Parliament of the Commonwealth of Australia

PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND FUND

Effectiveness of the National Native Title Tribunal in fulfilment of the Committee's duties pursuant to subparagraph 206(d) (i) of the *Native Title Act 1993*

December 2003

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TERMS OF REFERENCE

The Terms of Reference for the Parliamentary Joint Committee on the Aboriginal and Torres Strait Islander Land Fund are set out in Part 12 of the *Native Title Act 1993.* Section 206 provides:

206 Duties

The Parliamentary Joint Committee's duties are:

(a) to consult extensively about the implementation and operation of this Act and Part 4A of the *Aboriginal and Torres Strait Islander Commission Act 1989* with*:*

- (i) groups of Aboriginal peoples and Torres Strait Islanders; and
- (ii) industry organisations; and
- (iii) Commonwealth, State, Territory and local governments; and
- (iv) other appropriate persons and bodies; and

(b) to report from time to time to both Houses on the implementation and operation of this Act; and

(c) to examine each annual report that is prepared by the President of the NNTT or by any person under Part 4A of the *Aboriginal and Torres Strait Islander Commission Act 1989* and of which a copy has been laid before a House, and to report to both Houses on matters:

- (i) that appear in, or arise out of, that annual report; and
- (ii) to which, in the Parliamentary Joint Committee's opinion, the Parliament's attention should be directed; and

(d) from time to time, to inquire into and, as soon as practicable after the inquiry has been completed, to report to both Houses on*:*

- (i) the effectiveness of the NNTT; and
- (ii) the extent to which there are recognised State/Territory bodies; and
- (iii) the appropriateness of powers of delegation exercisable by the Registrar under this Act; and
- (iv) the extent of extinguishment or impairment of native title rights and interests as a result of the operation of this Act; and
- (v) the operation of the National Aboriginal and Torres Strait Islander Land Fund established by Part 10; and
- (vi) the effect of the operation of this Act on land management; and
- (vii) the operation of the Indigenous Land Corporation and the Aboriginal and Torres Strait Islander Land Fund established by Part 4A of the *Aboriginal and Torres Strait Islander Commission Act 1989*; and

(e) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

TABLE OF CONTENT

RECOMMENDATIONS

Chapter 3

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.

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.

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.

Chapter 4

Recommendation 4

The Committee recommends that ATSIS, 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.

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.

Chapter 5

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

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.

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.

Chapter 1

Introduction

Inquiry History

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

1.2 In 1999 the Committee's predecessor tabled a report (the Fifteenth Report) addressing all the areas for inquiry outlined under paragraph 206(d) of the Act. That report included the proceedings of a Conference held in March 1999 at the commencement of that committee's inquiry. In the report, it indicated that the Act, prior to the 1998 amendments, had specified that an inquiry into the matters listed under paragraph 206(d) should be undertaken by the committee two years after the Act's enactment. The report details the reasons for the delay[1], as well as indicating the committee's proposals for an inquiry into the effectiveness of the NNTT[2].

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

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

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

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

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

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

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

The Committee Inquiry

Conduct of inquiry

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

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

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

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

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

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

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

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

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

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

Scope of the Inquiry

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

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

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

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

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

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

Effectiveness – meaning and criteria

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

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

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

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

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

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

outcomes"[7]. The NNTT equated the intended outcomes to the performance of their statutory duties[8].

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

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

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

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

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

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

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

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7 Submission No 22, p 3.

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

9 NNTT Annual Report 2001-2002, p 28.

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

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

Concerns of Aboriginal peoples and Torres Strait Islanders

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

Tribunal not bound by technicalities etc.

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

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

> will have regard to:
>
> - the Tribunal's discharge of its statutory functions; and
> - the extent to which, when performing its functions, the Tribunal complies with s. 109.[12]

Structure of the Report

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

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

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

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

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

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12 Submission No 22, p 3.

13 Submission No 22, p 90.

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

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

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

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

Adoption of Report

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

Chapter 2

The Native Title Environment

Introduction

2.1 The decision by the High Court in *Mabo v the State Queensland [No.2]* 175 CLR 1 held for the first time that Indigenous Australians have native title rights in relation to land recognised by the common law. The judgment challenged Australia's legal and parliamentary systems to provide a framework to respect and protect those rights, while at the same time providing the necessary certainty to enable economic activity and development to proceed.

2.2 The *Native Title Act 1993* (the Act) commenced on 1 January 1994. The legislation provides a legal framework for the recognition of native title. It also established the National Native Title Tribunal (NNTT). As the NNTT observed in its submission its first ten years of operation have seen an evolution in practices and functions:

> In a relatively new legal environment it is not surprising that over the life of the tribunal the law has been subject to dramatic changes as legislation is implemented and then amended, and as judicial precedents are established.[1]

2.3 Soon after the commencement of the Act, certain developments (such as the *Brandy* case[2]) necessitated amendments to the Act. In addition, the High Court in its decision in *The Wik Peoples v The State of Queensland and Ors* (1996) 187 CLR 1 found that the grant of a pastoral lease does not necessarily extinguish native title.

2.4 Further, some held the view that the Act had not delivered real outcomes. As the then Attorney-General indicated in his second reading speech to the Native Title Amendment Bill 1998:

> After almost four years of operation and over 600 claims lodged under the Act, there had been only one determination of native title on mainland Australia.[3]

2.5 Various bodies had been particularly critical of the complex and time consuming native title process. Legislative amendments seeking to clarify the Act and respond to the other concerns were made with the passage of the *Native Title Amendment Act 1998.* The Act received Royal Assent on 27 July 1998.

