Chapter 5

Prompt and Legalistic?

Introduction

5.1 The final stipulation made by the Act is that the "Tribunal, in carrying out its functions, is not bound by technicalities, legal forms or rules of evidence."[1] Arguably this is the strongest reason for the existence of the Tribunal. The Act gives the Tribunal flexibility to pursue matters in a manner that a court could not. This subsection does not absolve the Tribunal from making its decisions within the confines of the law, nor from making its decisions open and accountable.

5.2 This requirement serves to clarify that which requires the Tribunal to act in an "informal and prompt way"[2] There is some view that this requirement has an inherent tension – that to act in an informal manner can also mean that the promptness required is not met. For this reason the Committee has elected to consider the two requirements together in this Chapter.

> There is some suggestion that the tribunal has become too legalistic, that the environment is becoming more like a court. The informality of the tribunal is disappearing and it is becoming a forum for law suits and lawyers.[3]

5.3 The focus of this Chapter is on two major issues, the first relates to the work of the Registrar and the second to that of the Tribunal. A number of issues concerning the work of the Registrar and his delegates in the application of the registration test have emerged during the inquiry. Most of these issues have been canvassed in Chapter 3. Discussion in this Chapter reflects concerns that the NNTT is not acting in an informal manner when it applies the test in relation to the "identification of area subject to native title"[4].

5.4 During the inquiry, there was also criticism of the work of the Tribunal as being overly legalistic in its approaches the future act provisions of the Act. These views are discussed in this Chapter.

---

1 The *Native Title Act 1993* (the Act), subsection 109 (3).

2 The Act, subsection 109 (1).

3 Mr Ken Street, *Committee Hansard*, 12 June 2003, p 319.

4 The Act, section 190B.

Informal

Geospatial requirements

5.5 The Registrar (or his delegate) before registering a claim and therefore opening the "right to negotiate" processes must ensure that the claim meets certain statutory conditions –the registration test.

5.6 The Northern Land Council (NLC) in its submission notes that the geospatial unit of the NNTT is consulted as to whether the application complies with the requirements of the Act, specifically subsection 190B (2). Subsection 190B (2) relates to the information and map identifying the area under claim. The NLC argues that the computer technology available to the geo-spatial unit of the NNTT has resulted in a scientific rather than a legal interpretation of the requirements. Thus, the NLC indicated that

> Anything less than the provision of precise co-ordinates results in advice from the mapping unit that the application, in its view, does not comply with the statutory requirements.[5]

5.7 The work of the geospatial unit was also the subject of comment by Rio Tinto Pty Ltd in their submission. Rio Tinto indicated that the mapping system used by the NNTT is not compatible with that of all states and it is difficult to use the information to complement other material such as the map of a claimant group.

> Cadastral coordinates do not mean anything to people in the bush. … the ability to draw down mappable information and then overlay it on other geographic information which people understand is critical.[6]

5.8 Yet another view of the work of the geospatial unit is presented by the representative of Ergon Energy who indicated in evidence that they supported the comment made by the Queensland Native Title and Indigenous Land Services, regarding mapping.

> It is particularly difficult at times to identify what the claims really are or are about from the mapping that we often get.[7]

5.9 The Committee notes that the NLC made its comments in the context of section 29 claimant applications. These applications are linked with the expedited process and therefore have a deadline of three months for lodgment (see Chapter 2 for further discussion). The problems faced by the NLC were exacerbated by the processing of an extensive backlog of section 29 notices. Although there was no criticism of the NNTT in its administration of the process, the demands made for

---

5 Submission No 35, p 5.

6 *Committee Hansard*, 28 March 2003, p 57.

7 Ergon Energy Pty Ltd, *Committee Hansard*, 14 April 2003, p 92.

geospatial information that is in keeping with the computer age[8] clearly was a frustration.

