evidence that suggested the manner in which some notifications were conducted was inadequate. The view is of concern to the Committee, not only because it could create a climate that makes mediation difficult but also because inherent in the view is a sense that the process is not balanced and the resulting outcome may be tainted with a similar view.

3.30 Etheridge Shire Council indicated in their submission that the notification process used by the NNTT in relation to claims made within the Shire has largely been media advertising: the Council considered this was both contrary to the expectations land holders had of the process and ineffectual. The land holders' expectations arose from public meetings at which representatives of the NNTT gave the impression "that the process of notification entailed each property owner with tenure rights being notified"[22]. This impression of the process was reinforced by information published on the process by the NNTT[23].

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21 Submission No 36, p 7.

22 Etheridge Shire Council Submission No 25, p 7.

23 Etheridge Shire Council Submission No 25, p 8.

3.31 The use of the media as a means of notification was regarded by the Shire as being "ineffectual". The reasons for this view include the size of the advertisement which is such that no real judgement can be made of the boundaries of the claim and what properties are encapsulated in it.

3.32 Secondly, it was unlikely for remote rural property holders to receive and then read such advertisements, particularly if placed in a weekday newspaper[24]. The Western Australian Pastoralists and Graziers Association, although they queried the placement of an advertisement at "page 74 of Saturday's Western Australian"[25], suggested that the media advertisement proved useful in starting "the grapevine"[26]. Further, they indicated that letters were received by those land holders within the claim area.

3.33 The Pastoralists and Graziers Association did indicate that there was some difference in opinion between the Tribunal and themselves over properties on the boundary of a claim registering as respondents. The Pastoralists and Graziers Association commented that the Tribunal's view was that only properties within the claim should consider registering while their view was the opposite[27].

3.34 Further, ATSIC indicated that some NTRB consider the description of areas in section 29 notices to be inadequate[28].

3.35 The NNTT, in their supplementary submission addressed the issues raised in the Etheridge Shire Council submission. The submission says that the Registrar, where possible, would prefer to notify the relevant individuals of claimant applications but at times it is "not practical for this to occur"[29]. The principal difficulty in making individual notifications arises in New South Wales and Queensland and results from the tenure information held and the compatibility of data systems. While the NNTT has established an arrangement with Queensland "that will permit the NNTT's Geospatial Unit to assist in the identification of individual interest holders"[30] there will continue to be the need for broad notification in some instances due to the time and cost factors.

3.36 Other comments relating to the adequacy or otherwise of the notification process also present a picture of contrasting views. While many consider the notices adequate and there also has been reference to the paperwork that claims generate[31], the

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24 Etheridge Shire Council Submission No 25, p 8.

25 *Committee Hansard*, 12 June 2003. p 356.

26 *Committee Hansard*, 12 June 2003, p 356.

27 *Committee Hansard*, 12 June 2003, p 355.

28 Submission No 29, p 13.

29 NNTT Supplementary Submission No 22A, p 18.

30 NNTT Supplementary Submission No 22A, p 19.

31 Mr Ken Street, *Committee Hansard*, 12 June 2003, p 327.

Executive Director of the Queensland Native Title and Indigenous Land Services (Queensland Department of Natural Resources and Mines) perhaps identifies the central issue creating the concern, with his argument for the re-establishment of the practice to hold plenary conferences:

> We feel there are a number of justifications for that, particularly in dispelling at the earliest possible time some of the concerns that are raised when people are not hearing what is going on or fear the worst because they have received a particular notice.[32]

3.37 There is other support for the concept. Mr Ken Street indicates that the Tribunal could facilitate "a forum like a pre-trial conference"[33] which includes the state and claimants. Issues of land title and native title rights could be considered at this forum.

3.38 The NSW Farmers Association indicated that it has formed a working relationship with the NNTT and together participate in public notification meetings. These meetings are effective in notifying possible respondents of upcoming claims. The suggestion was also made that the NNTT conduct an information campaign aimed at informing people of "their rights in the native title process"[34].