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1 Submission No 22, p 43.

2 *Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245.*

3 *House of Representatives Hansard*, 4 September 1997, p 7886.

2.6 The role of the Tribunal was substantially altered by the 1998 amendments which transferred certain functions to the Federal Court while enhancing others performed by the Tribunal. The 1998 amendments also gave the Tribunal an arbitration and mediation role in the *future act* process. (See paragraphs 2.29 – 2.38 for further discussion).

The Tribunal and the Registrar

2.7 The NNTT identifies its main role as being:

> to assist people to resolve native title issues. This is done through agreement-making.[4]

2.8 The Tribunal (the President, deputy presidents and other members) mediates native title determination applications, as well as compensation applications.

2.9 The position of Native Title Registrar is established under part 5 of the Act. The Registrar's statutory responsibilities include the establishment and maintenance of the:

- Register of Native Title Claims (subsection 185(2));
- National Native Title Register (subsection 192(2));
- Register of Indigenous Land Use Agreements (subsection 199A(2)).

2.10 The Registrar (or his delegates) also applies the registration test under sections 190A to 190C, and assists the President of the Tribunal in the management of the administrative affairs of the Tribunal (sections 96 and 129).

2.11 There are two distinct facets of activity within the Tribunal. The President commented in evidence that "many clients or stakeholders appear to perceive the tribunal as a single entity performing a range of functions under the act"[5]. In its submission this view was given further consideration:

> for example, many seem to consider that it is the Tribunal which applies the registration test to native title claimant applications and also mediates in relation to those applications when, in accordance with the Act, it is the Registrar (or his delegates) who apply the registration rest and members (or presidential consultants) who mediate.[6]

2.12 The President's view was supported by other evidence received by the Committee during the inquiry.[7]

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4 Submission No 22, p1.

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

6 Submission No 22, p 3.

7 See for example Northern Territory Cattlemen's Association Inc Submission No 6, and New South Wales Farmers' Association Submission No 20.

The Tribunal's mediation and agreement making role

2.13 The National Native Title Tribunal's roles include:

- Mediation of native title claims, compensation applications, consent determinations and a number of other agreements provided for under the Act;
- Assistance in the negotiation of Indigenous Land Use Agreements;
- Arbitration on objections to the use of the expedited procedure in proposed developments; and
- Facilitation of agreements on a wide range of matters under the Act.

2.14 The Tribunal's mediation and agreement making role is conducted under the direction of the Federal Court of Australia.

2.15 In its submission the NNTT explained:

> The purpose of mediation is to assist parties reach agreement on all or some issues specified in s.86A (1) of the Act, such as whether native title exists and, if it does exist, who holds native title, what constitutes the native title rights and interests, whether there are any other (non-native title) interests in the claimed area and, if so, the relationships they have with the native title rights and interests. [8]

2.16 The Tribunal also mediates compensation applications and may also provide assistance to those wishing to negotiate Indigenous Land Use Agreements (ILUAs), (see paragraphs 2.54-2.57). Its future act work is governed by Part 2 Divisions 3 of the Act.

2.17 Native title claimants lodge their applications with the Federal Court who in turn may refer the claim to the Tribunal for mediation. In its submission the NNTT set out the ensuing process:

> If the parties agree on some or all of those matters, they will set out their agreement in the form of a proposed order of the Federal Court. It is then for the Court to decide whether it can, or will, make an order consistent with the terms of the agreement reached between the parties.[9]

2.18 Further, it indicates that prior to the 1998 amendments, claimant applications were lodged with the Tribunal rather than the Federal Court. The Court was not involved in any referral process nor did it supervise the mediation program.[10]

2.19 The Committee was advised by the NNTT that at 30 June 2000, 214 applications had been referred by the Federal Court to the Tribunal for mediation. By 31 October 2002 that number had increased to 314. At this date, there were 259 active

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8 Submission No. 22, p 39.

9 Submission No 22, p 39.

10 Submission No. 22, p 40.

claimant applications awaiting possible referral by the Federal Court to the Tribunal for mediation. [11]

2.20 Prior to the 1998 amendments, non-claimant applications were allowed under the Act. The NNTT submission also explains the nature of so called "non-claimant" applications:

> Non-claimant applications are usually made for the purpose of obtaining a determination that native title does not exist or to enable a future act to occur without the need for negotiation with people who may hold native title in relation to an area. People who wish to be recognised as native title holders for the area subject to a non-claimant application can respond by filing a native title claim within the relevant period. Unless a claimant application is filed in response, the non-claimant applicant can proceed with future acts without going through the future act process set out in the Act.[12]

2.21 Whether an application is a native title claimant application or a non-claimant application the Registrar is required to notify the claim to the public and interested parties (see paragraphs 2.50 – 2.51), prior to the matter proceeding to mediation. The Tribunal notes that at 31 October 2002, there were 31 non-claimant applications in the system, which is less than five per cent of total active claimant applications. [13]

2.22 In addition to the work conducted by the Tribunal in the mediation of claims, it also has a role in facilitating certain agreements. These agreements may involve non-native title matters as the NNTT submission indicates:

> s.86F of the Act allows the Tribunal to facilitate agreements to settle applications that do not necessarily result in a determination of native title. Parties to court proceedings may request the Tribunal to provide assistance in negotiating an agreement relating to:
>
> - withdrawing or amending an application;
> - varying parties to the proceedings; and
> - doing anything else in relation to an application.[14]

2.23 This form of agreement was added by the 1998 amendments and is illustrated by an agreement between the ACT Government and ACT native title claim groups. The agreement provided that the claimants withdraw their claim in exchange for benefits including involvement in the management of the Namadji National Park.[15]

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11 Submission No. 22, p 55.

