

# Chapter 6

## Other Matters

6.1 It has been almost ten years since the establishment of the National Native Title Tribunal (the NNTT). It has worked in a rapidly changing environment marked by significant legal decisions which have resulted in amendments to the Act. Both the decisions and amendments have had a significant impact on the functions of the NNTT. Its work has been developed in an environment where the implications and effect of the legislation itself has been developing.

6.2 In this environment the NNTT has developed practices and procedures that are virtually without precedent. It would be understandable if it merely had clung to the rigors of the law and the legislation that underpins their work. However, there have been demonstrable efforts by the NNTT to pursue the statutory objectives placed on the conduct of their duties. The NNTT's achievement of these objectives, and consequently, its effectiveness has been considered in this report.

6.3 While the discussion has tended to focus on concerns and issues that arose during the inquiry, there was also positive comment made throughout the inquiry. The Committee frequently heard evidence supportive of the professional and helpful manner of the members and staff of the NNTT. For some, such as the representative from the Western Australian Aboriginal Native Title Working Group (WAANTWG), the work undertaken by particular offices within the NNTT was complemented:

there are many matters, particularly in relation to the claims management unit of the tribunal, where we are extremely satisfied with the tribunal's performance and where the experience has been very positive.<sup>1</sup>

6.4 Other aspects of the NNTT's work were also supported:

from the North Queensland Aboriginal Land Council's perspective, the relationship between us and the tribunal office here in Cairns is quite a positive one, and I think, quite a constructive one.<sup>2</sup>

6.5 The Committee formed the view that the NNTT had developed an administrative system that was skilled in managing and responding to the peaks in workloads experienced as a consequence of the legislative regime. This view was supported by evidence. The Northern Land Council, for example, while indicating the Tribunal was successful in the conduct of its statutory functions, cited the experience arising from the backlog of exploration licences in the Northern Territory.

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1 *Committee Hansard*, 12 June 2003, p 362.

2 *Committee Hansard*, 14 April 2003, p 98.

They knew that the backlog was coming ... they arranged to employ further officers to do it, ... it operated effectively because the tribunal and the office of the registrar did a very good job.<sup>3</sup>

6.6 The NNTT's willingness to address the emerging issues during the inquiry was also noted by the Committee. The NNTT used the inquiry process to gain feedback on its performance and to respond to these issues, not just to the Committee, but also to those who raised the concerns. The concerns relating to the future act process expressed in submissions, for example were responded to both in the supplementary submission and in letters to those who had raised the concerns. The Committee considers this an indication of the willingness of the Tribunal to continually refine the manner in which it conducts its duties.

6.7 Further evidence of the NNTT's concern to review and update the way in which it conducts its functions is included in its submission. As the *Native Title Act 1993* (the Act) has bedded down and the administrative processes have developed, the NNTT identified a number of administrative issues that it suggests could be rectified with minor amendments to the legislation.

6.8 One such issue is the requirement, under subsection 66(8) of the Act, for the NNTT to have all notifications of a native title application take place on the same day. The NNTT indicates that cost difficulties as well as practical issues arise if one of a number of advertisements relating to a particular notification does not appear on the day specified by the NNTT. The current terms of the Act necessitate a repeat of the process<sup>4</sup>. The Committee appreciates the costs associated with re-notification. However, it is concerned that any delays in notification that may result from amendments to the Act may have the potential to disadvantage some parties. Further they may increase the time delays associated with the process. Any amendments to give effect to this proposal by the NNTT should place some time frame on the notification process to ensure that all parties have the same opportunities

6.9 The NNTT raises two other matters in relation to its notification functions. It proposes that the Act be amended to "specify what substitute notification is required when current interest information is not available in a reasonable timeframe."<sup>5</sup> The Committee acknowledges that this a current factor in the delays experienced in the process.

6.10 The final notification matter relates to the obligation to advertise in special interest publications circulating in the area. The NNTT points out that there are not special interest publications in circulation in all areas of Australia and would

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3 *Committee Hansard*, 10 June 2003, p 250.