3.39 The Committee is of the view that a wide reaching notification program is critical to a fair and just outcome as it ensures that all parties who may have an interest have the opportunity to participate in the process. Given that notification meetings are already being conducted by the NNTT, there is clearly some flexibility to develop a range of notification strategies that could include both information campaigns and plenary meetings. These strategies should be explored in the appropriate cases.

3.40 The final issue arising from the notification functions of the NNTT was raised by ATSIC. The suggestion was made that the Registrar might undertake some of the identification and notification functions currently undertaken by the NTRB.[35] The Committee understands the resource implications for the representative bodies in undertaking these functions and considers that the suggestion may have merit. It notes that that in other legal spheres the notifying party is that which registers the claim.

Recommendation 2

The Committee recommends that the Registrar, in consultation with the Native Title Representative Bodies, should give consideration to notifying the native title parties of outcomes from the Tribunal.

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32 *Committee Hansard*, 15 April 2003, p 199.

33 *Committee Hansard*, 12 June 2003, p 321.

34 NSW Farmers' Association Submission No 20, pp2 and 3.

35 Submission No 29, p 14.

Mediation

3.41 The NNTT statutory obligations include mediation in many phases of the native title process. The Tribunal has a role in mediating native title determination applications, compensation applications, and where requested, in the negotiation of ILUAs.

Impartial

3.42 While some expressed concern about the fairness of the role played by the NNTT in mediation, others testified that in their experience in mediation the NNTT had proved to be "extremely fair, extremely helpful and very competent …they are there to assist all parties and they do it well."[36].

3.43 The Tribunal's role in mediation was questioned by a number of witnesses. There is some concern that the Tribunal is not an impartial player on the field of mediation. This concern was not limited to the early years of the Tribunal but remained a current issue. The Northern Territory Cattlemen's Association suggested that if the NNTT were to be perceived as concentrating too much on the "interests of claimants, then its role in mediation will surely be compromised"[37]. Further, the PGA of Western Australia indicated that their members continued to have concerns about the "neutral umpire" and drew attention to a number of newsletters that "always tended to talk about the claimants rather than the issues miners or pastoral people might have."[38].

3.44 The NNTT, in its submission suggests that comments regarding bias can be explained by the requirement on them to provide assistance about the native title process to those involved, and that almost invariably it is the claimant who receives that assistance in the first instance. However, the NNTT acknowledges that "the Tribunal's role is not to lend support to any party in particular but to assist all parties to resolve their native title issues"[39].

3.45 The Committee notes that the comments made during the inquiry by the Northern Territory Cattlemen's Association and the PGA of Western Australian concerning the NNTT's impartiality were anecdotal and based on perceptions rather than concrete examples. In an effort to make an assessment of how effectively the NNTT discharges the requirement to perform its duties as a mediator in a fair and just manner, the Committee considered the results of the client survey commissioned by the NNTT. The survey was undertaken in November and December 2002 and 2003. The results indicate that the perception that the NNTT was biased towards the indigenous applicants was a concern of 9 percent of the survey group. It rates as the

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36 Mr Ken Street, *Committee Hansard*, 12 June 2003, p 328.

37 Submission No 6, p 2.

38 *Committee Hansard*, 12 June 2003, p 352.

39 Submission No 22, p 10.

fourth highest factor in dissatisfaction with the work of the NNTT[40]. The conclusions to be drawn from the survey are inconclusive.

3.46 The Committee acknowledges the suggestions made by the NNTT in relation to the comments but is of the view that such perceptions may impact on the NNTT's ability to mediate successfully with groups who may consider themselves marginalised. It is a matter that the Committee considers the NNTT should be both aware of and may need to address in certain negotiations. The Tribunal must remain focussed on the need for fairness and equity in the process, and the need for the process to be seen in these terms.