12 Submission No 22, p 69.

13 Submission No. 22, p 70.

14 Submission No 22, p 40.

15 Available on Chief Minister's Department's website at http://www.cmd.act.gov.au/community/indigenous/ATSIagreement.html

2.24 The Tribunal also mediates on consent determinations. The NNTT submission notes that such mediation can be necessary when an agreement has been reached,

> but there are technical or logistical difficulties preventing the formal signing of the agreement. A consent determination may also be made when one of the claimants refuses to sign, even though the claim group as a whole has reached agreement.[16]

The Tribunal observes that this type of consent determination is made "where the parties (and particularly the native title party) are legally represented and have given their consent to the determination."[17].

2.25 The Tribunal's 2001-2002 annual report states that when the Court makes a consent determination, it publishes its reasons for the determination and terms of each order made by the court. These become a "valuable source of information for those who are negotiating agreements about native title determination applications elsewhere in Australia."[18].

2.26 The Tribunal has noted an increase in the number of consent determinations made in recent years. During the 2001-2002 financial year, the Tribunal registered 14 determinations of native title, 12 of which were made by consent of the parties, or which were unopposed.[19] In the previous year, the Tribunal registered 18 determinations of native title, 13 of which were made by consent of the parties.[20]

2.27 In addition to the agreements already referred to, the Tribunal advised the Committee that it can also mediate other kinds of agreements. These include:

- framework agreements that provided the foundation for future agreements in relation to specific matters;
- process agreements that set out how the parties will relate to each other; and
- agreements about statutory access rights.[21]

2.28 The Committee observes that the Tribunal mediates in a widely variable environment. The indigenous cultural sensitivities present in one area will not necessarily be the same in other areas. Equally, there are a range of different mining and pastoralist issues in each region, as well as different land tenure issues in each State and Territory.

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16 Submission No 22, p 94.

17 Submission No 22, p 94.

18 NNTT, Annual Report 2001-2002, p 6.

19 NNTT, Annual Report 2001-2002, p 4.

20 NNTT, Annual Report 2000-2001, p 5.

21 Submission No 22, p 41.

Future Acts

2.29 The NNTT, in its submission, defines future acts as:

> various legislative and other acts that take place on or after nominated dates and, among other things, 'affect' native title, that is, they extinguish native title rights and interests or are otherwise wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title rights and interests.[22]

2.30 Native title claimants or holders have the right to negotiate in relation to a future act if they have an application for native title that has passed the registration test (see paragraphs 2.43 to 2.49), or one that has been determined and granted. The right to negotiate is not a veto right but "claimants can negotiate about some proposed developments over land and sea waters"[23]. The Tribunal notes that the right to negotiate process:

> is only one aspect of a wider future act process there are many other future act processes that take place under relevant state and territory legislation, and the Tribunal has no role in respect of these processes.[24]

2.31 The NNTT's submission indicates that the future act process provides that:

> when a state or territory government publishes a future act notice … over an area where there is no registered claimant application … potential native title applicants have three months from the date specified in the notice within which to file a claimant application.[25]

2.32 If the application is registered then the right to negotiate applies and:

> the government, the developer and the registered native title parties must negotiate 'in good faith' about the effect of the proposed development on the registered native title rights and interests of the claimants. The parties can ask the Tribunal to mediate during the negotiations. If the negotiations do not result in an agreement the parties (no sooner than six months after the notification date) can ask the Tribunal to decide whether or not the future act should go ahead, or on what conditions it should go ahead.[26]

2.33 During 2001-2002, 25 mediations in relation to a future act negotiation were completed with a final agreement. [27]

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22 Submission No 22, p 79.

23 Available at NNTT's website at http://www.nntt.gov.au/publications/1021860536-5025.html

24 Submission No 22, p 80.

25 Submission No 22, p 33.

26 Available at NNTT's website at http://www.nntt.gov.au/publications/10218605325.html

27 NNTT, Submission No 22, p 276.

2.34 Future act applications may also be fast tracked or expedited under section 33 of the Act. The expedited procedure applies to acts:

> that have minimal impact on native title, such as some exploration or prospecting licenses. If the expedited procedure is used, the future act can be done without negotiations with the registered native title parties[28]

2.35 The NNTT submission notes that section 237 of the Act sets out the conditions under which the expedited procedure can apply.

> In order to attract the expedited procedure it is necessary to come to a view that the act is not likely to:
>
> - interfere directly with the carrying on of the community or social activities of the holders of native title in relation to the land or waters concerned; and
> - interfere with areas or sites of particular significance to the native title holders; and
> - involve major disturbance to any of the land or waters concerned.[29]

2.36 Registered native title parties have four months to object to the use of the expedited procedure. If an objection is lodged, the Tribunal must then hold an inquiry to determine whether the act attracts the expedited procedure. If the objection is successful the Act requires that comprehensive negotiations must take place in "good faith" before any development can proceed.

2.37 The future act regime was significantly changed by the 1998 amendments. The NNTT submission notes that while the Tribunal's mediation function remained unchanged:

> the Act was amended to require all parties to negotiate in good faith with a view to reaching an agreement in relation to the doing of a future act that does not attract the expedited procedure. Prior to the 1998 amendments only the government party was required to negotiate in good faith.[30]

2.38 In addition, the Act now provides that a future act will only attract the expedited procedure if it 'is not likely to' rather than 'does not' interfere directly with the physical aspects of community life.

