

# Chapter 4

## Economical?

### Introduction

4.1 On 25 June 2003, Senator Ridgeway informed the Senate that “more than half a billion dollars – of Commonwealth money has been spent on native title since 1993. ... \$167 million on funding the tribunal ...”<sup>1</sup> He went on to suggest that if effectiveness of the native title scheme was evaluated by making a comparison with corporations, then “you certainly would not be investing your shares in it”<sup>2</sup>. His comments highlight the financial investment that has been made in the scheme as a whole, and suggest that the return has not been commensurate with that investment. It is a view that appears to be gaining currency with some in the community<sup>3</sup>.

4.2 Given this emerging view, it is not surprising that the major concerns that arose on this issue during the inquiry, related to funding and the associated issue of resources. There was some suggestion that the NNTT was over funded and over resourced. Others argued that the effectiveness of the NNTT could be improved if the funding and consequently the resources for other bodies involved in the native title process were increased.

### Issues

#### *Overfunded and over resourced*

4.3 The native title process is indisputably one in which Governments, both State and Commonwealth, have made considerable investment. An investment, not just of funding but also training and time, which has required disbursement across a range of fields and bodies. For some, the practicalities of working in the field have lead to the view that allocation of the funding has been inappropriate.

4.4 Evidence heard by the Committee sought to illustrate that the NNTT was inappropriately funded. The representative of the Western Australian Aboriginal Native Title Working Group (WAANTWG), indicated that it was a “a fair symptom that it [the NNTT] has too many resources to spare – if it is able to spend resources on such clear navel-gazing [an internal staff survey of ‘staff’s perception of

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1 *Senate Hansard*, 25 June 2003, p 12,536.

2 *Senate Hansard*, 25 June 2003, p 12,536-7.

3 Native Title: Finding the way forward. Address by Geoff Clark, Chair ATSIC Native Title 2002 Conference, Geraldton.

themselves’]”<sup>4</sup>. These comments encapsulate a view held within certain groups working within the native title process.

4.5 The NNTT itself, when commenting on this evidence, offered that it was a view that had been expressed publicly many times – that “the tribunal is perceived to be well resourced or overresourced relative to representative bodies.”<sup>5</sup>

4.6 Such views are fuelled by the perception that the Tribunal duplicates the work conducted by the representative bodies. The Central Queensland Regional Council indicated that the “NNTT was a duplication of resources and efforts”<sup>6</sup>

4.7 The Northern Land Council (NLC) indicated to the Committee that there was considerable

duplication of functions between the Tribunal/Registrar and NTRBs [Native Title Representative Bodies] in circumstances where, particularly in the Northern Territory ... NTRBs were the appropriate bodies to perform these functions.<sup>7</sup>

4.8 The NLC, at the hearing, expanded on these views citing the following areas as those where the duplication of resources between representative bodies and the Tribunal/Registrar are seen to occur:

- the Registrar’s application of the registration test for native title applications;
- indigenous land use agreements, specifically in the registration of the agreement;
- the “compulsory” nature of mediation.

The Committee notes that the NLC acknowledged that the NNTT was acting within the terms of the Act when undertaking these tasks<sup>8</sup>.

4.9 The issues arising from the duplication of resources for mediation stem from the court’s routine referral of matters for mediation, despite the provision of the Act which stipulates that it has a discretion to refer matters to mediation<sup>9</sup>. This issue is addressed in paragraphs 3.61 to 3.63.

4.10 The NLC also put forward the case that in negotiating agreements the need for mediation by the Tribunal was limited, particularly if lawyers were representing the negotiating parties and there was knowledge of the native title process. The work of the NNTT represented an additional and unnecessary layer of “bureaucracy”

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4 *Committee Hansard*, 12 June 2003, p 364.

5 *Committee Hansard*, 20 June 2003, p 429.

6 Central Queensland Regional Council Submission No 8.

7 Northern Land Council Submission No 35.

8 *Committee Hansard*, 10 June 2003, p 243.

9 *The Native Title Act 1993* (the Act), subsection 86B(2).

creating an exchange of paper - an exchange that was implied to achieve little at the taxpayers' expense<sup>10</sup>.