3.47  direct allegations of partiality by the NNTT were made. However, from the indigenous perspective an underlying belief was evident that the Tribunal's mediation process fails to provide an environment that, only by exception, takes into account "the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders"[41]. On more than one occasion, the Committee heard that the membership of the Tribunal militated against such practices. "Without criticising any particular members, the culture of the tribunal is non-indigenous."[42]. This view is not only mirrored but expanded on later in the hearings by the representative from WAANTWG:

> The tribunal is chronically short of indigenous members. … there are things that Indigenous members can accomplish which, … non-Indigenous members simply cannot, because they have a level of cultural simpatico with native title claimant groups that is not available to non-Indigenous people.[43]

3.48 The Committee is of the view that effective mediation in native title matters requires unique and specialist skills. The Act recognises the need for these skills. Section 111 sets out those who may be appointed to positions on the Tribunal.

3.49 During the inquiry, perceptions of bias and pre determined positions in the native title environment have been raised with the Committee. It notes that there is currently a voluntary code of conduct for members of the Tribunal and that procedures have been developed for dealing with alleged breaches[44].

3.50 The Committee is of the view that the appointment to the Tribunal of indigenous members significantly enhances the work of the Tribunal.

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40 NNTT Client Satisfaction Survey 2003 – Overview, dated September 2003, p 2.

41 The Act, subsection 109(2).

42 Cape York Land Council, *Committee Hansard*, 14 April 2003, p 84.

43 WAANTWG, *Committee Hansard*, 12 June 2003, p 365.

44 NNTT Annual Report 2001-2002, p 97.

Recommendation 3

The Committee recommends, that at the completion of the terms of the current members of the Tribunal, the Government gives consideration to the appointment of an increased number of indigenous members in accordance with the provisions of the Act.

3.51 The Committee notes that the NNTT does encourage training, using accredited courses for members, particularly in mediation skills. However, the NNTT has the view that "those basic mediation skills – important as they are – are developed in a general mediation context and we need a lot more advanced training to our particular circumstances."[45].

3.52 The Tribunal has an in-house manual *Members' Guide to Mediation and Agreement Making under the Native Title Act*, which is used by staff. The NNTT has also tapped into the mediation experience of the former Tribunal Members by conducting a survey of former and present members of the lessons learnt and practices for the future. When collated this survey will provide another internal working document to assist members and staff[46].

3.53 The Committee accepts that such work will facilitate the mediation process by enhancing the skills and knowledge base from which the Tribunal members draw in the development of a mediation strategy.

Mediation strategy

3.54 The development of a mediation strategy by the Tribunal was also raised during the inquiry. At times the strategy locks out some participants until a later stage in the mediation program, usually until the government and native title claimants have reached an in principle position. Rio Tinto informed the Committee that these mediation strategies were generally developed at the request of either the relevant government or native title claimants and that the practice "ignores that in some instances there may be benefits for non-native title parties to be involved in mediation at an earlier stage,"[47].

3.55 The Committee understands that there are situations where such a negotiation strategy may not only be requested but also be the best option for reaching a negotiated resolution. However, it is also concerned that such strategies could be regarded as marginalising interests other than those of government and the native title claimants which could be seen as unfair to other respondents.

3.56 The Committee believes that the development of a mediation strategy is critical to the role played by the Tribunal in mediation and accepts that the Tribunal

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45 *Committee Hansard*, 20 June 2003, p 409.

46 NNTT, *Committee Hansard*, 20 June 2003, p 409.

47 Submission No 17, p 18, paragraph 5.11.

needs flexiblity in the approach taken. It welcomes the development of internal working documents to guide the Tribunal members in this task and asks that they be mindful of the need to balance the concerns of all parties when establishing a mediation program.

3.57 There is scope under section 136D(1) of the Act for the Tribunal to refer a matter to the Court for determination under section 86D. However, there are those who think that the role and effectiveness of the Tribunal in facilitating fair and just outcomes would be enhanced if the Tribunal had the power to enforce some of its decisions. This is particularly the case in relation to missed deadlines in relation to mediation programs.

3.58 The Committee, on a number occasions, heard evidence that expressed frustration over the delays that had occurred in progressing a claim because someone or one of the parties had not delivered something that was required. These failures to comply ranged from an overlapping native title claimant's refusal to attend meetings[48] to the state government's apparent inaction[49] over the registration of an ILUA.