2.39 A major impetus for the 1998 amendments was the High Court's judgement on *The Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1 (see paragraph 2.71 for further discussion).

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28 Available at website http://www.gov.au/publications/1021860536_5025.html

29 Submission No 22, p 87.

30 Submission No 22, p 82.

2.40 The 1998 amendments sought to clarify this judgment by removing the right to negotiate in relation to claims over pastoral leases, and clarifying that where native title is extinguished, it is extinguished permanently.

Native Title Registrar roles and functions

2.41 The Native Title Registrar's roles and functions include:

- maintenance of the Register of Native Title Claims, the National Native Title Register and the Register of ILUAs;
- registration testing of all native title applications;
- assistance in the preparation of native title applications; and
- notification to the public, governments and organisations of native title applications and ILUAs.

National Native Title Register

2.42 In its submission, the NNTT explained the function of the Native Title Register.

> The National Native Title Register contains details about determinations of, or in relation to, native title. The determination may be that native title does not exist or that native title exists in some areas but not in others.
>
> The High Court, Federal Court or recognised body making the determination must send details of the determination to the Registrar …[who then enters] the details of [the] determination …
>
> The provisions relating to the National Native Title Register existed prior to the 1998 amendments. However, there was no specific requirement that the Registrar include details relating to whether or not native title was in fact determined to exist [31].

2.43 The Registrar is responsible for the registration test which is an administrative test. The registration test was a key feature of the 1998 amendments. The NNTT explained the impact of the amendments.

> All claimant applications made on or after 30 September 1998 are subject to the registration test as are most claimant applications made before the registration test came into effect. In addition, claimant applications must be re-tested if they are amended in the Federal Court.[32]

2.44 The registration test's criteria are set out in sections 190B and 190C of the Act. The NNTT indicates that in order for claimant applications to be registered, they must properly identify the boundaries of the claim, clearly define the claimant group

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31 Submission No 22, pp 59-60.

32 Submission No 22, p 29.

and ensure that the applicants are authorised by the claimant group, ensure that areas claimed have not been areas where native title has been extinguished, and that there is a factual basis for the claimed native title.[33]

2.45 The NNTT indicates that under the current provisions, it is not possible for members of the same claimant group to have two or more claims for the same area. While these so called overlapping claims still exist, the registration test operates to ensure that such claims are between different groups[34]. However, this was not the situation before the 1998 amendments.

2.46 Under the pre 1998 regime the Registrar was required to apply "an acceptance test". The threshold criteria of that test were designed to screen "applications based on an assessment of whether they were frivolous or vexatious or whether the application could be made out prima facie."[35]. One result of this test was the registration of numerous overlapping claims leading to concern and criticism of the process. Further, as the NNTT indicate "As a consequence of number of court decisions the acceptance test was revealed to be inadequate"[36].

2.47 The registration test has evolved over the years since its implementation. The NNTT notes that "initially there were no legal precedents for the application of the registration test and no experience in terms of the standard of evidence necessary to meet the requirements of the test."[37]. Three applications for review of registration test decisions have since been filed in the Federal Court which resulted in the Registrar amending the registration test procedures.[38]

2.48 Court decisions have also had an impact on the application of the registration test. The NNTT explains the impact of the High Court's decision in *Western Australia v Ward and others* (2002) 191 ALR 1 in its submission:

> [the case] clarified issues such as where native title is (or is not) extinguished, and described native title as a bundle of rights. … As a result of the [subsequent] consultation processes, the Registrar made minor amendments to the procedures.[39]

2.49 As of 31 October 2002, the Tribunal had made 788 registration test decisions. There were 74 applications awaiting a decision. In excess of half of the 788 decisions

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33 Submission No 22, p 29.

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

35 NNTT Submission No 22, p 29.

36 Submission No 22, p 29.

37 Submission No 22, p 29.

38 These are *Western Australia v Native Title Registrar and others* (1999) 95 FCR 93, *Queensland v Hutchison* (2001) 108 FCR 572 *and Risk v NNTT* [2000] 1589.

39 Submission No 22, p 35.

were made by the 30 June 2000, which was 21 months after the registration test took effect.[40].

Notification

2.50 The next step in the process is notification. The NNTT submission outlines that process.

> Once a claimant application has been assessed against the conditions of the registration test, the Registrar notifies the general public and people with an interest in the area covered by the claim.[41]

2.51 The NNTT further indicates that any person with an interest in the area may then apply to the Federal Court to become a party (or respondent) to the proceedings, entitling them to participate in the mediation and litigation of the application.[42]

2.52 The Registrar also has duties that relate to assisting people to prepare applications and other native title matters. These functions were expanded by the 1998 amendments to the Act. Under the current provisions of the Act, the Registrar:

> may assist people to prepare applications and accompanying material, and may help any parties at any stage in matters related to the native title court proceedings. The assistance may include providing research services and conducting searches of registers or other records of current or former interests in land or waters.[43]

2.53 The NNTT indicates that the Registrar's assistance functions pre the 1998 amendments, were limited to the provision of "assistance to those people preparing claimant, non-claimant and compensation applications"[44].

Indigenous Land Use Agreements

2.54 The 1998 amendments to the Act also defined a process to achieve Indigenous Land Use Agreements (ILUAs). The NNTT describe ILUAs as "voluntary agreements made between people who hold, or claim to hold, native title in an area and people who have, or wish to gain, an interest in that area"[45]. Further, its website offers the following as matters that ILUAs can be negotiated: native title holders agreeing to a future development, clarify how native title rights coexist with the rights of other

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40 NNTT, Submission No 22, p 31.