4 NNTT Submission No 22, p 39.

5 Submission No 22, p 39.

appreciate clarification of this provision of the Native Title (Notices Determination) 1998<sup>6</sup>.

6.11 In relation to its mediation functions, the NNTT indicates that the terms of subsection 136A (4) of the Act are so narrow that “integrity of mediation”<sup>7</sup> may be compromised. An amendment to broaden the scope of the subsection and clarify its relationship with section 136G is sought.

6.12 The NNTT argues that its effectiveness in registering determinations could be improved if the Act was amended to ensure that when making determinations the Court specified the details required to be included in the Native Title Register<sup>8</sup>. Section 193 of the Act requires the Registrar to identify the areas where native title exists and where it has been extinguished. The Committee accepts that such detail should be included in the Court’s determinations (see paragraphs 5.5 to 5.15 for discussion).

6.13 The legal obligations placed on the NNTT to charge for inspections and searches of the Native Title Register and the Register of Indigenous Land Use Agreements also place an impediment on the NNTT in the efficient pursuit of its functions. An amendment to the Act to remove the requirement to charge inspection and search fees in relation to the Register of Indigenous Land Use Agreements would permit the NNTT to post the Register on its website<sup>9</sup>. The *Native Title (Tribunal) Regulations 1993* impose the search fee in relation to the Native Title Register<sup>10</sup>.

6.14 Finally, the NNTT proposes that the Act be amended to ensure that the Registrar is notified by the parties of the expiration of an Indigenous Land Use Agreement (ILUA). The Registrar has a statutory obligation to remove the ILUA from the Register when it comes to an end<sup>11</sup>.

6.15 The Committee is broadly supportive of the legislative amendments proposed by the NNTT. It is not convinced of the necessity of amending the Act to ensure all the clarifications. Further, raising these amendments with the Committee suggests that there has been no apparent approach to the Attorney-General.

## The Future

6.16 It was evident to the Committee that for many involved in the native title process there is still a perceptible level of frustration with the process. However, the sense of frustration and, at times, injustice was rarely attributable to the manner in

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6 Submission No 22, p 39.

7 Submission No 22, p 57.

8 Submission No 22, p 61.

9 NNTT Submission No 22, p 111.

10 NNTT Submission No 22, p 61.

11 NNTT Submission No 22, p 111.

which the NNTT performs its functions. There were some negative comments about the future of native title in the current legislative framework. The Executive Director of the Cape York Land Council informed the Committee that:

I think that they [the NNTT] have to address native title from a different perspective and a different direction altogether.<sup>12</sup>

6.17 While the Committee acknowledges that the legislation has experienced difficulties as it has been tested and developed, it also believes that it has provided the flexibility to provide for the variance in native title issues from region to region. It notes the comments by the WAANTWG representative that

The record for resolving matters in Western Australia, and nationally, is extraordinarily good, when you factor in the other way claims are resolved.<sup>13</sup>

6.18 The NNTT has been important in the service of the legislation. The functions it has performed have been demanding yet it has sought to develop co-operative approaches to the emerging issues. The Committee believes that it needs to continue to develop its co-operative approach, particularly in relation to its mediation and assistance functions. The NNTT should examine ways to forge co-operative partnerships to ensure that there is the flexibility to meet new challenges.

6.19 There is an inherent awkwardness for the Tribunal in its roles as both mediator and arbitrator and the Committee is of the view that these roles should be further defined by itself. The legal foundation of its work as arbitrator should be clearly and concisely conveyed in language that can be understood by all with an interest in native title. Without losing its objectivity, the Committee asks the NNTT to give particular consideration in this matter to those who are native title claimants as they work in a legal framework that is frequently unfamiliar.

6.20 The Committee is concerned that without informed consent the capacity of the Act to deliver enduring outcomes will be compromised.

6.21 Finally, the Committee would make the observation that the objectives set out in section 109 of the Act are worthy of the consideration of others who work in the field in that they provide a workable basis for the achievement of desired outcomes for the wider community.

Senator David Johnston

Committee Chair

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

13 *Committee Hansard*, 12 June 2003, p 374.