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

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NATIONAL NATIVE TITLE TRIBUNAL

Supplementary Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

Inquiry into the Effectiveness of the National Native Title Tribunal

10 April 2003

NATIONAL NATIVE TITLE TRIBUNAL

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

Introduction

[1] This supplementary submission is made by the National Native Title Tribunal (NNTT) to the Committee in relation to the Committee's inquiry into the effectiveness of the NNTT.

[2] It is in addition to the main written submission lodged by the NNTT on 11 November 2002 and where appropriate refers to, but does not repeat, aspects of the main submission.

[3] This supplementary submission addresses some of the issues raised in other written submissions made to date to the Committee, and supplements evidence given by representatives of the NNTT at the public hearing in Canberra on Thursday, 27 March 2003.

[4] Some submissions express concerns with the role of the NNTT in ways that suggest dissatisfaction with aspects of the *Native Title Act 1993* (Cth) ('the Act'). To meet some of those concerns would require amendment of the Act. Such changes would require policy decisions by the Federal Government and are matters for the Government to consider. This submission proceeds on the basis that the current scheme will remain substantially as it is.

Statistical update

[5] At the Committee's first public hearing of 27 March 2003 in relation to this inquiry, NNTT representatives provided recent statistics in relation to registered indigenous land use agreements (ILUAs), native title determinations and native title claims. Those statistics are reproduced in the following figures for the information of the Committee:

Figure 1 – ILUAs registered as at 27 March 2003

	ILUAs Registered	Cumulative Total
1994/1995	0	**0**
1995/1996	0	**0**
1996/1997	0	**0**
1997/1998	0	**0**
1998/1999	1	**1**
1999/2000	5	**6**
2000/2001	16	**22**

2001/2002	27	**49**
2002/2003	25	**74**

Figure 2 – Determinations registered as at 27 March 2003

	Determinations Registered (NNTR)	Cumulative Total
1994/1995	0	**0**
1995/1996	0	**0**
1996/1997	2	**2**
1997/1998	2	**4**
1998/1999	5	**9**
1999/2000	2	**11**
2000/2001	18	**29**
2001/2002	14	**43**
2002/2003	2	**45**

Figure 3 – Registered native title claims

As at:	Number
30/06/1994	3
30/06/1995	15
30/06/1996	196
30/06/1997	259
30/06/1998	353
30/06/1999	396
30/06/2000	403
30/06/2001	471
30/06/2002	483
30/06/2003	500

Relevance and role of the National Native Title Tribunal

[6] *Issues:* Some submissions suggest that:

- more clarity is needed about the roles, functions and powers of NNTT members (ATSIC);[1]

- the NNTT's function of providing assistance to applicants to prepare non-claimant applications is not consistent with the recognition and protection of native title (ATSIC);[2]

- the NNTT should not be involved in the preparation of native title determination applications other than at the request of a native title representative body

[1] Submission no. 29, paras. [13] and [65]
[2] ibid, paras. [9], [47] to [50]

(NTRB) and it is inappropriate to assist people who are unwilling to accept or understand the need for NTRBs to prioritise claims (WAANTWG);[3]

- redefinition of the NNTT's function is required urgently so that all parties can have equal confidence in the relevance of its activities (NT Cattlemen's Association);[4]

- the intervention of the Federal Court has added an additional layer of bureaucracy that further complicates the administration of individual claims (NT Cattlemen's Association);[5]

- the NNTT is an extra layer on Federal Court and state mechanisms for handling native title, it is ineffective in terms of achievements and outcomes (CQRC);[6]

- Many issues affecting the "effectiveness" of the NNTT are outside of its control (NT Cattlemen's Association); [7] and

- the NNTT appears to measure its success in terms of the number of claims that can be successfully resolved under its mediation, and frequently publishes statistics, this takes no account of the respective rights and aspirations of the mediation parties (NT Cattlemen's Association).[8]

[7] *Response:* These submissions reflect a variety of perspectives on what the persons or bodies making the submissions consider the role of the NNTT is or ought to be. The variety of views also provide examples of the range of views that informed the policy development underpinning the Act as originally enacted and the 1998 amendments to it.

[8] The first four points summarised above relate directly to the roles, functions and powers of the NNTT. The roles, functions and powers of the members, Registrar and employees of the NNTT are found primarily in the Act. The NNTT was established under that Act. The Act prescribes what the NNTT is to do and provides guidance about how it is to perform its functions. The NNTT's main submission sets out the relevant provisions of the Act and discusses their operation in some detail. The NNTT does what the Parliament has directed it to do, and will continue to act in accordance with the statutory direction. To the extent that it has some discretion (e.g. in the types and levels of assistance it offers), the NNTT will continue to take into account a range of factors on a case by case basis.

[9] Whether the involvement of the Federal Court in the process has complicated the administration of individual claims is something in which opinions might vary. Importantly, the scheme for dealing with native title applications under the Act as originally enacted was constitutionally flawed[9] and the scheme as amended in 1998

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[3] Submission no. 19, paras. [5.21] and [5.26]
[4] Submission no. 6, final para.
[5] ibid
[6] Submission no. 8, passim
[7] Submission no. 6, p. 1, para. [7]
[8] ibid, p. 2, para. [6]
[9] See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 and *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151

meets the constitutional requirements. The relationship between the Court and the Tribunal has arguably improved many aspects of the previous scheme. For example, the supervision of mediation by the Court and the power of the Court to make orders to parties or to direct matters to trial have the potential to insert a level of discipline into the process that the NNTT (without such powers) could not do alone.