5.10 The NNTT provided the Committee with an explanation of its requirements in relation to section 29 claimant applications and the assistance it gives to those, including representative bodies, making applications. It indicated that "The provision of co-ordinates is only one way in which the area covered by a claimant application can be described with reasonable certainty for the purposes of the Act." and cites two publications prepared by the NNTT to assist[9].

5.11 Further, the NNTT refuted the comments made by Rio Tinto regarding the overlaying of information by indicating that their "data provision records" indicate that material has been provided to the company at monthly intervals since 2001. This information "has permitted Rio Tinto to integrate the Tribunal's data into its own systems so that it can overlay against its own mapping information"[10].

5.12 The Committee notes that early in the inquiry's public hearing program the NNTT advised that:

> A few weeks ago we introduced an internal system called GIRO II within the tribunal. … The best example of the high water mark that we have reached is that in three states we are able to peel away the layers of tenure. You can look at the claim over the top and then you can look at, say, mining.[11]

Clearly the issue of the provision of geospatial material, identified by the Queensland Native Title and Indigenous Land Services and supported by Ergon Energy, is one that the NNTT was aware of and has been working to rectify.

5.13 While the Committee understands the explanations, it notes that the NNTT has not responded to the concern that the geospatial unit applies co-ordinate definitions of claim areas in a rigorous manner. The Committee agrees that the letter of the law should be applied but it is concerned that the informality envisaged in the legislation does not appear to always underwrite the actions of the NNTT, especially in matters where there are statutory timelines. The Committee acknowledges that the NNTT, as indeed do all those involved in native title process, has a responsibility to comply with those timelines. Further, it appreciates that where workloads peak because of specific circumstances, meeting those responsibilities will be difficult but those difficulties are experienced across the board and the onus should be on all participants to co-operate to ensure that the deadlines are met.

---

8 Northern Land Council, *Committee Hansard*, 10 June 2003, pp 254-255.

9 NNTT Response to Specific Issues in Submissions to PJC inquiry into the effectiveness of the NNTT, dated 1 August 2003, p 6.

10 NNTT Response to Specific Issues in Submissions to PJC inquiry into the effectiveness of the NNTT, dated 1 August 2003, p 8.

11 *Committee Hansard*, 27 March 2003, p 20.

5.14 However, the significance of a native title determination goes beyond the process. The boundaries of each determination must be able to be identified and mapped so that in the future native title areas are readily discernable to all. Mr Street indicated in evidence:

> a need for certainty as to the boundary of those claim areas. … All other types of land tenure ultimately have a positioning and a legality as a result of survey. This does not appear to have happened with native title.[12]

5.15 If the tenure search problems that are a feature of the delays in the native title process today are to be avoided in the future then the boundaries of the claim/determination must be clearly identified and that practice must begin as soon as possible. The information held by the NNTT in relation to the geospatial definition of boundaries is a critical component for any mapping exercise and the identification of the area begins with the registration of a claim. The Committee encourages those preparing applications, whether claimant or non claimant, to ensure that boundaries are as clearly defined as possible from the outset of the process. Equally, in making determinations relating to native title the courts should provide a clear enunciation of the areas over which native title has been extinguished as well as those where it is found to continue.

Prompt?

5.16 While the Act places some of the statutory deadlines on the work of the NNTT, other functions do not have specified deadlines. In the absence of any deadlines the NNTT must act in accordance with the provisions of section 109 of the Act, that is, it must carry out its functions in a prompt way. There was some indication during the inquiry that this was not always considered to be the situation.

5.17 The Cape York Land Council indicated that there had been an agreement between the NNTT and the Land Council that the claim would be registered by a certain date. That did not occur, because of problems relating to maps within the NNTT. It was made clear to the Committee, that in the view of the Land Council, the NNTT not only failed to honour a commitment to register the claim by a certain date, it also failed to inform the land council that there was to be a delay[13].