4.11 The NNTT responded, in part, to these comments at the hearing of 20 June 2003. Concern was expressed about the perceived duplication in the Registrar's application of the registration test. In examining "whether the lawyers and anthropologists employed by the land councils have the right group for the country"<sup>11</sup> there was the suggestion that the Registrar was duplicating the work of the representative body. The Registrar's response was unequivocal. He indicated that neither he nor his delegates "go behind"<sup>12</sup> the information demonstrating the claimant group and the authorisation – "We do not go out and do the rep body's work a second time"<sup>13</sup>.

4.12 In relation to the registration of ILUAs, the Registrar informed the Committee both in evidence and in additional information provided to the Committee that he does not "go behind a certificate issued by a representative body in connection with an intended ILUA"<sup>14</sup> unless there is an objection lodged following notification. Should an objection be lodged, the Registrar will conduct an inquiry that would include an examination of the process by which the representative body obtained authorisation for the registration of the agreement. At 1 August 2003, six such inquiries had been conducted<sup>15</sup>.

4.13 The NLC acknowledged that an objection received in the notification process leads to further inquiries.<sup>16</sup>

4.14 The NNTT acknowledged that, in relation to mediation for ILUAs, as experience and therefore knowledge grows in this field, the need for the Tribunal to assist in such negotiations will be reduced<sup>17</sup>. Further, it was indicated that members of the Tribunal have some discretion in developing a mediation strategy and that the strategy can be developed in co-operation with the parties. It is possible to develop a strategy where the Tribunal's involvement is minimal and the parties negotiate directly with one another. The use of the Tribunal's resources on these mediations is

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10 *Committee Hansard*, 10 June 2003, p 243.

11 Northern Land Council, *Committee Hansard*, 10 June 2003, p 242.

12 *Committee Hansard*, 20 June 2003, p 388.

13 *Committee Hansard*, 20 June 2003, p 402.

14 NNTT Responses to specific issues in Submissions to PJC inquiry into the effectiveness of the NNTT, dated 1 August 2003, p 2.

15 NNTT Responses to specific issues in Submissions to PJC inquiry into the effectiveness of the NNTT, dated 1 August 2003, p 3.

16 *Committee Hansard*, 10 June 2003, p 242.

17 *Committee Hansard*, 20 June 2003, p 404-5.

limited to the requirements to report to the court – “a phone call before I report to the court, probably.”<sup>18</sup>.

4.15 The Committee considered whether there was underlying concern giving rise to these comments regarding duplication. ATSIC in evidence acknowledged that a number of representative bodies have a perception “that a group which is not satisfied with the response of a representative body has been able then to attract assistance from the tribunal.”<sup>19</sup>. The NNTT, in accordance with the provisions of the Act, does undertake mediations and other assistance with indigenous claimant groups outside the representative body framework. However, the concerns over duplication arose primarily in the Northern Territory. In the Territory, the Land Councils (which took on the role of representative bodies with the advent of the Act) have a strong tradition in representing the interests of their indigenous clients.

By and large throughout the Northern Territory, Aboriginal people have accepted, endorsed and supported their land councils. ... there are very few non land council sponsored claims and very few overlapping claims.<sup>20</sup>

4.16 The comments highlight a strong tradition and a maturity in the Territory that can be attributed to the existing Lands Rights legislation. The Committee is of the view that work of the NNTT as part of a national scheme is one that has yet to find a balanced relationship with the existing practices within the Territory.

4.17 The Committee recognises that further credence is given to the views that the NNTT is over funded by the surplus that the NNTT has had in their financial statements over the last two reported financial years (that is 2000-2001 and 2001-2002). This underspend was also acknowledged by the NNTT indicating that the funding had been secured on projections, they have expended the resources in a disciplined way and that the surplus has resulted from slow downs elsewhere<sup>21</sup>.

4.18 The Committee does not accept the proposition that the surplus represents disciplined spending by the NNTT. While it is indisputable that the NNTT did not overspend the money appropriated for it to undertake its functions nor did the NNTT deliver the outcomes predicted. The Committee noted in its last report on the annual report that the surplus was achieved despite an increase in the unit cost of the majority of its output groups.

### ***Under resourced bodies***

4.19 The slow downs elsewhere referred to by the NNTT reflect the other major concern that was reiterated during the inquiry - that other bodies vital to the native title process were under funded and under resourced. This was having a significant

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18 NNTT, *Committee Hansard*, 20 June 2003, p 404.

19 *Committee Hansard*, 28 March 2003, p 39.

20 Central Land Council, *Committee Hansard*, 10 June 2003, p 260.

21 *Committee Hansard*, 20 June 2003, p 430.

impact on the work and efficiency of the NNTT. It was a view that was echoed in a wide range of evidence and frequently expressed in comparative terms to the funding of the NNTT.