[10] The NNTT is not an extra layer in Federal Court and state mechanisms. Rather, it remains an integral part of a federal scheme that operates in each state and territory. No state or territory has a comprehensive scheme for dealing with native title issues. In South Australia where there is the most potential for dealing with native title issues under state laws, much of the work is done under the Act and, as appropriate, involves the NNTT. Those factors (and other matters dealt with in the Tribunal's main submission, annual reports and other documentation) demonstrate the need for the NNTT and its effectiveness in performing its functions under the Act.

[11] The costs of the process (such as Court fees and search fees) are outside the control of the NNTT. The aim of the mediation process is to either avoid or shorten the litigation process, with consequential savings in financial and other personal costs and the heightened prospects of outcomes that are acceptable to the parties rather than imposed on them by a Court. The NNTT's role is to assist parties reach such outcomes.

[12] As noted in the NNTT's main submission, its annual reports, and the evidence and statements of the President of the NNTT to the Committee in public hearings on 4 and 27 March 2003, many factors affecting the effectiveness of the NNTT are beyond its control.

[13] As the NNTT has also noted in its main submission[10] and elsewhere, there are various measures of its effectiveness, not all of which can be recorded in the outputs that are developed in accordance with the Commonwealth Government's accrual reporting requirements and are set out in the NNTT's annual reports. As the President of the NNTT stated in his overview in the Annual Report 2001-2002:

> A report of this type necessarily focuses on outputs and outcomes, structures and spending. But figures and graphs, outputs and process compliance statements only tell part of the story. People are involved at every stage – native title parties, individual landholders, government officers, company representatives, recreational land users, Tribunal members and employees and many others. Each will have a range of experiences of, and responses to, the native title regime. The ways in which that scheme influences the aspirations, expectations, and day-to-day lives of those affected by it is also important. They can only be glimpsed in an annual report of this nature.[11]

[14] Some of the variety of experiences (positive and negative) have been recorded in various NNTT publications including the two publicly released cassette tape recordings *Yarning about native title* (June 1999) and *Yarning about native title – Indigenous land use agreements* (January 2000).

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[10] Submission no. 22, e.g. paras. [14] to[17], [83] to [101], [249] to [282]

[11] Page 23

Resources

[15] *Issues:* Several submissions contend that NTRBs are inadequately funded in comparison to the NNTT, the Federal Court and ATSIC.[12] The KLC notes that the operations of separate parts of the native title system by different agencies (e.g. NNTT, Federal Court) has the effect of raising the workload and demand on resources for NTRBs.[13]

[16] Submitters' views vary on the way to deal with the imbalance in resource allocation. The NSW Cabinet Office suggests a redirection of funds from the NNTT to NTRBs.[14] Rio Tinto advocates an increase in operational funding for NTRBs.[15] The Central Queensland Regional Council suggests that the NNTT represents a duplication of resources and effort that could be applied instead to strengthen and streamline NTRBs.[16]

[17] *Response:* The NNTT has commented previously on the interdependence of elements of the native title system and, in particular, the importance of NTRBs within the system:

> Properly functioning representative bodies are important for the practical administration of significant parts of the Act, the resolution of claimant applications and the registration of future act outcomes and ILUAs. They are not just important for the people they represent. The Tribunal and other parties to native title proceedings or negotiations benefit from properly functioning bodies which assist in dealing with and resolving a range of native title issues.[17]

[18] The NNTT has also commented that the pace of the resolution of native title issues is influenced by the resources available to the parties to proceedings or negotiations. In its Annual Report 2000–2001, the NNTT observed:

> Since the later amendments to the Act commenced to operate on 1 July 2000, the primary (if not sole) source of funding for native title claim groups is the relevant native title representative body. Increasing attention is given to the demonstrably limited resources of the native title representative bodies to perform their functions under the Act.[18]

[19] The NNTT has contended in its main submission that the principal thrust of the Committee's inquiry into its effectiveness should centre on the efficacy with which the NNTT carries out its statutory functions.[19] Nevertheless, efficient and effective systems and processes within the NNTT will not compensate for the limited capacity of key institutional participants to be fully engaged in various native title processes. It

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[12] Rio Tinto, submission no. 17, para. [2.1]; ATSIC, submission no. 29, paras. [17], [18], [84 to 90]; WAANTWG, submission no.19, paras. [4.29] to [4.36]; and KLC, submission no. 27, pp. 1-2
[13] Submission no. 27, p. 2
[14] Submission no. 3, p. 1
[15] Submission no.17, para. [2.1]
[16] Submission no. 8, p. 1
[17] NNTT Annual Report 2000–2001, p21; NNTT Annual Report 2001–2002, p17
[18] Page 27
[19] Submission no. 22, para. [11]

is particularly important that NTRBs have sufficient resources to represent the interests of Indigenous people in native title and related proceedings and negotiations.