5.18 The Committee is certainly aware that the finalisation of native title claims, even the successful ones, do not seem to be resolved in a matter of months but rather years. The Bar-Barrum people who are successful claimants (who are one of the case studies provided by the NNTT) indicated that their claim commenced in 1995 and did not reach conclusion until 2000 with a consent determination for some of the area under their initial claim. Further claims are still to be progressed.[14]

---

12 *Committee Hansard*, 12 June 2003, p 319.

13 *Committee Hansard*, 14 April 2003, pp 75.

14 *Committee Hansard*, 14 April 2003, pp 116-117.

5.19 This time scale contrasts favourably with that experienced by the Arakwal people of Byron Bay. They informed the Committee that they have been pursuing their claims, with some success, over a 10 year period[15] and there are still claims outstanding. It was suggested that remaining claims "will take about another 10 years" to finalise due to land searches and related issues[16].

5.20 While there seems to be clear evidence of delays there seems to be very little evidence to suggest that the delays are due to the actions of either the Tribunal or the Registrar rather than the requirements of the process. However, the Committee is concerned that in one instance cited by the Cape York Land Council, the NNTT progressed the matter when pressed by the Land Council to do so – "That is one good aspect of NNTT."[17]. There is a clear suggestion that this was not an isolated instance.

5.21 Priorities in native title matters and who or what sets them was an issue that emerged during the inquiry. The NNTT indicated that the Federal Court orders are instrumental in determining the "pace and sequence of dealing with matters"[18]. In addition, in cases where there are disputes relating to overlapping claims for some of the land claimed, administrative decisions may be made, at the request of the claim groups, to split the claims so that progress can be made on the uncontested claim[19].

5.22 The perspective of a Native Title Representative Body (NTRB) was provided by the North Queensland Aboriginal Land Council. The Land Council related to the Committee the tenor of discussions that occurred during a meeting with officers from the NNTT, the Land Council and the State Government to "coordinate resources in relation to progressing native title claims and to agree on which claims should be given priority."[20] At the meeting, the NNTT indicated that a matter that was being pursued outside the representative body framework was being given priority by the NNTT (and therefore may require the resources of the representative body) because "they were a group that could produce some outcomes for the tribunal in terms of their funding requests."[21] From the Land Council's perspective progressing the claim represented an "absolute waste of resources".[22] The Land Council has its own criteria to determine the priorities in its allocation of resources in native title matters.[23]

---

15 *Committee Hansard*, 16 April 2003, p 220.

16 Arakwal Corporation, *Committee Hansard*, 16 April 2003, p 233.

17 *Committee Hansard*, 14 April 2003, p 75.

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

19 NNTT, *Committee Hansard*, 27 March 2003, p 10.

20 *Committee Hansard*, 14 April 2003, p 103.

21 *Committee Hansard*, 14 April 2003, p 103.

22 *Committee Hansard*, 14 April 2003, p 103.

23 *Committee Hansard*, 14 April 2003, p 107.

5.23 The Executive Director of the Queensland Native Title and Indigenous Land Services indicated that on their part they have regular meetings with the representative bodies "to talk about priorities for claims in the particular regions"[24] and further that their program has sufficient flexibility to progress a claim that "meets some of the parameters that make it clear it is one that can be moved along"[25]. Comments made by Justice French in *Frazer and Others v State of Western Australia* 198 ALR 303 suggest that not all States pursue such consultative policies when setting priorities[26].

5.24 In setting out the role of the NNTT in the mediation process Justice French makes it clear that the establishing a timetable for particular claim is an "element of the mediation process undertaken by the NNTT in the exercise of its statutory function and in respect of which it may be required to report to the court."[27] His Honour stipulates that resource constraints may require a staggered program to reflect priorities within a region but that mediation should be applied in a timely manner.

5.25 The Committee also accepts that the volume of work in native title matters is such that all cannot be progressed simultaneously and there is therefore a need to establish priorities as to which claims will progress within a set time frame. However, it is of the view that the number of respondents and claimants in any given claim and the resources they have available are not the only factors that should be included in any guidelines for setting of priorities.