4.20 ATSIIC, in its submission called on the Committee, to give “particular attention to the issue of resourcing”<sup>22</sup> and expanded on this view at the hearing:

The funding that is being provided by government is not sufficient for the representative bodies to perform their functions.<sup>23</sup>

4.21 The ATSIIC submission reflects the views of the representative bodies. The Acting Executive Officer of North Queensland Aboriginal Land Council told the Committee that “the rep bodies are unfunded”<sup>24</sup>. The frustration of the Kimberley Land Council was evident in their comments that

The tribunal fundamentally is resourced to the hilt compared to representative bodies and the effectiveness of the tribunal is dependent on the ability of the representative bodies – in particular the Kimberley Land Council – to do various activities on the ground.<sup>25</sup>

4.22 The WAANTWG expressed the view that the resourcing of representative bodies was critical, “an observation that has been repeated and repeated and is now trite”<sup>26</sup>.

4.23 For some, the issue of over funding the NNTT clearly is based on comparison with other Commonwealth funded bodies working in the field. Having identified what is considered to be over funding of the NNTT and what is regarded as an associated under funding of the representative bodies there is an argument that some of the funding allocated to the NNTT should be redistributed to those other bodies.

4.24 The NSW Cabinet Office for example, suggests “that some of the funding allocated to the tribunal might be better used in funding the representative bodies”<sup>27</sup>. This view was also put by Mr Frith - “my sense is that certainly a reallocation of funding to some extent from the tribunal to representative bodies would go some of the way to address that imbalance.”<sup>28</sup>

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22 ATSIIC Submission No 29, p 15.

23 *Committee Hansard*, 28 March 2003, p 42.

24 *Committee Hansard*, 14 April 2003, p 112.

25 *Committee Hansard*, 11 June 2003, p 288.

26 *Committee Hansard*, 12 June 2003, p 364.

27 The Cabinet Office, New South Wales Submission No 3.

28 *Committee Hansard*, 11 June 2003, p 278.

4.25 In its supplementary submission, the NNTT indicates that merely redirecting its funds may not necessarily provide a solution, but rather create a new set of problems with the NNTT unable to cope with the "... additional workload generated by an enhanced NTRB capacity."<sup>29</sup>. The representative from WAANTWG countered the suggestion arguing:

Frankly, to present an argument on behalf of the haves which says, 'Don't give things to the have-nots, because you might make a mistake and give the have-nots too much and then we haves would miss out' – which is what that submission is saying – is simply a silly argument.<sup>30</sup>

4.26 In funding terms it is difficult to sustain an argument that the NNTT is overfunded in terms of that provided to the representative bodies. Senator Ridgeway also informed the Senate that "approximately another \$370 million through ATSIC to fund the various rep bodies across the country" had been expended on native title over the past 10 years<sup>31</sup>. The Minister for Immigration and Multicultural and Indigenous Affairs informed the Committee that in "2002-2003 a total of \$47.1 million was directly distributed amongst the 15 currently recognised NTRB [native title representative bodies] and the one section 203F body (New South Wales Native Title Services)"<sup>32</sup>.

4.27 The total expenditure for 2002-2003 for native title financial assistance schemes administered by the Attorney-General's Department for respondents and non native title claimants was \$10 million<sup>33</sup>.

4.28 The total appropriated for the NNTT in the same financial year was \$33.4 million<sup>34</sup>. Whether this represents an overfunding is difficult to determine. The Committee's examination of the NNTT's 2001-2002 Annual Report suggests that, based on its performance in the previous financial year, that the NNTT has difficulties in setting its performance outcomes. The under spend of 2001-2002 was precisely that - it resulted from the NNTT's failure to meet the targeted outcomes it had predicted would be achieved within the financial year.

4.29 Further, whether additional funding to the representative bodies would result in the NNTT operating in a more efficient manner is a more difficult question to answer.

4.30 The Minister advised the Committee that the Government had commissioned the Miller report to examine "whether the mechanisms currently being employed by

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29 NNTT Supplementary Submission No 22A, p 5.

30 *Committee Hansard*, 12 June 2003, p 364.

31 *Senate Hansard*, 25 June 2003, p 12,536.