[20] The NNTT submits that correcting any imbalance in resources between it and the NTRBs is not simply a matter of redirecting NNTT resources to NTRBs. Inherent in this suggestion is a risk that an NNTT with reduced resources might not be capable of dealing with additional workload generated by an enhanced NTRB capacity. Moreover, under the current Act the NNTT will continue to be requested to perform functions that some submitters consider 'duplication' of the role of NTRBs. For example, many parties to future act proceedings would still request the NNTT to carry out mediation under s.31 of the Act. Similarly, as outlined in the part of this supplementary submission dealing with intra-Indigenous disputes, the NNTT could be directed from time to time by the Federal Court to mediate between competing claimant groups, irrespective of earlier NTRB dispute resolution efforts.

[21] Under the published forward estimates, the NNTT's resources levels are adequate for the anticipated workloads. The NNTT would be capable of dealing with workloads at the higher levels projected two years ago in budget planning, but which have not eventuated due to general downturns in workload arising, for example, from parties' anticipation of, and adjustment after, the major High Court native title decisions.

[22] Many NTRBs derive their funding from a number of sources, including ATSIC, state governments and commercial project proponents. It is not the role of the NNTT to judge whether particular NTRBs are appropriately resourced or are applying their resources to essential priorities. That judgement is for ATSIC and the responsible Minister. Nevertheless, the NNTT submits that the Federal Government needs to examine the level of resources available for NTRBs and, if necessary, increase them to ensure an appropriate relativity of resources between the various institutions within the native title system.

Disputes among Indigenous people

[23] *Issues:* Two broad themes are apparent in a number of submissions to the Committee in relation to the NNTT's role in disputes among Indigenous people. The first is an acknowledgement of the positive role that the NNTT can perform in helping parties to resolve those disputes. The South Australian Government has noted that in that state the NNTT could assist in the resolution of overlaps and authorisation issues within claimant groups.[20] The NSW Cabinet Office welcomes the NNTT's ability to resolve internal disputes among Indigenous parties.[21] Rio Tinto suggests that resources should be provided to the NNTT and NTRBs to resolve overlapping claims and proposes amendments to the Act to enable the NNTT to mediate in these circumstances.[22]

[24] The second theme centres on the desirability of NTRBs carrying out dispute resolution among Indigenous people, consistent with the conferral of additional functions on them under the amendments to the Act that came into effect on 1 July

[20] Submission no. 23, p. 13
[21] Submission no. 3, p. 1
[22] Submission no. 17, para. [3.6]

2000, e.g. s.203BF. ATSIC questions whether the NNTT has defined a role for itself in seeking to resolve intra-Indigenous disputes, as dispute resolution is the function of NTRBs under the Act.[23]

[25] The WAANTWG notes that some NTRBs see the NNTT as having a useful role in intra-Indigenous dispute resolution as it provides a level of formality to assist applicants to focus on the issues. The WAANTWG notes however that NTRBs also believe that with more resources they could resolve these issues themselves.[24]

[26] ATSIC asserts that it is preferable to build the capacity of NTRBs to resolve intra-Indigenous disputes and as far as possible NTRBs should fulfil that function.[25]

[27] *Response:* In its main submission, the NNTT noted that, because the resolution of overlapping applications is often a threshold issue to the determination of native title applications by consent, there may be related questions about whether the matter is best dealt with by:

- the NTRB exercising its statutory dispute resolution function; or
- mediation conducted by the NNTT at the direction of the Federal Court.[26]

[28] The NNTT notes the dispute resolution function for NTRBs is set out in s.203BF of the Act. Sub-section 203BK(3) of the Act provides that a representative body may be assisted by the NNTT in performing its dispute resolution function but only if the NTRB and NNTT have entered into an agreement under which the NTRB is liable to pay the NNTT for the assistance. To date the NNTT has not entered into such an agreement to assist an NTRB in the carrying out of this function.

[29] The purposes of mediation of claimant applications by the NNTT are set out in s.86A(1) of the Act. The purposes include, if native title exists or existed in relation to the area of land or waters covered by the application, to assist the parties to reach agreement on:

- who holds or held the native title;
- the nature, extent and manner of exercise of native title rights and interests in relation to the area;
- the nature and extent of any other interests in relation to the area;
- the relationship between native title rights and interests and other interests;
- whether native title rights and interests confer possession, occupation, use and enjoyment of the area on the native title holders to the exclusion of all others.

[30] The NNTT may mediate with one, all or some of the parties to an application.

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[23] Submission no. 29, paras. [6], [53 to 54]
[24] Submission no. 19, paras. [5.11] to [5.12]
[25] Submission no. 29, paras. [7], [53 to 54]
[26] Submission no. 22, para. [235]

[31] Within this statutory framework, it is within the Federal Court's discretion to refer an application to the NNTT which involves a dispute between two or more groups of Indigenous people about who holds native title, what the native title rights and interests are, and whether the native title rights and interests of one group are exclusive. Sometimes the Court gives a specific direction that mediation be carried out among Indigenous parties. The NNTT is not purporting to replace NTRBs by carrying out their functions under s.203BF of the Act. Rather, it is responding to the directions of the Federal Court which, in its discretion, considers that NNTT mediation would assist in a particular case.