41 Submission No 22, p 35.

42 Submission No 22, p 35.

43 Submission No 22, p 14.

44 Submission No 22, p 14.

45 NNTT Annual Report 2001-2003, p 47.

people, provide access to an area, or provide for extinguishment of native title, or for compensation.[46]

2.55 Both the Tribunal and the Registrar can discharge functions in relation to ILUAs. The Tribunal can be asked to assist parties negotiating ILUAs, including the provision of mediation. The Registrar's functions include the notification and registration of ILUAs.[47]

2.56 Once an ILUA is registered under the Act, it has the effect as if it were a contract among the parties, and all parties are bound by it.

2.57 Between 30 September 1998 and 31 October 2002, there were 87 ILUA applications lodged - 56 had been registered and five withdrawn. At 31 October 2002, there were 26 ILUAs being processed. [48]

Other factors that influence native title

2.58 The Tribunal is a unique entity in that it is subject to external scrutiny from three separate organisations:

- the Tribunal is accountable to the Federal Court and must provide written reports to the Court setting out the results of each mediation.
- under the current Administrative Arrangements Order, the Commonwealth Attorney-General is the Minister administering the Act.[49] Accordingly, the Tribunal is part of the Attorney General's portfolio and must report to Government through annual reports and Portfolio Budget Statements.
- the Tribunal is required under Part 12 of the Act to be subject to the scrutiny of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund.

2.59 Other external variants which can cause unpredictability in the native title process include variation in state/territory based legislation and the evolving legal climate. Evidence given by the Tribunal noted the varying environment in which native title operates:

> One might be well down the track in a mediation and then a major High Court decision comes in, or there is a change of state government and a different policy, and suddenly what was heading towards a particular form

46 Available at NNTT website at http://www.nntt.gov.au

47 NNTT Submission No 22, p 99.

48 NNTT Submission No. 22, p 109.

49 Except for Division 6 of Part 2 and Part 11 (which relate to prescribed bodies corporate and representative Aboriginal/Torres Strait Islander bodies, respectively), which are administered by the Minister for Immigration and Multicultural and Indigenous Affairs.

of agreement is at the very least on hold while people reassess their position relative to the changing environment.[50]

State and Territory Government matters

2.60 The intention of the Act is to allow native title to be dealt with in a manner that is both flexible and appropriate to each State and Territory jurisdiction. Sections 26 and 43 of the Act allow States and Territories to develop their own native title regimes that apply instead of the right to negotiate - where the Commonwealth Minister determines that the regime complies with criteria set out in the Act. In addition, States and Territories may apply to the Commonwealth Minister to have certain procedures apply under that State/Territory law instead of the right to negotiate.

2.61 Three States have alternative regimes in operation:

- South Australia, which has three section 43 regimes;
- New South Wales, which has two section 26A determinations and two section 26C determinations; and
- Queensland, which has three section 26A determinations and four section 43 determinations.

2.62 However, from 1 July 2003, Queensland reverted to using the provisions of the Act for handling applications for mineral exploration and mining on land where native title has been claimed. This was due to the Federal Court ruling that the section 43 determinations made by the Federal Attorney General were invalid.

2.63 Evidence heard during the inquiry suggested that jurisdictions have been slow in committing resources to, and moving forward on, native title matters. There has also been a climate of uncertainty generated by evolving legal decisions with some jurisdictions reluctant to move forward on negotiations until pending decisions are known.

2.64 The Cape York Land Council, for example, stated that the Queensland Government was "not going to move on any claim in Cape York" until they had seen the impact of the Yorta Yorta and Ward decisions. [51] According to the Queensland Government, the post-Yorta Yorta "Guidelines to Connection" document, and the post-Ward decision registration guidelines had not yet been updated. Delays in Cape York claims were due to the State's new tenure resolution approach to a substantial claim that the State anticipates will have significant flow-on effects[52]. In addition, the North Queensland Aboriginal Land Council notes that the State only has limited

50 *Committee Hansard*, 20 June 2003, p 419.

51 *Committee Hansard*, 14 April 2003, p 79.

52 *Committee Hansard*, 15 April 2003, pp 203-207.

resources to deal with claims, and can only deal with two major claims at any one time. [53]

2.65 In Western Australia, the Bardi Jawi Native Title Claimant Group suggest that the State refused to agree on the parameters for negotiation prior to mediation as a stalling tactic to keep the matter out of court due to the potential impact of impending legal decisions.[54]

2.66 Prior to the Mabo decision and with the exception of the Northern Territory, Australian States and Territories had no legislation to deal with Indigenous land issues. Years have since been spent in developing capability and legal frameworks in the States so that native title claims can be effectively processed. Evolving legal developments have raised the bar for States struggling to implement their own regimes and deal with native title within their boundaries.

2.67 In addition, some States are working out their land tenure research arrangements which will help to inform parties whether or not native title has been extinguished by the types of leases granted on a parcel of land. Queensland is developing a position on the research of historical land tenure. They are considering the practicalities of looking over paper files going back 150 years in some cases, to understand the history of land tenure in claim areas.[55] During the inquiry, the President of the Tribunal noted that:

> most of the work on tenure research would be done by state government officials, … states are looking very closely at what sorts of resources might be required.[56]

2.68 He continued by indicating that initial assessments may not have been realistic. The enormity of the task was becoming evident and the President gave the example of a directions hearing in which a Judge of the Federal Court expressed some concern when the State government tendered evidence about the amount of work involved. The President indicated that the Judge recognised that it:

> was just very difficult and that the people—to paraphrase his words—needed to think laterally and strategically about dealing with these issues and not simply say it is going to take decades or 150 years to do the tenure research. That just was not practical. People had to find some other way of dealing with it.[57]

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

54 *Committee Hansard*, 11 June 2003, pp 305-309.

