# Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

## *OPERATION OF THE NATIVE TITLE ACT*

## Inquiry Into The Effectiveness Of The National Native Title Tribunal

Submission No:6

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Mr Peter C. Grundy
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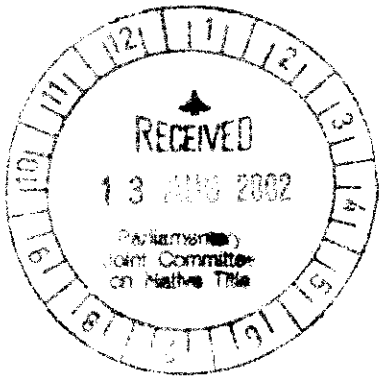
Dear Mr Grundy

**Re: <u>Submission to the Parliamentary Joint Committee on Native Title</u>**

Attached please find the Submission to the Parliamentary Joint Committee on Native Title on the Effectiveness of the National Native Title Tribunal, by the Northern Territory Cattlemen's Association.

Yours sincerely

BOB LEE
Executive Director
24 July 2002



# THE EFFECTIVENESS OF THE NATIONAL NATIVE TITLE TRIBUNAL

## Submission to the Parliamentary Joint committee on Native Title by the Northern Territory Cattlemen's Association

Comments have been sought by The Parliamentary Joint Committee on Native Title on the effectiveness of the National Native Title Tribunal (NNTT).

We note that The NNTT commenced operations in mid 1994 as a consequence of the enactment of the Native Title Act in 1993. The Federal Parliament considered that support would be required to administer many of the issues arising from the newly discovered common law concept of Native Title. There was also a view that widespread litigation on the nature and extent of Native Title might be avoided by mediated outcomes. It was thought that many issues might be settled by negotiations between the parties without resort to lawyers or the legal system.

The NNTT was given a range of functions, including the registration of land claims on behalf of Aboriginal applicants; and the maintenance of a database of claim details. Associated with these functions were the administration of non-claimant applications and the initial processing claims for compensation.

The NNTT also provides a mediation service for claimants and respondents.

In practice the NNTT has had to deal with issues never anticipated when the legislation was enacted. For example, it was never expected that there would be "all of country claims" sometimes covering hundreds of privately occupied properties, or that there would be "polygon" type claims principally associated with mining tenements. Nor was it expected that there would be overlapping ownership disputes between different Aboriginal claimants. A subsequent challenge to the authority of Tribunals (the Brandy Case) was upheld by the High Court of Australia preventing the NNTT from operating in a determinative role in native title issues.

The 1998 amendments to the Native Title Act addressed some of the shortcomings of the 1993 legislation but introduced additional complexity. The administration of the Act has now been placed under the oversight of the Federal Court. This has established an additional layer of bureaucracy that has further complicated the administration of individual claims. Because all claims are now matters before the Federal Court, each claim requires legal representation in Federal Court directions hearings. Thus the original objective of avoiding legal intervention in the mediation stage has not been achieved. If anything, the management of claims is now more complex and legally driven than if there had been no formal mediation stage.

It is within this context that we must examine the "effectiveness" of the NNTT. It is clear that the original role of the NNTT has been changed by circumstances that it could not have foreseen and many of the issues influencing the "effectiveness" of the NNTT are driven by issues outside the NNTT's control.

When the NNTT was established in 1994 it had nothing to build on other than the High Court judgements and the provisions of the Native Title Act. A staff and

administrative structure was assembled for tasks and policies that had never previously existed.

The NNTT is increasingly seen by pastoralists as a body that concentrates on claimant issues and largely ignores respondents. Periodic publications of the NNTT concentrate on news about claimants and their success in Native Title matters. It would be unusual to find any reference at all to landholders or to their views in national or state NNTT publications. The headline articles in the last two issues of "Talking Native Title" have been "The day justice came to a Kimberley school yard." (issue No.2) and "Mabo's sea change ten years on." (issue No. 3). It is our view that articles such as these have too much unbalanced political content to be coming from a statutory body with a role in mediating native title issues.