3.59 The view that the Tribunal can do very little "if someone does not want to play the game"[50] is not discounted by the NNTT's evidence and is implicit in its other literature. A theme addressed in the NNTT's last two annual reports has been the impact of "external forces" on the NNTT's performance of its duties. In their submission, the attitude of state and territory governments is highlighted as a critical factor in the resolution of issues – "where a state or territory government is not willing to enter into negotiations, issues can only be partially resolved"[51].

3.60 Further, the NNTT suggest that state and territory governments not only affect mediation by their own actions but set the standard. State government inaction has a flow on effect that results in other parties redirecting their limited resources. This would result in a general inertia in any mediation program, placing in limbo any claim and understandably creating a high degree of frustration for all those concerned who actively want to pursue the conclusion of the claim.

3.61 The Committee, particularly in this context, understands the concerns raised by the Northern Land Council (NLC) that the Court does not exercise the discretion it has under section 86B of the Act to order that an application should by-pass the mediation process. The proposal that the Act be amended to reverse the current provisions is argued on the basis that the process is time consuming and is, at times, without purpose[52]. It was also put to the Committee that

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48 Eastern Yugambeh Native Title Group Management Committee Submission Nos 1.1a and 1b.

49 Ghungalu Community, *Committee Hansard*, 15 April 2003, p 142.

50 North Queensland Aboriginal Land Council, *Committee Hansard*, 14 April 2003, p 105.

51 NNTT Submission No 22, p 45.

52 Northern Land Council, *Committee Hansard*, 10 June 2003, p 243.

I was informed in no uncertain terms by the presiding judge at the time that he regarded the statute as requiring mediation unless there was some exceptional reason.[53]

3.62 The Committee's attention was also drawn to the decision in *Frazer and Others v State of Western Australia* [2003] FCA 35. The Committee notes that while the decision relates to the development of a mediation strategy which is inclusive of the Tribunal, in doing so it also requires all parties to participate. While the Committee accepts that mediation by its very nature is best conducted in a atmosphere of co-operation and that frequently resource issues impact on the capacity of parties to respond, it believes that the Tribunal should more actively pursue the option it has to apply to the Court for orders to ensure that mediation progresses.

3.63 Further, the advice of the President of the Tribunal suggests that the request to amend the Act to reverse mandatory referral to mediation arises in response to claimant applications following future act notices in the Northern Territory[54]. Where overlapping claims are not an issue, the Committee accepts the view that the Court should use the flexibility provided by section 86B of the Act to ensure that the parties views on mediation are heard.

Just outcomes

3.64 During the inquiry the Committee became increasingly concerned about a number of issues arising from negotiated agreements. These raised questions as to whether the agreements were just and whether the NNTT should undertake its duties both to register the agreements and to assist in the mediation of agreements in a different manner.

3.65 The issues arising from some evidence from native title claimants who were negotiating or had negotiated agreements caused the Committee to query the level of understanding and informed consent of those parties. The representatives from the Ghungalu Community, for example, seemed to have no clear understanding of the terms and conditions of the agreements that were negotiated on their behalf[55].

3.66 The Committee is not in a position to establish if all members of the community had a similar understanding, but sought the NNTT's view on the role it played both in relation to the negotiation of agreements and ILUAs and their registration. The Registrar was clear that he had no role in making an assessment as to the terms of the agreement. He informed the Committee that "'The content of the bargain is not of concern to me.'"[56]. He explained that the Act did not provide him with any authority to look to the terms of the ILUA and that he was required to ensure that the agreement satisfied the relevant provisions and having done so, to register it

53 Northern Land Council, *Committee Hansard*, 10 June 2003, p 247.

54 *Committee Hansard*, 20 June 2003, p 397.

55 *Committee Hansard*, 15 April 2003, p 142.

56 *Committee Hansard*, 20 June 2003, p 413.

as an ILUA. The Committee accepts the Registrars reading of his statutory obligations.