55 Executive Director, Native Title and Indigenous Land Services, Queensland Department of Natural Resources and Mines, *Committee Hansard*, 15 April 2003, p 206.

56 *Committee Hansard*, 27 March 2003, p 19.

57 *Committee Hansard*, 27 March 2003, p 19.

Legal decisions

2.69 Since the commencement of the Act, there have been a number of landmark decisions which have had an impact on the working of the Tribunal. These include:

- *The Wik Peoples v the State of Queensland and Others (1996)* 187 CLR 1;
- *Bodney v Westralia Airports Corporation Pty Ltd (2000)*180 ALR 91;
- *Commonwealth v Yarmirr(2001)* 168 ALR 426;
- *Little v State of Western Australia [2001]* FCA 1706;
- *Miriuwung Gajerrong - Western Australia v Ward and others (2002)* 191 ALR 1;
- *Members of the Yorta Yorta Aboriginal Community v Victoria (2002)* 194 ALR 538.

2.70 In each case, the major findings have resulted in refinement of the law and the work of the Tribunal, whether through direct application of the principles or through legislative amendments. This has brought greater clarity to the concept and definition of native title under the Act, which rights and interests of Indigenous people will be recognised as native title, and the principles in relation to the extinguishment or suspension of native title.[58]

2.71 The High Court's decision in *The Wik Peoples v the State of Queensland and Others; the Thayorre Peoples v the State of Queensland and Others (1996)* 187 CLR 1 was determined by a narrow majority of the Court (4-3) and concerned the status of pastoral leases with a suggestion that other types of leasehold property could be affected. In its decision the High Court said that native title could survive extinguishment in cases where land has been the subject of a pastoral lease, because the grant of a pastoral lease did not confer exclusive possession. Native title could exist alongside a pastoral lease, although it was subject to the rights of the pastoral lease holder. Pastoral leases were negotiated under Queensland statute, and the common law principles concerning leasehold did not apply.

2.72 In *Bodney v Westralia Airports Corporation Pty Ltd [2000]* 180 ALR 91, the Federal Court considered whether land acquired by a municipal body for an airport and subsequently acquired by the Commonwealth was subject to native title. The Court further considered whether the Crown owed a general duty to indigenous people in relation to dealings with land. The Court found that the acquisition by the Crown of an estate in fee simple extinguishes native title, just as a grant to any other corporation or person does so.

2.73 In the *Commonwealth v Yarmirr (2001)* 168 ALR 426 (the Croker Island case), parties sought to clarify:

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58 For a discussion of the impact of recent native title decisions, see Wright, L. NNTT Occasional Paper Series No. 1/2003, *Themes emerging from the High Court's recent native title decisions*, Perth, 2003.

- whether the Act provides the basis for recognition of native title beyond the limits of the Northern Territory (that is, to areas of sea and sea-bed); and
- whether the native title holders had exclusive native title rights and interests (including an exclusive right to fish, hunt and gather) in the waters and sea-bed in the claim area.

2.74 The Croker Island case was pursued as a test case to establish the fundamental question of whether native title may be recognised and protected in relation to Australia's coastal seas. The High Court confirmed that native title may exist below the low water mark. It also clarified that exclusive native title rights to the sea will not be recognised on the basis that those rights are inconsistent with the common law public rights to navigate and fish and the international right to innocent passage.

2.75 In the case of *Little v State of Western Australia (2001) FCA 1706*, the Court dismissed an appeal from two Tribunal determinations WO00/167 and WO00/351.[59] The grounds for appeal were failure to accord procedural fairness, and error in law in reliance on subsections 36(1) and (3) of the Act in both determinations. The Tribunal's finding was that all material to be submitted by the applicants was not received by the date of the set hearing, and that the Tribunal had an obligation to take all reasonable steps to make a determination as soon as practicable[60].

2.76 The Court dismissed the appeal, finding that the Tribunal member was entitled to expect parties to be ready to proceed before him when an opportunity of hearing is offered. The Court found that the Tribunal had relied on subsections 36(1) and (3) in error as they apply to an application for determination in relation to whether a future act may be done, rather than a decision upon an expedited procedure objection application. However, the Court found that the Tribunal has an obligation to act promptly (s109) and chose not to remit the matter unless the procedural fairness ground was made out.

2.77 The decisions of the High Court in *State of Western Australia v Ward & Ors*; *Attorney-General of the Northern Territory v Ward & Ors*; *Ningarmara & Ors v Northern Territory & Ors*; *Ward & Ors v Crosswalk Pty Ltd & Anor* 191 ALR 1 ("WA v Ward") were four appeals from decisions of the Full Court of the Federal Court. The issue was the determination of native title rights and interests under the Act in approx 8000 square km in the East Kimberley of Western Australia and into the Northern Territory. The Court held:

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59 Little and others had lodged an objection application to an exploration licence claiming that it would interfere with many Aboriginal sites of significance and constitute a major disturbance to the land and to the claimant's attachment (including spiritual attachment) to the land, in accordance with section 237 of the Act. Evidence presented by the objectors did not contain a statement of the nature or location of sites or areas of particular significance or of community or social activities that are likely to be interfered with. The applicant's solicitors were unavailable on the date of the hearing and sought adjournment, without success. The determinations were made on the papers.