[32] The Court's reasons for directing that the NNTT carry out mediations among Indigenous parties are based on its assessment of the relative positions of the parties in the application. Whether or not an NTRB has intervened at an earlier stage to attempt mediation amongst Indigenous parties may be, but is not necessarily, relevant to the Court directing the NNTT in this way. In many instances, an NTRB has requested that the NNTT carry out mediation amongst Indigenous parties and the Court has made orders accordingly. In these circumstances, the NNTT works very closely with NTRBs in connection with such meetings. With rare exceptions, the NNTT would only convene such meetings where it had the support and co-operation of the NTRB.

[33] It is also important to note that not all applications for determination of native title are made by claimants who are represented by an NTRB. Many applications in the system are represented by organisations or bodies other than an NTRB, or are prosecuted by unrepresented applicants. In some cases, the NTRB represents people other than the claim group. In these circumstances, an NTRB may find it difficult to mediate among Indigenous parties and that situation may lead to the Court to order mediation by the NNTT.

[34] As a general principle, the NNTT supports the role of the NTRBs in intra-Indigenous dispute resolution as envisaged by s.203BF. The NNTT's mediation function is greatly assisted by having Indigenous parties come to proceedings with outstanding issues settled. The NNTT notes, however, that some NTRBs see their capacity to carry out intra-Indigenous dispute resolutions as depending on the level of resources available for them to do so.

[35] However, even with net additional resources for NTRBs to carry out dispute resolutions functions, it is likely that the Federal Court would still direct the NNTT to mediate among Indigenous parties in many instances. There is no restriction in the Act as it is currently structured to prevent the Court from making such an order.[27]

Relationship with clients/stakeholders

Perceptions of pro-Indigenous bias

[27] The Federal Court is not expressly prevented from mediating such matters under the *Federal Court of Australia Act 1976*, although one judge has expressed the opinion that it would not be appropriate to utilise the powers in that Act when there are specific powers on the same subject in the *Native Title Act*: see *Adnyamathanha People v South Australia* [1999] FCA 402 at [29] per O'Loughlin J.

[36] *Issues:* Perceptions of a pro-Indigenous bias are apparent in some of the submissions lodged with the Committee.[28] Two main strands to this perception are apparent in the submissions. One is the perception that the NNTT concentrates excessively on claimant issues and ignores respondents, eg in carrying out mediations or in the content of its publications.[29] Another strand emerges in relation to the provision of assistance under s.78 of the Act.[30]

[37] *Response:* The NNTT appreciates the perceptions of some stakeholders that its shows a bias towards Indigenous parties in the native title system. These perceptions may be formed on the basis of a number of factors, including:

- the purpose of the NNTT, in particular its role as a mediation body in a statutory scheme which has as one of its objectives the recognition and protection of native title;

- the performance by the Registrar and NNTT employees of their statutory functions to assist applicants in the making of claimant applications, and the many instances of dealing with disputes among Indigenous parties;

- the NNTT's practice of dealing with Indigenous applicants and state and territory governments as the constant respondents in all native title determination applications, to settle procedural or threshold issues before mediation can continue; and

- the NNTT's 'bias' towards mediation as the preferred process for settling native title applications, rather than the adversary process of litigation.

[38] In its main submission, the NNTT made reference to the need to conduct its business and to be seen to be conducting its business in an impartial manner.[31] Managing stakeholders' perceptions of the NNTT's activities is a major task for the NNTT. The NNTT agrees that some of its publications have focused strongly on the achievements of Indigenous Australians in native title processes. In adopting this approach, the NNTT has sought to demonstrate that the native title system can deliver outcomes. As noted above, one of the objects of the Act is the recognition and protection of native title.

[39] Each determination of native title is a significant outcome for Indigenous Australians. The NNTT has taken the view that these determinations should be marked by an appropriate media release or article in one of its regular publications. Nevertheless, the NNTT submits that across a range of its recent publications, e.g. *Talking Native Title* and the Annual Report, and in the graphics and text on its new website, there is an even-handedness in the depiction of the NNTT and its client groups and a range of native title issues and outcomes of the various processes.

s.78 Assistance and research backgrounders

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[28] South Australian Government, submission no. 23 at p. 14; Northern Territory Cattlemen's Association, Submission no. 6, p. 2; NSW Farmers Association, Submission no. 20, pp. 1-2
[29] Submission no. 6, p. 1–2
[30] Submission no. 20, p. 1–2
[31] Submission 22, para. [44]

[40] *Issue:* The New South Wales Farmers Association observed in its submission that given the NNTT's provision of assistance under s.78 to assist applicants, many respondents query the capability of the NNTT to conduct operations impartially, particularly in mediation.[32]

[41] *Response:* In its main submission, the NNTT has provided statistics on provision of assistance in the reporting period 2001-2002.[33] It noted that during the 2001-2002 reporting period, assistance to applicants amounted to 19% of total requests for assistance. This was a decrease from the two years previous, when the NNTT recorded that applicants made up 29% of the total requests for assistance. The NNTT draws attention once more to this statistic to dispel the notion that overt bias is present in the provision of assistance under s.78. In 2001-2002, some 80% of assistance provided under that section was for non-Indigenous parties to native title proceedings.

[42] Again, it is a question of parties' perceptions as to where the NNTT is applying its efforts and resources. It falls to the NNTT to inform stakeholders of the factual situation to dispel misconceptions.