3.67 The Tribunal's evidence also indicated that it has defined its role in relation to the negotiation of ILUAs or other agreements on the basis of the request for assistance:

> What type of assistance is required? Is it high-level mediation assistance? Is it facilitation?[57]

3.68 The Committee believes that the Tribunal members, when asked to assist in the negotiation of agreements should be receptive to the role they are asked to play. However, it also notes that the Tribunal regards the ILUA provisions of the Act as "a practical and effective means of resolving native title issues by agreement."[58]. The Committee is concerned that there could be a perception that the Tribunal is lending its imprimatur to this form of determination and agreement making process.

3.69 The Committee acknowledges the potential of the agreement making provisions of the Act but believes that effective agreements should be enforceable, workable and user friendly. The Committee does not want to see a new pathway to costly litigation established with these agreements. The Committee suggests that the Tribunal, when asked to mediate an agreement or ILUA, make it clear to all parties that successful agreements are enforceable, workable and user-friendly.

Assistance

3.70 The NNTT has a number of statutory obligations that require some form of assistance to be provided. At the commencement of any process to determine native title there is a requirement to register a claim. The NNTT provides assistance at this preliminary stage in the preparation of the application. In its submission, ATSIC argues that the NNTT should not provide any such assistance to non-claimant applications as it constitutes "double dipping", given that these applicants have access to the assistance available through the Attorney-General's Department.

3.71 The Attorney-General's Department administers programs of assistance for non-indigenous respondents in the native title process. The Family Law and Legal Aid Division (FLLAD) of the Department makes its determinations for funding on guidelines that were approved in 1998 by the Attorney-General.

3.72 These guidelines are publicly available and set out the nature of the schemes and the administration of the schemes, including the types of assistance available and the eligibility criteria. There are essentially three schemes of assistance available –

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57 *Committee Hansard*, 20 June 2003, p 412.

58 NNTT Submission No 22, p 100.

assistance under section 183 of the Act, the Special Circumstances (Native Title) Scheme and the Common Law (Native Title) Scheme[59].

3.73 Eligibility for the schemes is broad and includes "individuals, partnerships, small businesses, local government bodies and other organisations"[60]. Eligibility does not extend to native title claimants as they are funded through the representative bodies[61].

3.74 The type of assistance is largely that of meeting costs and covers those incurred in legal representation, counsel's fees, court fees, expert (such as anthropologists') fees, reasonable accommodation and travelling expenses and other reasonable disbursements[62].

3.75 The Committee received substantial comment during the inquiry on this assistance. Concern was expressed at the fairness of the programs when it seemed that few if any applications for assistance were rejected[63].

3.76 Further, those who were being funded appeared to be in a position of having "seemingly unlimited funding … . Not one … has ever complained during mediation that their legal representation is threatened or inadequate."[64]. This, the Committee was informed, contrasted starkly with the position of native title applicants operating within the framework of the representative bodies.

3.77 There was also the suggestion that because the funding appeared to be unlimited there was no incentive for "the legal representatives for respondent parties … to negotiate a settlement on native title. Obviously, the opposite applies: the longer they have the process proceed, the more costs they are going to get"[65].

3.78 The Committee does not underestimate the level of frustration that this funding creates within representative bodies, as highlighted in the following comments:

> a feeling of some bitterness and great unfairness about the proceedings. We [the Wongatha native title applicants] had on our side one solicitor and usually two barristers – at times a Queen's Counsel, at other times not. We

59 Financial Assistance by the Attorney-General in Native Title Cases, available on the Attorney-General's Department website. (www.ag.gov.au)

60 Financial Assistance by the Attorney-General in Native Title Cases, available on the Attorney-General's Department website.(www.ag.gov.au)

61 Financial Assistance by the Attorney-General in Native Title Cases, available on the Attorney-General's Department website. (www.ag.gov.au)

62 Financial Assistance by the Attorney-General in Native Title Cases, available on the Attorney-General's Department website. (www.ag.gov.au)