60 NNTT. *Little and the State of Western Australia and Wildbeach Corporation P/L, application nos WO00/167 and WO00/351*.

- native title is a bundle of rights, parts of which can be extinguished.
- the granting of mining leases and pastoral leases, does not necessarily extinguish native title.
- in relation to mining leases, where the rights granted under those leases are not inconsistent with native title, the rights of the mining leaseholder will prevail over native title but will not extinguish it.
- pastoral leases also do not give a right of exclusive possession to the pastoral leaseholder. The High Court said (at 131) "To the extent that rights and interests granted by a pastoral lease were not inconsistent with native title rights and interests, the rights and interests under the lease prevailed over, but did not extinguish, native title rights"
- the evidence established no native title right to or interest in any mineral or petroleum.[61]
- The creation of public reserves in Western Australia does not necessarily extinguish all aspects of native title, although it is inconsistent with any native title rights to determine the use of that land.

2.78 In the *Members of the Yorta Yorta Aboriginal Community v Victoria (2002)* 194 ALR 538, the Yorta Yorta community had sought to overturn previous Federal Court findings that the claimants were unable to demonstrate their continued acknowledgement and observance of traditional laws and customs to the land claimed. The High Court subsequently found that the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs and that there was no evidence that they continued to acknowledge and observe those laws and customs. This had ramifications for section 223 of the Act, particularly in defining "tradition". The rights and traditions granted under "traditional" laws require a system which has existed continuously since sovereignty. If that system has ceased to exist, so will the rights and interests, and they cannot be revived.

Concluding comments

2.79 This chapter briefly examined the complex and dynamic legislative and caselaw environment which native title occupies, and within which the National Native Title Tribunal must operate. Over the last ten years, the Tribunal has sought to develop and define its role while discharging its statutory functions; the following chapters provide an assessment of the Tribunal's effectiveness in doing so.

61 High Court of Australia: *WA v Ward* Statement 8 August 2002 at www.austlii.edu.au/au/special/hca/ward statement html

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 No 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.

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 …"[1] 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"[2]. 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[3].

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'] "[4]. 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."[5]

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"[6]

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.[7]

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 meditation.

The Committee notes that the NLC acknowledged that the NNTT was acting within the terms of the Act when undertaking these tasks[8].

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[9]. 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[10].

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"[11] 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"[12] the information demonstrating the claimant group and the authorisation – "We do not go out and do the rep body's work a second time"[13].

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"[14] 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[15].

4.13 The NLC acknowledged that an objection received in the notification process leads to further inquiries.[16]

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[17]. 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

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."[18].

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."[19]. 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.[20]

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[21].

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 ATSIC, in its submission called on the Committee, to give "particular attention to the issue of resourcing"[22] 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.[23]

4.21 The ATSIC 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"[24]. 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.[25]

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"[26].

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"[27]. 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."[28]

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22 ATSIC 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."[29]. 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.[30]

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[31]. 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)"[32].

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[33].

4.28 The total appropriated for the NNTT in the same financial year was $33.4 million[34]. 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[35]. 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."[36]

4.31 The Committee is aware that ATSIC/ATSIS 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"[37].

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[38], 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 ATSIS/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

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 ATSIS, 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[39]. 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[40]. The recommendations for increased resources are not limited to funding but extend to "technical resources, qualified staff and access to relevant experts"[41].

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[42].

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[43].

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."[44]. 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.[45]

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[46].

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"[47]. Others members, including Bardie McFarlane working in Western Australia were also identified as extremely competent and of great assistance.[48]

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[49]. 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[50].

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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.

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.

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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

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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.

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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]

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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]

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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

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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

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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).

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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;

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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

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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.

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.[1]

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.[2]

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.[3]

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 it 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[4]. 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." [5]. 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[6].

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"[7] 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[8]. 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[9]. The *Native Title (Tribunal) Regulations 1993* impose the search fee in relation to the Native Title Register[10].

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[11].

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.[12]

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.[13]

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.

APPENDIX 1

LIST OF SUBMISSIONS

1. Eastern Yugambeh Native Title Group

1a Eastern Yugambeh Native Title Group

1b Eastern Yugambeh Native Title Group

2. Mr Peter Davison

3. The Cabinet Office, New South Wales Government

4. Australian Property Institute

5. Mr John Tapp

6. Northen Territory Cattlemen's Association Inc.

7. Mr Tony Tapsell

8. Central Queensland Regional Council

9. ACT Government

10. Department of Infrastructure, Planning and Environment, Northern Territroy

11. Mr John Wade

12. Indigenous Land Corporation

13. Mr Angus Frith

14. Shire of Flinders, Queensland

15. Dr James Weiner FASSA

16. Local Government Association of Queensland Inc.

17. Rio Tinto Limited

18. The Law Society of New South Wales

19. Western Australian Aboriginal Native Title Working Group

20. NSW Farmers Association

21. Central Land Council

22. National Native Title Tribunal

22a National Native Title Tribunal

23. South Australian Government

24. Queensland Government

25. Etheridge Shire Council, Queensland

26. Mr Simon Choo

27. Kimberley Land Council, Western Australia

28. Mr David Ritter

29. ATSIC

30. Ergon Energy, Queensland

31. Mineralogical Society of Queensland Inc.

32. Cape York Land Council

33. NSW National Parks and Wildlife Service

34. Arakwal Aboriginal Corporation, New South Wales

35. Northern Land Council, Northern Territory

36. Dyirbal Native Title Working Group, Queensland

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE AT PUBLIC HEARINGS

Thursday, 27 March 2003
Parliament House, Canberra

National Native Title Tribunal
Mr Graeme Neate, President
The Honourable Chris Sumner, Deputy President
Mr Christopher Doepel, Registrar