[43] *Issue:* The New South Wales Farmers Association also commented that the NNTT routinely prepares 'research bricks' but these do not appear to be equally available to claimants and respondents.[34]

[44] *Response:* Research papers or backgrounders are usually commissioned by the NNTT members as a tool to assist in resolving issues within claim groups, e.g. overlaps or disputes within the claim group itself, usually over principles of descent. Sometimes these backgrounders are requested as a resource to assist an NTRB in its research into the background of a claim.

[45] Decisions about the distribution of research backgrounders are made by the NNTT member who commissioned the report. The backgrounders have been distributed to claimants or their representatives and the relevant state and territory governments. A bibliography of each report is posted on the NNTT's website. The NNTT's Library has to date received one request from a party who was neither an applicant nor a representative of a state government to examine one of the backgrounders. That party was advised that the particular backgrounder was not a public document.

[46] In light of the above submission, the NNTT is reviewing its general practice with regard to the broader circulation of research backgrounders. In the meantime, it is open for respondent parties to a native title claimant application to approach the relevant member to request wider distribution of any backgrounder prepared for a particular application.

Mediation skills and approach

Introduction

[32] Submission no. 20, p. 1
[33] Submission no.22, para. [90] and figure at p. 20
[34] Submission no. 20, p. 2

[47] In its main submission, the NNTT has provided a comprehensive overview of its practice and the factors affecting mediation.[35] Many submissions lodged with the Committee deal with the NNTT's capacity and skills to carry out successful mediation.[36] The NNTT acknowledges there are various views and concerns about how mediation should occur and the role of the NNTT.

[48] Mediation in the native title area poses a range of challenges which are found together in few, if any, other types of mediation. Approaches to mediation that have been developed and refined in other areas have to be adapted to the circumstances of native title. Mediation practice is still developing and its dynamics are yet to be fully explored. The NNTT has devoted considerable attention to examining and articulating the fundamental principles underlying NNTT-assisted agreement-making.

[49] Members of the NNTT are appointed by the Governor-General for a period not exceeding 5 years. Although the NNTT is an administrative body and members do not exercise judicial power, they have in the performance of their duties, the same protection and immunity as a Justice of the High Court (s.181). As noted in its main submission,[37] the Act gives members considerable procedural discretion in the mediation of particular applications. Members develop a framework or process for the mediation of each application having regard to the relevant circumstances. In the exercise of their statutory powers members act independently according to law. They are not subject to direction by the President in the manner in which they exercise those powers.

[50] On appointment, members can access professional mediation training (e.g. LEADR) and attend cultural awareness training.

[51] Within the prerogative of each member's performance of their independent statutory functions, there is an adherence to some fundamental principles. These principles underlie all aspects of NNTT's mediation practice. The application of these principles in a consistent manner is the basis of the NNTT's impartiality.

[52] It should be noted that while such principles remain constant, the practical steps in attempting to implement them will vary in accordance with the particular mediation context, and may be influenced by such factors as the number of parties involved, the subject of the negotiations, and any timeframes within which issues need to be resolved.

Principles of mediation

[53] In performing its functions and exercising its powers, including in relation to mediation, the NNTT:

- should act consistently with the provisions of the *Racial Discrimination Act 1975 (*Cth); s.7(2)(a);

[35] Paras. [152] to [248]
[36] WAANTWG, Submission no. 19, para. [5.6]; ATSIC, Submission no. 29, para. [11]; Rio Tinto Submission no. 17, para [6.5]; Queensland Minister for Natural Resources and Minerals, Submission no. 24, p1
[37] Submission no. 22, paras. [194] to [197]

- must pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way: s.109(1);

- 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 involve: s.109(2); and

- is not bound by technicalities, legal forms or rules of evidence: s.109(3).

[54] As a general rule, mediation is conducted on a private, without prejudice basis. In the case of court-ordered mediation this is done in accordance with the Act: ss.135A(4), 136B, 136C. In any other case it is done by agreement of the parties. In certain circumstances:

- the mediator may prohibit or restrict the disclosure of certain information given, statements made, or the contents of documents produced at a mediation conference: s.136F; and

- the mediator may direct that only one or some of the parties may attend, and be represented, at a mediation conference, and may exclude a party or representative from a mediation conference: s.136B.

[55] Mediation is not an adversarial or litigious process. Although it occurs within a legal framework, and usually under the supervision of the Federal Court, it is a process independent of litigation. The NNTT has considerable discretion in relation to the mediation of each application and, for example:

- may hold such conference of the parties or their representatives as it considers will assist in resolving the matter: s.136A(1); and

- may meet directly with parties in the absence of any representative: s.136A(1), s.136B(2), s.136B(3).

[56] Although, under the Act, the NNTT is responsible for the process of the mediation, the NNTT acknowledges that the outcomes of the mediation belong to the parties. Accordingly, both the process and the outcomes of the mediation requires the commitment of the parties to the process and appropriate conduct during it.

[57] The NNTT recognises that sustainable agreements depend on durable relationships.

[58] Where the parties agree that native title exists, the emphasis of the mediation will be outcomes that:

- ensure the recognition and protection of native title: ss.3(a), s.225(b);

- are practical, workable and sustainable; and

- where the native title rights are not exclusive, encourage durable relationships that are necessary for coexistence of the various rights and interests that exist in relation to the land or waters: s.225(d).