5.26 The Committee considers that in setting work priorities the NNTT should consider the variety of responsibilities under the Act that a "stakeholder" may have (for example mediation workloads should be assessed in terms of litigation or future act work being undertaken). Other responsibilities that the organisations or individual may have that are outside the native title process should also be factored into the work program.

5.27 If a transparent and inclusive approach was developed by the NNTT in its priority setting it would also give more certainty to the others in the process and enable the more effective utilisation of resources. The development of such guidelines could also possibly reduce the delays that currently feature in the process.

Recommendation 7

The Committee recommends that within the next 12 months and on both a national and state/territory basis, the National Native Title Tribunal should

---

24 *Committee Hansard*, 15 April 2003, p 209.

25 *Committee Hansard*, 15 April 2003, p 210.

26 Frazer and Others v State of Western Australia 198 ALR 303.

27 Frazer and Others v State of Western Australia at 311.

develop a broad framework for setting priorities that includes consultation with each of the "stakeholders".

5.28 The Committee also notes the concerns raised by the Central Land Council (CLC) in relation to the registration of ILUAs. The CLC indicated that they had been involved in the negotiation of a significant number of ILUAs registered and their experience was that instead of the three months timeline established for the notification and registration period it took "closer to five months"[28]. They supported the view that the period of three months was too lengthy and "wholly inadequate in terms of the commercial necessity of the agreement".[29] The exploration and mining season in the Northern Territory operates from March through to October because of weather constraints. A five month notification and registration period can result in a delay of 12 months in development.

5.29 The timelines indicated by the NNTT differ for the processing of an ILUA depending on whether an objection is lodged following notification. If no objection is lodged the ILUA is processed by Tribunal within an average of 6.7 months from lodgement with the Tribunal. This includes a period of 12 working days from the end of notification. The time line for processing an ILUA where there has been an objection is 7.5 months.[30]

Recommendation 8

The Committee recommends that the National Native Title Tribunal should, within the time limits set by the *Native Title Act 1993*, seek to reduce the time lines associated with the registration of Indigenous Land Use Agreements.

Future Act Work

5.30 While there may be concern over the length of some of the timelines involved in the native title process, there was also some criticism of the work of the Tribunal in enforcing time limits during expedited procedure inquiries.

5.31 The Act sets a legislative framework that provides the native title claimants with the "right to negotiate" over specified proposed developments in the area of their claim. The right to negotiate is "a right to have a say about whether, and how, the development takes place"[31]. It is not a veto right.

5.32 The Act also provides that the mediation/negotiation of future acts effectively can be by-passed by a state or territory government issuing a notice under section 29 of the Act, thereby activating the expedited procedure provided under section 237. Native title claimants have the right to object to a future act being

28 *Committee Hansard*, 10 June 2003, p 267.

29 *Committee Hansard*, 10 June 2003, p 267.

30 NNTT Annual Report 2001-2002, p 49.

31 NNTT *Short Guide to Native Title and Agreement- Making*, June 2003, p 10.

declared subject to the expedited procedure. The Tribunal again has a role in arbitrating as section 32 of the Act requires a determination to be made as to whether the act attracts the expedited procedure. (see Chapter 2 for further discussion.)

5.33 The time constraints for negotiations were commented on by Mr Street from the perspective of the mining industry:

> The process of the procedures … is, particularly in the expedited procedures, far too constrained in time. It does not give the parties enough time to negotiate and the thing is done with undue haste,[32].

5.34 It was also argued in the Western Australian Aboriginal Native Title Working Group's (WAANTWG) submission that the NNTT's approach to enforcing the timelines they have set for expedited procedure inquiries is inappropriate. There was the suggestion that the timelines, particularly those relating to the period allowed for negotiations between parties, were driven by the NNTT's corporate goals[33]. The WAANTWG suggest that the representative bodies have felt pressured "because the time frames for negotiation are not perceived to be consistent with the time frames which the NNTT wishes to impose in the expedited procedure hearings"[34]. It speculates that the NNTT's time frames are those that conform to their performance measures.

