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:20

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Our Ref: 552/02

5 November 2002

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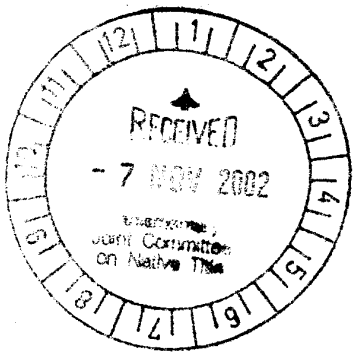

Dear Mr Grundy

Re: Submission to Parliamentary Joint Committee on the Effectiveness of the National Native Title Tribunal

Thank you for the opportunity to make a submission to the Joint Committee's inquiry into the *Effectiveness of the National Native Title Tribunal.*

NSW Farmers' Association represents the interests of approximately 700 agricultural respondents involved in 17 native title claims in New South Wales and Southern Queensland.

General Comments

Most of the Association's dealings with the Tribunal take place through the NSW/Act Office of the Tribunal in Sydney. We have found the staff and representatives of the Tribunal to be polite, friendly and helpful.

It should also be noted that the Tribunal's website and information sheets provide an excellent resource, particularly for those new to native title. The information is easily comprehended and accessible.

Impartiality

The *National Native Title Tribunal Annual Report 2001-2002* states that the Tribunal's single outcome is the recognition and protection of native title. This outcome is based upon one of the main objects of the *Native Title Act 1993 (NTA).*

Under s.78(1)(a) of the *NTA,* the Native Title Registrar, through the Tribunal's staff, may give assistance to prepare native title claimant applications.

It is against such outcomes and responsibilities that many respondents query the capacity of the Tribunal to conduct other aspects of its operations without questions arising as to its impartiality. This is particularly so in relation to mediation.

Another area in which perceptions of partiality may arise relates to the availability of background research conducted by the Tribunal into native title claims. The Association understands that the Tribunal routinely prepares and collates "research bricks" on specific native title claim areas. Presumably this research is a function arising under s.108(2) and (3) of the *NTA*.

These claim based "research bricks" do not appear to be equally available to claimants and respondents. The Association respects the culturally sensitive nature of certain information relevant to the native title process. However, this issue should not arise in relation to the vast bulk of information which, one would imagine, is already available on the public record.

Mediation

The role of mediator in native title matters is not an easy one.

One of the issues that arises for the Tribunal is that mediations appear to be conducted in a vacuum. It is common for connection material, or any substantive information supporting the claim, to be unavailable at the point at which mediations commence.

From the point of view of a respondent to proceedings, who does not necessarily accept that native title exists in relation to his or her interests, it is difficult to discuss matters detailed in s.86A(1) and s.225 without receiving basic information as to how his or her interests are affected by the claim.

The capacity of the Tribunal staff to conduct effective mediations in such a vacuum must be questioned.

The Association notes with approval the comments of the *Northern Territory Cattleman's Association Inc*, in its submission to this inquiry, that it is unfair that claimants and respondents be required to mediate in situations where they do not know their respective rights and obligations.

Notification Process

Under s.66(3) of the *NTA*, the Native Title Registrar is required to give notice containing details of the application to certain persons or bodies. This notification may be subject to s.66(5).

Section 66(3)(a)(iv) requires notification to any person who, when the application was filed in the Federal Court, held a proprietary interest, in relation to any area covered by the application. Such interests are those registered in a public register of interests in relation to land or waters maintained by the Commonwealth or a State or Territory.

In recent years the Association has established a sound working relationship with the Tribunal in relation to notifications. Forthcoming notifications in New South Wales are advised to the Association as a matter of course. Generally, in those claims that are likely impact upon a number of agricultural interest holders, the Association is invited by the Tribunal to take part in the public notification process. In such cases representatives of the Association join Tribunal staff in addressing public information meetings.

Through the combination of Tribunal and Association resources it is possible to reach many agricultural interest holders of the type contemplated by s. 66(3)(a)(iv).

However, the Association has concerns about native title claims notified in past years, and about interest holders who may have obtained interests since the notification. Of

particular concern is the likely disparity between the numbers of interest holders eligible to become parties and the number of who actually do become parties to claims.

It would be interesting to see statistics on the percentage of eligible interest holders who are parties to claim affecting their interests.

Becoming a party to a claim is an interest holder's chance to "have a seat at the table" in terms of the negotiations and legal proceedings affecting their interests. In the event of the claim proceeding to hearing, being a party gives an interest holder the opportunity to present evidence to the court to either show a claim in relation to their property cannot be sustained, or limit its application to their property.

In line with the discretion provided by s.78(1)(b) of the *NTA*, the Tribunal might give consideration to an information campaign aimed at those interest holders who are unaware of, or misinformed about, their rights in the native title process.

If, as the Association suspects, there is a large percentage of agricultural interest holders who are unaware of existing claims against their interests, and unaware of their rights in the face of those claims, then a retrospective notification and information process may be a valid area of operation for the Tribunal.

While it is the role of the Federal Court to decide under s.84(5) whether an interest holder may become a party to proceedings, the Association contends that natural justice would be served by ensuring that relevant interest holders are made aware of their right to apply.

Conclusion

The issues raised in this paper say more about the Tribunal's place in a complex and imperfect system than they do about any particular shortcomings of the Tribunal itself.

The varied roles and responsibilities allocated to the Tribunal do warrant further investigation. In a process that, at its end, fits within an adversarial system of law, even the perception of partiality on behalf of the Tribunal serves to undermine its effectiveness in the native title process.

Similarly, the capacity of the Tribunal to conduct meaningful mediations in a vacuum is limited. Whatever the reasons, be they lack of funding or cultural limitations, further investigations of the reasons underlying the inability of applicants to substantiate their claims in the mediation process is warranted.

Finally, consideration should be given to limitations upon the effectiveness of the Tribunal's notification process. An option such as a general, retrospective, information campaign for existing claims could be considered. All relevant interest holders should be given an opportunity to "have a seat at the table" in native title proceedings affecting their interests.

Yours sincerely,

Joan Waterford
Native Title Coordinator