[59] Where the parties agree that native title existed or agree that determining or recognising the existence of native title is not necessary for the purpose of the particular outcome, the emphasis of the mediation will be on outcomes that:

- are practical, workable and sustainable;
- encourage durable relationships; and
- deal with the issues that the parties agree need to be resolved by the agreement.

[60] The NNTT acknowledges and respects that parties bring their rights to the mediation. Those rights form part of the context for the mediation.

[61] The NNTT acknowledges and respects that parties bring a range of interests to the mediation. These interests arise from and may include:

- interests that are or may be recognised at law, such as interests in relation to land or waters;
- use of the land or waters by a party;
- community or group interests; and
- issues of concern.

Interests are not only or even primarily individual interests, but arise both from membership of a particular social group and from individual positions. The interests of parties will have historical, political, economic, cultural and social aspects. The interests of parties may include:

- the separate interests of an individual person, organisation, corporation or government;
- interests that various individual parties or groups or parties have in common; and
- the collective interests of a group or community.

Issues raised concerning mediation

[62] *Issue:* ATSIC has questioned the need for a mandatory mediation process and the effectiveness of a single mediation body on the basis that the effective functioning of the process is not promoted by restricting mediation to a single body.[38]

[38] Submission no. 29, paras. [14], [67 to 72]

[63] *Response:* The only process where mediation by the Tribunal is mandated by the Act is in relation to native title applications (i.e. native title determination applications, compensation applications and revised native title determination applications). As a general rule, the Federal Court must refer every application to the NNTT for mediation as soon as practicable after the end of the notification period (s.86B(1)). The Court may, on the application of a party to the proceeding *or* of its own motion, make an order that there be no mediation in relation to the whole of the proceeding *or* a part of the proceeding (s.86B(2)). In certain specified circumstances the Court must order that there be no mediation in relation to the whole or a part of the proceeding (s.86B(3)). The Act sets out the factors that the Court is to take into account in deciding whether to make an order that there be no mediation in relation to the whole or part of a proceeding (s.86B(4)). Although experience to date shows that the Court usually refers native title applications to the NNTT for mediation, there are instances where, in light of local circumstances, the Court has delayed referring applications to the NNTT.

[64] The Court may, at any time in a proceeding, refer the whole or a part of the proceeding to the NNTT for mediation (s.86B(5)). This can occur, for example, when a matter is part-heard before the Court and may lead to a mediated outcome rather than a judgment of the Court. The NNTT's assistance in such circumstances has been acknowledged by the Court:[39]

[65] The NNTT has other mediation roles. In particular, it:

- *must* mediate where a negotiation party to future act negotiations requests the NNTT to do so (s.31(3));

- *may* mediate where people who want to negotiate an ILUA request the assistance of the NNTT and the NNTT agrees to provide such assistance (ss.24BF, 24CF, 24DG);

- *may* mediate where people wish to make an agreement about the exercise of rights of access to certain areas for traditional activities (s.44B(4)); and

- *may* mediate where all of the persons involved in a dispute about a right of access to certain areas for traditional activities request the NNTT to mediate (s.44F).

[66] In those circumstances, any mediation by the NNTT is done at the request of the parties and is not something imposed on them.

[67] It should also be noted that others have statutory mediation functions in relation to native title matters:

- NTRBs in relation to disputes between their constituents about the making of native title applications and the conduct of various consultations, mediations, negotiations or proceedings (s.203BF); and

[39] *Nangkiriny on behalf of the Karajarri people v Western Australia* [2002] FCA 660 per North J at paras [8], [21]

- the Federal Court under the *Federal Court of Australia Act 1976*.[40]

[68] Parties in negotiations about a range of native title issues are also free to engage other mediators (if any) as they consider appropriate in relation to those negotiations.

[69] In summary, the Act and practice show that there is not a mandatory mediation process, nor is the NNTT the only body that can provide mediation assistance.

[70] The NNTT submits, however, that there is demonstrable benefit in having a statutory body with the range of mediation functions conferred by the Act and a range of experience and expertise available to it to deal with native title matters. It considers that the NNTT's role in discharging those functions has proved beneficial to the parties and hence to the resolution of a wide variety and large number of native title issues.

[71] *Issues:* Submissions have reflected a range of responses to the practice of mediation by the Tribunal. For example, it was suggested that:

- the Tribunal could play more of a facilitation role rather than strictly mediation (SA Government);[41]

- mediation should be structured so that non-native title parties are involved at the outset and their views and interests are accommodated at that stage rather than being excluded by governments and claimants until in-principle agreement is reached (Rio Tinto);[42]

- there is frequent scheduling of mediation meetings without regard to the capacity of NTRBs to take part (ATSIC);[43]

- mediation of claims in Western Australia requires respected and articulate people who can drive the discussions, force people to focus on the relevant issues and push the parties to reach an agreement (WAANTWG);[44]

- many issues can be resolved by agreements and to concentrate on claims unnecessarily limits resolutions, particularly where a state government's approach is relationship centred and goes beyond matters under the Act and where parallel mediations are conducted as a result (SA Government); and[45]

- mediation should not be mandatory at a stage when issues and facts are unknown to the parties, the Act should be amended so that there is no mandatory process under s.61 (CLC).[46]

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[40] Note, however, that one judge has expressed the opinion that it would not be appropriate to utilise the powers in that Act when there are specific powers on the same subject in the *Native Title Act*: see *Adnyamathanha People v South Australia* [1999] FCA 402 at [29] per O'Loughlin J.
[41] Submission no. 23, pp. 10-13
[42] Submission no. 17, paras. [2.5] and [5.12]
[43] Submission no. 27, para. [6.4]
[44] Submission no. 19, para. [5.8]
[45] Submission no. 23, pp. 10-11
[46] Submission no. 21, p. 2

[72] These submissions demonstrate a range of views about the appropriate types of mediation that the NNTT might conduct (from facilitative through to highly directive) and other matters which relate to the programming and conduct of the mediation of individual applications.