5.35 The NNTT's response to these comments indicates that its performance measures are based on its interpretation of its statutory obligations and the work that can be achieved within the period. It is also suggested that the NNTT's approach to the timeliness issue has the support of State Governments, who support the resolution of objection inquiries in a timely manner. Further they suggest that an open ended objection inquiry would be a contradiction in the legislative framework which provides for time limits on the right to negotiate procedures[35].

5.36 The Committee notes that the NNTT has issued guidelines to assist parties in lodging objections to the expedited process. These guidelines have been the subject of comment by the representative bodies and it was necessary to re-issue them in October 2001.

Overly legalistic?

5.37 It is also in relation to this future act work and, in particular, the guidelines, that the Committee received most of the evidence arguing that the Tribunal was not

32 *Committee Hansard*, 12 June 2003, p 319.

33 Submission No 19, p 8.

34 Submission No 19, p 21.

35 Submission 22A, pp 2-4.

effectively fulfilling the statutory waiver to be "not bound by technicalities, legal forms or rules of evidence."[36].

5.38 The WAANTWG representative sought to highlight the Tribunal's reliance on legal forms and technicalities by outlining an example about an annexed map made in the decision on WOO1/581. The member's comments in the decision indicated a map was not sufficiently identified to ensure that it was the map referred to in the affidavit. There was only one annexed map.[37]

5.39 In addition, the WAANTWG submission argued that the revised guidelines issued by the NNTT (the October Guidelines) for lodging Form 4 objections contravene subsection 109(3). The October Guidelines indicate that the NNTT will not accept an application that does not meet the requirements of section 76 of the Act. WAANTWG continues by indicating that this provision of the October Guidelines is not uniformly applied by all members of the Tribunal; some members accepting objections if reasons for non-compliance are specified[38].

5.40 The question of inconsistency in the work of the Tribunal in future act matters comes under further scrutiny in the WAANTWG submission. WAANTWG indicated that there are variations in the Tribunal's practice in granting adjournments on expedited proceedings inquiries. The inconsistencies relate not only to granting adjournment applications by the representative body but also in the different treatment given to these applications made by the state or grantee party and those made by representative bodies[39]. The submission also argued that the Tribunal is inconsistent in the requirements placed on Aboriginal people and grantees to provide evidence of the matters set out in their contentions[40] to inquiries on expedited procedures.

5.41 Mr Angus Frith in his submission sets out the provisions of the Act that form the basis for any determination by the NNTT as to which future acts are subject to the expedited procedure and illustrates the NNTT's practice in relation to each of the provisions. He concluded that the NNTT deals with these issues during an objection inquiry "in a manner that is characterised by complexity, evidentiary demands, and legal intricacy"[41].

5.42 When appearing before the Committee, Mr Frith suggested that the expedited procedure should be abolished. In his view the Tribunal could usefully apply its agreement making functions to "try to facilitate agreements between the

---

36 The Act, subsection 109 (3).

37 *Committee Hansard*, 12 June 2003, p 363.

38 Submission No 19, pp 12-13.

39 Submission No 19, pp 15-22.

40 Submission No 19, pp 34 and 35.

41 Submission No 13, p 16.

various parties as to the manner in which the right to negotiate might be applied in respect of exploration licences."[42].

5.43 The question of inconsistency in the determinations made by different members of the Tribunal is raised in the submission by Mr Simon Choo. He highlights the decisions made as to whether paragraph 237 (a) applies to interference with physical activities alone or also can include interference with spiritual activities, indicating that members take substantially different views[43].