63 ATSIC Submission No 29, p 9.

64 Cape York Land Council Submission No 32, p 7.

65 North Queensland Aboriginal Land Council, *Committee Hansard*, 14 April 2003, p 113.

> had against us three QCs or senior counsel … In particular, the PGA [Pastorist and Graziers Association] had every day three lawyers there – a barrister and two solicitors. … We were presenting our case. We were calling all the witnesses.[66]

3.79 Nor does the Committee underestimate the impact that such assistance can have on the native title process. In the same example cited above further comments were made about the pressure placed on the judge from the respondents legal representatives to the have the claim heard in Kalgoorlie rather than the claim area because of travel considerations. It was suggested to the Committee that hearing evidence in such a setting was "detrimental to the ability of Aboriginal people to effectively present their evidence as best they can."[67].

3.80 The Committee notes that the example cited was not one in which the NNTT was mediating but one before the court. However, the sense that the system was working against the native title applicant was evident.

3.81 A similar disadvantage was felt by the Pastoralists and Graziers Association (PGA) in the initial stages of the operation of the legislation. In providing evidence about the origins of the Attorney-General's Department's assistance, the PGA of Western Australia indicated that "there were meetings called with regard to native title and the claimants arrived fully armed with lawyers, legal representation and backup and the pastoral people were there without any representation at all,"[68].

3.82 The legal representatives of such organisations assisted by the FLLAD funding from the Attorney-General's Department frequently represent the different interests of number of individuals. However, the Committee notes the concerns that call the fairness of the assistance into question, particularly in a climate that recognises the legislative protection of the rights of the pastoralists and miners[69].

3.83 The Committee notes that in the ten years from 1993 to 2003 a total of $48,331,820 was expended under the three programs administered by the Attorney-General's Department. This represents a total of 1010 grants, some of which was provided to respondent parties in such cases as Miriuwung Gajerrong, Yorta Yorta and the De Rose Hill Station Claim. In the three financial years from 2000-2001 to 2002-2003 the majority of approved applications and funding was for assistance to local government organisations, pastoralists and fishers. In the last financial year funding to fishers has increased and that to the local government organisations and pastoralists has declined. In that period there has also been an increase in both approved applications and funding to the category listed as miners[70].

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66 Kimberley Land Council, *Committee Hansard*, 11 June 2003, p 299.

67 Kimberley Land Council, *Committee Hansard*, 11 June 2003, p 299.

68 *Committee Hansard*, 12 June 2003, p 359.

69 *Committee Hansard*, 11 June 2003, p 299.

70 Correspondence from the Attorney-General to the Committee, dated 7 October 2003.

3.84 As tempting as it might be to recommend that the Attorney-General examine the guidelines and particularly those that are dependent on the definition of "reasonable", the Committee is mindful of the need for the provision of assistance in the first place. Without access to legal representation and costs for other expenses some respondents may not be able to fully participate in mediation and/or litigation which may contribute to an extension in the time taken to process claims.

3.85 The Committee is aware that the issue of FLLAD assistance from the Attorney-General's Department does not seem to be significant in the Northern Territory[71]. The suggestion is that the "native title landscape" in the Northern Territory is different from that elsewhere in the sense that there are usually fewer respondents than in other states. The Central Land Council claims that:

> Typically there are four [respondents] … "The Territory, the Commonwealth, the holder of the primary title … and Telstra or the Northern Territory gas pipeline"[72]

3.86 The situation in the Northern Territory is further characterised by an extended period in which the Northern Territory land rights legislation has operated. This legislation has paved the way for the conduct of any processes under the native title legislation by educating the stakeholders on indigenous issues – "the officers in the respective organisations and firms are familiar with the concepts."[73]. The Committee observes that an understanding of the concepts needs to be combined with an acceptance of the issues before the maturity of approach evident in the Northern Territory can be replicated elsewhere.

3.87 The Committee acknowledges that the evidence on the Attorney-General's Department funding relates to an aspect of the native title process that is not within the purview of this inquiry. Consideration of the issue was merited by the fact that it is linked with the perception that the NNTT is lacking fairness in its provision of assistance and that perception lies with the representative bodies. The fact that those in the Northern Territory do not have such a view and the suggestion that this may be due to stakeholders' understanding of native title concepts is of concern.