[73] The role of the NNTT in the mediation of claimant applications is described in some detail in the NNTT's main submission.[47] It is not necessary to repeat what is written there. For the purposes of this supplementary submission, the Committee is invited to note that:

- each application that is referred to the NNTT for mediation will have particular features related to such factors as the number of parties, the size of the area(s) covered by the application, the types of tenures covered by the application, the political climate, whether the parties do or do not know each other, cultural differences between the parties, tensions between the parties, the range of matters in issue, disputes between Indigenous people (e.g. evident by overlapping claimant applications), the capacity of each party to participate in the mediation process, power imbalances between the parties, and the degree to which the Federal Court is supervising the progress of mediation and making orders in relation to the progress of mediation;

- each application will be different from each other application and some features may change in the course of progressing from referral to resolution; and

- NNTT members develop and direct the implementation of mediation programs for the applications for which they have carriage, recognising that there is no 'one size fits all' approach to the mediation of applications generally and conducting the process having regard to relevant factors.

[47] Submission no. 22, paras. [176] to [283]

Summary

[74] It remains a member's prerogative to act as he or she sees fit in managing a mediation in accordance with the requirements of the Act and fundamental principles underlying the NNTT's mediation process. Not all parties' expectations in the management of a mediation will be capable of being met. In fact, the process of managing party behaviour to ensure that power and resource imbalances are moderated as much as possible to enable effective mediation to occur may antagonise certain parties and lead to their dissatisfaction with parts of the process.

[75] The NNTT will continue to refine its principles and practices for carrying out mediation. It will also identify core elements of its mediation principles and practices with the view to designing a suitable syllabus for advanced training of its members and case managers. The syllabus will take into account the unique multi-party, cross-cultural interest-based mediation that occurs in the native title context.

Responding to clients' needs

(a) Assistance and information

[76] *Issues:* Several submissions commented on the nature and quality of geospatial information provided by the NNTT.[48]

[77] Underlying these submissions is a desire for clients to be able to obtain access to specific, accurate information in relation to native title claimant applications and ILUAs.

[78] *Response:* The quality of geospatial products provided by the NNTT is determined to a large extent by the quality of information that can be obtained from state and territory government tenure information custodians and other sources. There is an element of circularity in the NSW Cabinet Office's comment that the NNTT's ability to search registers is limited to local government areas and not specific parcels of land that may be included in a minerals title, which results in the provision of unwanted information.[49]

[79] The NNTT has faced this challenge in several states, including NSW, in attempting to obtain comprehensive and accurate information about land tenure for the purpose of notifying of claimant applications. The more difficult that information is to obtain, the poorer the quality of the NNTT's geospatial products.

[80] The NNTT seeks to make geospatial information and data available to the public in as accurate a manner as possible. The NNTT has recently introduced Giro II which is an internal tool to assist members and case managers. Giro II brings together information in four jurisdictions - Western Australia, Northern Territory, Victoria and Queensland - to show the precise boundaries of a native title application or ILUA together with the underlying land tenures (excluding freehold lands). While it

[48] NSW Cabinet Office, submission no. 3, p. 1; Rio Tinto, submission no. 17, paras. [2.16] and [8.8]; Queensland Minister for Natural Resources and Mines, submission no. 24, p. 4.
[49] Submission no. 3, p. 1

provides a range of information for other states, the system does not show the underlying land tenures as this information is either not yet available from those states or is excessively priced. The Commonwealth released its policy on pricing and access to spatial data in September 2001 with the objective of making spatial data readily available and affordable, however, the states are yet to follow suit.

[81] Members and staff working in the NNTT's regional registries can obtain access to Giro II to assist in responding to inquiries from parties to native title proceedings and negotiations. The NNTT wishes ultimately to provide this information to the public on the Internet but realises that the service available in respect of different states and territories may differ.

[82] The NNTT commenced providing national and state maps depicting the geographic extent of native title matters with the launch of its new website in October 2002. These are updated quarterly and are rated in the top category of information accessed and downloaded from our website.

[83] The NNTT has noted comments in the submissions that its website should be improved so that information on future act determinations and the status of native title applications is accessible. All future act determinations are on the NNTT's website. While some information on native title applications is currently on the website, the NNTT plans to improve the overall quality and relevance of that information for the public.