32 Minister for Immigration and Multicultural and Indigenous Affairs, Speaking notes.

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

34 PBS 2003-2004, Attorney-General's portfolio, Budget related paper No 1.2, p 168.

ATSIC to distribute funding to NTRB could be improved.” The Miller Report indicated that ATSIC could not make an assessment of the NTRB performance on quantifiable outputs/outcomes<sup>35</sup>. Without such an assessment it is difficult to identify the reasons for the performance issues in the work of the representative bodies. The Minister further indicated that “Until such time as the reasons for NTRBs’ performance difficulties are satisfactorily identified, the Government is unable to support any additional funding for NTRB or, indeed, a reallocation of funding within the Commonwealth native title system more generally.”<sup>36</sup>

4.31 The Committee is aware that ATSIC/ATSIIS has commenced implementing a performance based assessment scheme for representative bodies. It was also informed that the timetable initially proposed was reduced dramatically to two weeks and that there was no associated training with the implementation of the scheme. This roll-out was a cause of concern for those in the representative bodies charged with its implementation – “We are going to hang ourselves on performance criteria that we are expected to develop in a couple of weeks”<sup>37</sup>.

4.32 It is also of concern to the Committee. A hastily implemented program will encounter problems and may frustrate the identification of the cause of the performance difficulties in the representative bodies. Consequently the long term objective of appropriately targeting funding or resources within the native title system may not be achieved.

4.33 The Committee is of the view that the program is necessary if the problems are to be identified and properly addressed. Further, the program is essential to good project management and annual budget planning. While it recognises the need to move forward, it queries the efficacy of the current rollout.

4.34 Further, given the difficulty experienced by the NNTT in establishing meaningful and useful outputs and associated targets and cost projections<sup>38</sup>, the Committee suggests that in the native title environment the implementation may need more than the standard rollout for the mainstream public service. It suggests that there may be a real need not only for guidance and training for the staff implementing the budgetary program but also the development of templates by ATSIIS/ATSIC that can be used as models by the representative bodies. The establishment of templates for the native title work will not only be of assistance but also provide a standard base for comparative purposes.

#### **Recommendation 4**

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35 Minister for Immigration and Multicultural and Indigenous Affairs, Speaking notes.

36 Minister for Immigration and Multicultural and Indigenous Affairs, Speaking notes.

37 Kimberley Land Council, *Committee Hansard*, 11 June 2003, p 294.

38 See Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Report Examination of Annual Reports for 2001-2003*, June 2003.

**The Committee recommends that AT SIS, to assist Native Title Representative Bodies to implement a performance based assessment scheme, consult with them to develop templates as models for their 2005-2006 (and out years) budget proposals and the management of work priorities.**

4.35 The Committee considers the work recently finalised by the Australian National Audit Office (ANAO) on the Northern Territory Land Councils and the Aboriginal Benefit Account would be of assistance in the development of the templates<sup>39</sup>. Of particular assistance is the ANAO's recognition that the smaller land councils in the Territory would not have the same needs in developing outcomes and outputs as the larger land councils and that a performance based assessment system should be placed in the context of a larger accountability framework which includes audit and risk management assessments. Given the NNTT's performance against its outcomes and outputs the Committee also suggests that the NNTT acquaint itself with the ANAO's work on this subject.

### ***Skills Deficit***

4.36 While funding is obviously a central issue for those in representative bodies, they were not alone in their comments on resources. Perhaps the strongest exposition of the resource deficit being experienced by representative bodies was made in Rio Tinto Pty Ltd's submission. The submission outlines the resource imbalance within the system and identifies the associated shortfalls in native title processes. It is peppered with recommendations that the funding and resources provided to representative bodies should be increased. Specifically, it identifies the need to increase operational funding for the mediation of native title applications, negotiations of right to negotiate agreements and ILUAs<sup>40</sup>. The recommendations for increased resources are not limited to funding but extend to "technical resources, qualified staff and access to relevant experts"<sup>41</sup>.

4.37 Rio Tinto has identified a number of resource issues that go beyond a question of funding. Additional funding will obviously improve rates of pay for staff, particularly professional staff. But the Committee was informed that there are other disincentives for staff to seek employment with representative bodies, including the pressures of the working environment and the remote locations of many of the offices. Further the number of appropriately qualified and experienced people available falls short of the demand for their skills<sup>42</sup>.

4.38 It is a market where skills are at a premium and the various sectors working in the native title process are competing against one another. Indicative of this trend

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39 Australian National Audit Office Audit Report No 28 2002-2003, Northern Territory Land Councils and the Aboriginal Benefit Account.