3.88 The NNTT, in its submission, indicates that one of the means by which it has raised awareness of native title and the associated processes is through the establishment of "partnerships with key interest groups"[74] and the development of "information products". Further, it has become "more focused in its methods for targeting, refining and distributing those products."[75]. It is suggested that there is

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71 *Committee Hansard*, 10 June 2003, p 272.

72 *Committee Hansard*, 10 June 2003, p 272.

73 *Committee Hansard*, 10 June 2003, p 256.

74 Submission No 22, p 16.

75 NNTT Submission No 22, p 16.

general agreement that an understanding of the native title processes is essential to the effective operation of the native title system as a whole.[76]

3.89 The NNTT also addresses the issue of a greater role in public education in its submission, citing the debate arising out of a legislative amendment considered in Federal Parliament in April 1998. The amendment was rejected and therefore, the NNTT suggest their "more limited and targeted undertaking" which required no "additional statutory support"[77] is justified. The NNTT clearly sees its role as limited to those who are stakeholders in the native title process. Further, the advice or assistance given should be limited to matters within its statutory functions and this does not include the provision of legal advice[78].

3.90 While the Committee makes no comment on the breadth of the education or awareness programs offered by the NNTT, it would suggest that not all those who could reasonably be regarded as stakeholders are being reached by the targeted programs. This is not to suggest that the "awareness" programs have failed completely, but rather there is still a considerable distance to travel. The Committee was certainly made aware by some in the mining industry that there continued to be an ignorance of the process and that the Tribunal's role could include "an education facilitator in the process"[79].

3.91 The PGA of Western Australia indicated that the concepts of "shared country and primary custodians"[80], for example, were not familiar to them and "With respect to the tribunal's outreach, maybe they could explain to us how better to access effective material to assist all parties to respond to claims."[81]. In addition, they saw a role for the Tribunal to "understand better what the pastoralists think."[82]. These comments reflect those in the submission by the Northern Territory Cattlemen's Association who suggest that the real measure of effectiveness should be "the degree to which the parties are informed about their respective options and legal rights."[83].

3.92 The Committee is aware of the difficulties in presenting an accurate and informed view in an environment where contrary views continue to be espoused. Further, it notes the active manner in which the NNTT seeks to impart information about the native title process. However, the effectiveness in terms of fairness in the delivery of assistance by the NNTT must be questioned. The Committee suggests that

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76 NNTT Submission No 22, p 15.

77 NNTT Submission No 22, pp 14 and 15.

78 NNTT Submission No 22, p 21.

79 Mr Ken Street, *Committee Hansard*, 12 June 2003, p 328.

80 *Committee Hansard*, 12 June 2003, p 353.

81 Western Australian Pastoralist and Graziers Association, *Committee Hansard*, 12 June 2003, p 353.

82 *Committee Hansard*, 12 June 2003, p 353.

83 Northern Territory Cattlemen's Association Ltd Submission No 6, p 3.

the NNTT continues to seek opportunities to inform those who are involved in the native title process about the process.

3.93 Finally, in response to the concern expressed by ATSIC on "double dipping". On 20 June 2003, there were 21 non-claimant applications active in the native title process[84]. There has been no evidence that suggests the non-claimant applicants have received any assistance from the NNTT other than the assistance which is generally provided to inquiries.

3.94 As this assistance is also available to native title claimants who also have access to the work and assistance of lawyers and anthropologists through representative bodies, the Committee does not accept that there is any unfairness in the way in which the NNTT discharges its duties in this regard. Further, any suggestion that this constitutes "double dipping" could equally be levelled at any representative body that the NNTT assisted with a native title claim.

Conclusion

3.95 The work of the NNTT is clearly demanding, with a number of competing interests. The Committee is of the view that in the 10 years since its establishment it has pursued its functions in a manner that has been fair, just and objective. It accepts there are difficulties in balancing the competing interests required in taking into account the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.

84 NNTT, *Committee Hansard*, 20 June 2003, p 381.