Friday, 28 March 2003
Parliament House, Canberra

Rio Tinto Ltd
Mr Bruce Harvey, Chief Adviser, Aboriginal and Community Relations

Aboriginal and Torres Strait Islander Commission
Mr Robbie Salee, Commissioner
Mr Brian Stacey, Manager, Land and Development Group

Monday, 14 April 2003
Pacific International Hotel, Cairns

Cape York Land Council
Mr Richie Ahmat, Executive Director
Mr Jim Brooks, Principal Legal Officer

Ergon Energy Pty Ltd
Mr Neil Webley, Distribution Property and Acquisitions Manager

North Queensland Aboriginal Land Council
Dr Ross Pearson, Acting Executive Officer
Mr Martin Dore, Principal Legal Officer

Bar-Barrum People
Mr John Wason

Mr Andrew Kerr, Senior Associate, MacDonnells Solicitors

Tuesday, 15 April 2003
Parliament House, Brisbane

Ghungalu Community
Ms Marie Kemp, Member
Ms Patricia Leisha, Member

Mineralogical Society of Queensland Inc.
Mr Anthony Forsyth, President
Mr Ronald Young, Vice-President

Eastern Yugambeh Native Title Group
Mr Wesley Aird, Member, Management Committee

Thanakwithi Angumothimaree Aboriginal Corporation
Ms Moira Bosen, Elder
Mr Mervyn Wales, Elder
Mr Charles Budby, Representative

Queensland Department of Natural Resources and Mines
Mr James McNamara, Executive Director, Native Title and Indigenous Land Services
Mr Andrew Luttrell, Director Policy, Native Title and Indigenous Land Services

Mr Peter Poynton (Private capacity)

Wednesday, 16 April 2003
Byron Bay Beach Resort, Byron Bay

Arakwal Corporation, Byron Bay
Mrs Linda Vidler, Deputy Chairperson
Mrs Yvonne Stewart, Treasurer and Acting Coordinator

Tuesday, 10 June 2003
Aurora Frontier Darwin, Darwin

Northern Land Council
Mr Ron Levy, Principal Legal Officer

Central Land Council
Mr David Ross, Director
Mr Gregory Borchers, Legal Officer

Wednesday, 11 June 2003
Mangrove Resort Hotel, Broome

Mr Angus Frith (Private capacity)

Kimberley Land Council
Mr Wayne Bergmann, Executive Director
Mr Stepher Walker, Acting Principal Legal Officer

Bardi Jawi Native Title Claimant Group
Mr Martin Sibosado, Spokesman

Thursday, 12 June 2003
Commonwealth Offices, Perth

Western Tenement Services, Perth
Mr Kenneth Street, Managing Director

Dr Brian Smith (Private capacity)

Broome Shire Council
Mr Gregory Powell, Chief Executive Officer

Pastoralists and Graziers Association
Mr John Clapin, Chairman, Native title Committee
Dr Henry Esbenshade, Director, Native Title

Western Australian Aboriginal Native Title Working Group
Mr David Ritter, Principal Legal Officer, Yamatji Land and Sea Council
Mr Cedric Davies, Future Act Officer, Yamatji Land and Sea Council

Friday, 20 June 2003
Parliament House, Canberra

National Native Title Tribunal
Mr Graeme Neate, President
The Hon Chris Sumner, Deputy President
Mr Christopher Doepel, Native Title Registrar
Mr Hugh Chevis, Director, Service Delivery
Ms Marian Schoen, Director, Corporate Services and Public Affairs
Mrs Ruth Wade, Member

APPENDIX 3

Acronyms and Definitions

ATSIC	Aboriginal and Torres Strait Islander Commission
ATSIS	Aboriginal and Torres Strait Islander Services
The Act	The *Native Title Act 1993*
CLC	Central Land Council
Expedited procedure	initiated by a notice under section 29 of the Act which activates the procedures provided for under section 237 of the Act by-passing the mediation/negotiations under the future act process
FLLAD	Family Law and Legal Division of the Attorney-General's Department
Future act	an act in relation to land or waters which affects native title or would affect native title if it were valid; and is not a past act (see sections 233 of the Act)
ILUA	Indigenous Land Use Agreement (see sections 24BA, 24CA, 24DA and 253 of the Act)
NLC	Northern Land Council
NNTT	National Native Title Tribunal
NTA	*Native Title Act 1993*
NTRB	Representative Aboriginal/Torres Strait Islander body as defined by section 253 of the Act.
PGA	Pastoralists and Graziers Association
Registration test	a set of conditions under the Native Title Act 1993 that is applied to native title claimant applications, If an application meets all the conditions, it is included in the Register of Native Title Claims, and the native title claimants then gain the right to negotiate,

	together with certain other rights, while their application is underway
Representative Body	Representative Aboriginal/Torres Strait Islander body as defined by section 253 of the Act.
section 29 notices	deals with a government giving notice of a proposal to do a future act (usually the grant of a mining tenement or a compulsory acquisition).
the Tribunal	National Native Title Tribunal
WAANTWG	Western Australian Aboriginal Native Title Working Group