If "effectiveness" is to be measured on the basis of impartiality and assistance in the treatment of all parties involved in the claim procedure, then there is scope for considerable improvement.

The farm organizations and mediation representatives have had extensive personal contact with NNTT staff about claims management on a national basis. At this level the "effectiveness" of the NNTT is much better. NNTT staff at all levels are unfailingly polite and helpful and have a genuine desire to resolve difficult issues.

Until recently there had been very few Native Title claims on privately held pastoral land in the Northern Territory as compared with other adjoining states. Consequently there has not been much direct contact between the Northern Territory office of the NNTT and the pastoral industry. This situation is now expected to change as many more claims are referred to the NNTT for mediation. Such contact as has occurred in the past has been positive and friendly.

Respondents do understand that the NNTT is required to operate in a support role to claimants as well as providing a mediation service. But if the NNTT is seen to be concentrating too much on the interests of the claimants, then its role in mediation will surely be compromised. It is recognised that this dual role is a fault in the system rather than any shortcoming of the NNTT, but the potential for conflict of interest will be accentuated by any bias shown by NNTT staff.

Moreover, the NNTT seems to believe that its success can be measured in terms of the number of claims that can be successfully resolved under its mediation. To this end, it frequently publishes statistics updating the number of claims that have been settled. This viewpoint seems to take no account of the respective rights and aspirations of the mediation parties.

The main vehicle being promoted by the NNTT in the resolution of claims is the Indigenous Land Use Agreement (ILUA). In practice, an ILUA allows for a contract to be negotiated with Aboriginal people that can be registered with the NNTT, and is intended to be binding on all Aboriginals and other respondent parties to the claim.

But an ILUA does not address the underlying issue of Native Title, and does not resolve the long term rights and obligations that might be held by the respective

parties. There is also a fear by pastoralists that compliance by the Aboriginal signatories with conditions in the ILUA will be impossible to enforce.

The NNTT position on ILUAs was put forward at a substantial two-day NNTT sponsored conference in Brisbane in August 2001 entitled "Negotiating Country". Although well over 200 people attended this conference, only fifteen people were from the whole of the farming, mining, and fishing industries.

The conference was addressed by many people who earn their living from, or administer Native Title. In the main presentation, the NNTT said that the ILUA was its preferred mechanism for settling land claims. But landholders were hardly represented, and no respondents were invited to put their views. Only one comment about ILUAs was forthcoming from respondent groups in a later panel session. This came from a well known barrister who often represents people in the mining industry, and who concluded that ILUAs were time consuming and uncertain in outcome, and should be a very last resort in the management of Native Title matters. Many people now believe that ILUAs are just another mechanism to pressure people to take part in a process that they may not need, and may be actually contrary to their best interests.

It is in the area of mediation and resolution that we believe that the effectiveness of the NNTT is most wanting. We do not think that the number of mediated settlements should be any measure of NNTT "effectiveness". If there is to be any measure of "effectiveness" it should be the degree to which the parties are informed and serviced about their respective options and legal rights.

We believe strongly that the NNTT should take a neutral but facilitative role in the management of its Native Title functions, and should not be publicly advocating any preferred solution. A further important issue is that claimants and respondents are being required to mediate in situations where they do not know their respective rights and obligations. This situation is basically unfair.

The pastoral and mining industries represent the main commercial interface between Aboriginal people and the rest of the community, and have a right to expect fair and impartial treatment. The management of Native Title claims on the pastoral rangelands has the potential to become a real impediment to effective progress in reconciliation if it is not handled with fairness and sensitivity.

There is now an urgent need to restructure the whole Native Title claims process. The intervention of the Federal Court has introduced another level of administrative bureaucracy, but this has not corrected the underlying flaws in the system. The NNTT objective to resolve unsettled claims where parties are unaware of their basic rights, and where there are no clear precedents about the evidence required to prove Native Title, cannot be considered an "effective" policy. Moreover it should not be the place of the NNTT to be making judgements about how claims should be resolved.

There is an urgent need to overhaul basic structures and responsibilities under the Native Title Act, and to redefine the functions of the NNTT so that all parties can have equal confidence in the relevance of its activities.