5.44 The NNTT has responded to these concerns by outlining its policies in relation to adjournments and time periods for negotiation. The Tribunal also acknowledges that there are other parties to the process and their requirements are also a consideration.[44]

5.45 Further, the NNTT indicates that members of the Tribunal are independent statutory officers.

> They are not subject to the President's direction in the manner in which they exercise their powers. … The President (or his delegate) has issued *Procedures under the Right to Negotiate Scheme* which are applied as guidelines. … They may be departed from in any case in which a member thinks it appropriate to do so.[45]

5.46 Concern over the NNTT being overly legalistic in its approach to expedited procedures is also expressed by the NLC in relation to the interpretation of "sites of particular significance" referenced in paragraph 237 (b) of the Act.

> The question is whether the word 'particular' means that there is a class of sites of significance and it is only the particular ones which are picked up by the provision or whether the word 'particular' is distinguishing between land generally and a site.[46]

In the NLC's view the Tribunal has taken a narrow approach by interpreting the word as referring to the level of significance rather than the location.

5.47 The NLC's view is shared by the WAANTWG. In their submission they outline the evidentiary demands required by the Tribunal's approach, highlighting problems that these demands create. Sites registered as significant under heritage legislation are not necessarily regarded by the NNTT as meeting the requirements of paragraph 237 (b).

---

42 *Committee Hansard*, 11 June 2003, pp 281-282.

43 Submission No 26, p 14.

44 Submission No 22A, pp 21-24

45 Submission No 22A, p 19.

46 *Committee Hansard*, 10 June 2003, p 252.

5.48 In evidence the WAANTWG representative suggested that objections were lodged to expedited procedures as a means of securing heritage protection. Further, due to a number of factors, some representative bodies have a standing instruction to object to the expedited procedure until such time as the matter can be carefully considered[47]. The state of Western Australia has a similar policy of a blanket declaration of expedited procedure for future acts.

5.49 The concerns over the evidentiary requirements become clearer if placed in the context that both declarations for expedited procedure and objections for such claims seem to have become a mechanism for protecting interests until further work can be done to establish whether there are any interests to protect.

5.50 The CLC explicitly indicated that in a significant number of cases native title claims were lodged with the sole intention of gaining the right to negotiate and whatever benefits may accrue from that process. There was no real expectation that the claim would result in a determination of native title[48], yet the claim was progressed through the system requiring the use of limited resources. The CLC indicated that there should be two types of claims – and that the "future act claims" should not be progressed. Currently the Federal Court "does not have the statutory right to distinguish between the two"[49] types of claims.

5.51 The NNTT acknowledged this development:

> What the act does not distinguish between are the different reasons for which people lodge applications. Each application appears on the face of it to be an application for determination of native title, and the system, uninformed by anything other than the application, treats them all the same … The system, not surprisingly, is being used in ways and perhaps to an extent that was not anticipated at the time the amendments were made.[50]

5.52 The President of the NNTT continued by asking the question – "having initiated or used those procedures, should they be compelled to go to what the Act seems to contemplate as the full distance to secure that other outcome – that that is a determination of native title?"[51]

5.53 The evidence received by the Committee on the manner in which the NNTT conducted its functions in relation to future act work highlights three significant issues:

- mandatory compliance with the October Guidelines for Form 4;

---

47 *Committee Hansard*, 12 June 2003, p 369.

48 *Committee Hansard*, 10 June 2003, pp 262-263.

49 Central Land Council, *Committee Hansard*, 10 June 2003, p 262.

50 *Committee Hansard*, 20 June 2003, p 396.

51 *Committee Hansard*, 20 June 2003, p 396.

- the definition of "sites of particular significance"; and
- the use of objections to expedited procedures and the use of the right to negotiate in future acts to gain associated benefits.

Much of this evidence focused on a legal discourse – what is the correct interpretation of the Act and case law with a liberal use of the law to support the views put to the Committee. It was also put to the Committee by the NNTT that "if someone wants to change the law, they have to either go to the Federal Court to tell us that we are wrong or come to parliament and get parliament to say that the act needs amending."[52].