40 Rio Tinto Pty Ltd Submission No 17, pp 8 and 9.

41 Rio Tinto Pty Ltd Submission No 17, p 18.

42 Rio Tinto Pty Ltd, *Committee Hansard*, 28 March 2003, p 56.



is the comment made by the NNTT that staff leaving the organisation are remaining within the native title sphere<sup>43</sup>.

4.39 Furthermore, some evidence suggested that the members of the Tribunal did not always have the requisite skills to undertake their duties effectively. Rio Tinto flagged the need for the Tribunal to include members that were “capable of effectively mediating the negotiation of large commercial agreements.”<sup>44</sup> The skills base of Tribunal members was also questioned in evidence from representative bodies.

4.40 The WAANTWG submission echoed the concerns expressed by Rio Tinto. The submission indicated that in Western Australia:

it is not always the case that the member conducting the mediation is sufficiently experienced or skilled to actively mediate and drive the parties in negotiations.<sup>45</sup>

4.41 The skills problem does not appear to be isolated to the west. The North Queensland Aboriginal Land Council informed the Committee that:

there is a pretty big range in quality of members within the tribunal. There are some members that you would happily get to mediate a claim, and there are some that you would never invite to mediation meeting<sup>46</sup>.

4.42 Other witnesses were more specific in identifying those members of the Tribunal who did have the requisite skills. The Executive Director of the Cape York Land Council indicated that “I do not think anyone who has mediated in Cape York, except for Graham Fletcher, has that [mediation] skill”<sup>47</sup>. Others members, including Bardie McFarlane working in Western Australia were also identified as extremely competent and of great assistance.<sup>48</sup>

4.43 If sufficient funding is the only remedy required to ensure the correct skills base and the NNTT is regarded as being over funded then it should be safe to assume that there would not be a skills deficit there. Clearly this is not the situation. While funding may be regarded as part of the issue, increasing funding alone will not rectify all the identified problems.

4.44 The Committee is of the view that an improved skills base is required. It notes that the NNTT is currently in a research partnership with the Australian

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43 *Committee Hansard*, 4 March 2003, p 25.

44 Rio Tinto Pty Ltd Submission No 17, p 22.

45 Submission No 19, p 37.

46 *Committee Hansard*, 14 April 2003, pp 114.

47 *Committee Hansard*, 14 April 2003, p 73.

48 See for example, Dr Smith and WAANTWG, *Committee Hansard*, 12 June 2003, pp 338, and 368 respectively.

Institute of Aboriginal and Torres Strait Islander Studies, ATSIS and others to develop models of managing decision making and disputes in indigenous society. It welcomes the work and assistance of the NNTT in this partnership.

### **Recommendation 5**

**The Committee recommends that the National Native Title Tribunal continue to explore partnerships to develop programs aimed at capacity building within organisations involved in the native title process.**

### **Recommendation 6**

**The Committee recommends that a further inquiry be conducted into the work demands and funding needs of native title representative bodies.**

## **Conclusion**

4.45 There is no dispute that the development of the native title framework has been a resource intensive exercise, not only in terms of funding but also the development of the appropriate skills. The Committee is of the view that such an initial outlay is understandable given that such structures as the NNTT were not in existence prior the enactment of the legislation.

4.46 Concern expressed over the perceived over funding of the NNTT and the under resourcing of native title representative bodies in the native title framework serve to highlight that the resource demands for the future are likely to increase. Any framework for future funding in the native title process should be based on a realistic performance assessment and recognise the need for skills development and capacity building.

4.47 Whether these issues can be used to justify an argument that the NNTT has or has not pursued its functions in an economical way, the Committee takes the view that it is inconclusive. However, what is clear is that the under resourcing and subsequent need for prioritisation of matters by native title representative bodies does lead to delays in resolving competing native title matters.

4.48 The Committee notes that the NNTT in its submission has identified areas where it has adopted cost saving measures while still fulfilling its statutory functions<sup>49</sup>. Yet the Committee has also indicated that the surplus in the budget is an under spend and that projected targets have not been met. The Committee noted in its report on the NNTT's 2001-2002 Annual Report that further work was required by the NNTT on its benchmarks so that the actual situation can be assessed<sup>50</sup>.

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49 See, for example, Submission No 22, pp 110 and 111 relating to savings in advertising.

50 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Examination of Annual Reports for 2001-2002, June 2003, p 8.