5.54 The Committee appreciates that the Tribunal has adopted its approach to ensure that the principles of the expedited process are implemented, that the law is complied with and there is consistency in its determinations.

5.55 While the administrative decisions by the Tribunal should be solidly underpinned by the law there is clearly some flexibility in its application. The NNTT noted that Tribunal members are statutory officers and are therefore not subject to the President's direction. Inherent in this comment is the discretion that is exercised by the members of the Tribunal who are cited in the WAANTWG submission as accepting objections if reasons for non-compliance are given. The Committee also notes that the Tribunal has granted a moratorium on processing all objection matters for a specified NTRB[53]. This flexibility should be adequately reflected in the October Guidelines.

Recommendation 9

The Committee recommends that the National Native Title Tribunal amend the guidelines on acceptance of expedited procedure objection applications to include a provision that a registered native title party wishing to lodge an objection may discuss, within the time limits set by the *Native Title Act 1993*, issues related to compliance with the appropriate tribunal member.

5.56 The debate has indicated that the future act process is, in some instances, offering a range of options to all involved. It serves to highlight that there are other avenues that should be explored. The Committee notes the differing approaches initially taken by the two representative bodies in the Northern Territory in relation to objections to the expedited procedure and that these approaches are now similar[54].

5.57 In this context, the Committee also notes the suggestion by Mr Frith that the Tribunal apply its agreement making functions to functions in relation to the right to negotiate. It is aware of the work that a member of the Tribunal has been undertaking in Western Australia with the heritage working group and the mineral titles working

52 *Committee Hansard*, 20 June 2003, p 435.

53 NNTT, *Committee Hansard*, 20 June 2003, p 433.

54 NNTT, *Committee Hansard*, 20 June 2003, p 433.

group to address a number of future act related issues in the state. The proposals include amendments to the State legislation to "facilitate negotiations under the Native Title Act and have these extended-term exploration licences."[55]. Template heritage agreements which will provide heritage protection are under consideration[56].

5.58 Given these options and the potential to develop administrative practices within the terms of the law, the Committee does not support the view that amendments to the Act should be sought, no matter how entrenched the opposing views have become.

5.59 The Act operates in a defined legal framework that offers legal recourse to adjudicate on the matters of interpretation. This course should be followed in relation to the requirement for compliance and the definition of what constitutes a site of particular significance if the interpretation continues to raise concerns.

5.60 Finally, the President and the CLC's comments highlight one of the internal tensions within the Act. The NNTT is answerable to the Federal Court for the progression of cases (native title claims) and the Federal Court does not have the power to determine that a case will not proceed in the manner envisaged by the CLC. The CLC suggested that a "future act claim" would effectively be sidelined from the case list, to be activated again should some further future act be registered[57]. The Committee considers that an agreed work program between the NNTT and the parties should assist in establishing priorities and resource usage. However, in the long term it is not just reasonable but also advisable for the claim to be progressed to completion.

Conclusion

5.61 The NNTT straddles a difficult fence in pursuing its functions in an informal and prompt manner, free of legal technicalities. As the evidence outlined suggests it is not always successful in achieving these objectives.

5.62 The Committee considers that there is a tendency to focus on the law, particularly in future act matters, without considering the potential of administrative actions, or the needs of the native title claimants, their representatives and other respondents in the native title process. There is no argument that the law should be complied with but there is clearly the potential to be more innovative within the terms of the law.

5.63 On the basis of the evidence presented to the Committee in relation to the NNTT undertaking its functions in an informal and prompt manner, free of legal technicalities the Committee must conclude that there is more the NNTT can do to

---

55 Dr Smith, *Committee Hansard*, 12 June 2003, p 335.

56 Dr Smith, *Committee Hansard*, 12 June 2003, p 335.

57 *Committee Hansard*, 10 June 2003, p 262.

achieve these objectives. The recommendations made by the Committee in this Chapter are designed to assist in this.