(b) Registration and notification

Registration of claimant applications

[84] *Issue:* The NNTT notes the comments made by Rio Tinto that the registration test should be concluded within shorter timeframes.[50]

[85] *Response:* In its main submission, the NNTT dealt with quantitative issues, including timeframes, for applying the registration test to native title claimant applications.[51] As outlined in the NNTT's main submission, the administration of the registration test is divided into two streams. One stream deals with claimant applications that are affected by a s.29 notice that has been issued by a state or territory government. The timeframes for application of the registration test in these cases are usually tight, often less than a month after the lodgement of a claimant application in response to a s.29 notice.[52]

[86] *Issue:* Two submissions lodged with the Committee suggest that the registration test, to be properly applied, requires the Registrar to carry out inquiries that he is not in a position to make. Dr James Weiner submits that the registration test is not set up to properly verify the bona fides of the claim groups, which is particularly problematic in the future act area, so that 'spurious' claims can proceed through registration only to surface years later in the course of mediation.[53] Dr Weiner

[50] Submission no. 17, paras. [3.7] to [3.11]
[51] Submission no. 22, paras. [132] to [145]
[52] ibid, para. [140]
[53] Submission no. 15, p. 4

suggests that NTRBs are better placed to assess the legitimacy of a claim group and that a claimant application should not be lodged without NTRB approval.

[87] The WAANTWG submits that the registration test requires the Registrar to embark on an inquiry and assessments of considerable anthropological and linguistic complexity which he is not equipped or in a position to successfully undertake.[54] The WAANTWG notes that the effect of s.24FA(1) deprives native title holders of the protection of statutory and common law procedural rights in relation to future acts. A decision not to register a claim may result therefore in the determination of rights.[55]

[88] *Response:* While the precise policy and legislative settings for the registration test are a matter for Government and the Parliament, the NNTT notes that the purpose of the registration test for claimant applications is to provide a screening process against a series of criteria. The evidentiary threshold for several elements of that test is set at an administrative standard, requiring the Registrar to be satisfied that certain conditions have been fulfilled.[56]

[89] It is the experience of the Registrar and his delegates that the registration test can be administered adequately against these evidentiary requirements. Since the decision in *Risk v National Native Title Tribunal*[57] the Registrar and his delegates have been required to conduct a more rigorous examination of the constitution of the native title claimant groups, reducing considerably the potential for so-called spurious claims as identified by Dr Weiner. Sufficient information to satisfy the requirements for the registration test, taking into account the *Risk decision,* can be obtained from applicants or their representatives within the current framework for the administration of the registration test.

Notification of claimant applications

[90] *Issue:* In its submission, Etheridge Shire Council states its concern about a broad notification process that was carried out in its area for one application.

[91] *Response:* In its main submission, the NNTT has outlined the Registrar's practices in relation to the notification of claimant applications.[58] The Registrar's reasons for carrying out broad notifications, rather than individual notification, are grounded in the fact that the tenure information is not always available in a timely or cost effective way from state government tenure custodians.[59] The Registrar's approach to the notification referred to by Etheridge Shire Council is outlined in the NNTT's main submission at paras [164]—[167]. The Registrar would like to note, for the record, that the Deputy Registrar mentioned by Etheridge Shire Council in its submission[60]as having behaved in an aggressive manner was not a member of the NNTT staff. It is apparent from the other parts of the Etheridge Shire Council's submission that the complaint is about a member of staff of the Federal Court.

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[54] Submission no. 19, paras. [5.14] to [5.20]
[55] Submission no. 19, paras. [6.1] to [6.7]
[56] See sub-sections 190B(2), (3), (4), and (5). See also sub-section 190B (6) that requires a finding, *prima facie*, that at least some of the native rights interest claimed in the application can be established.
[57] [2000] FCA 1589
[58] Submission no. 22, paras. [152] to [175]
[59] Submission no 22, paras. [157] to [161], [163].
[60] Submission no. 25, at p. 14

[92] The Registrar would prefer, as far as possible, to carry out individual notification of claimant applications. However, as stated in the NNTT's main submission, it is sometimes not practical for this to occur. It will continue to be difficult to obtain tenure information in a timely and cost effective manner in at least two states, namely Queensland and New South Wales. Broad notification will need to be carried out from time to time.

[93] In Queensland, arrangements have been made between the Registrar and state tenure custodians that will permit the NNTT's Geospatial Unit to assist in the identification of individual interest holders, based on a comparison between records supplied by the State and the NNTT's own data holdings. These arrangements will permit greater certainty in identification of individual interest holders, although they will not necessarily remove the need for broad notification in some instances. Furthermore, as the primary data about individual interest holders still cannot be obtained directly from the State, the administrative burden falls on the Registrar and his staff to carry out a greater level of analysis to identify as many individual holders as they can. The cost to the NNTT of carrying out notification in these circumstances is higher than in other states where tenure information and interest holder details is readily available and in electronic format.

(c) Future Act

Introduction

[94] *Issue:* The WAANTWG's submission deals with the NNTT's expedited procedure inquiries.[61] In addition, Mr Angus Frith also lodged a submission with the PJC which comprised a paper presented to the Native Title Conference in Geraldton in September 2002.[62]

[95] *Response:* In responding to the submissions made by WAANTWG and Mr Frith it is necessary to draw attention to the role of members of the NNTT in the conduct of right to negotiate inquiries (i.e. inquiries into either an expedited procedure objection application or a future act determination application).

[96] As noted in the section of this supplementary submission dealing with mediation, the NNTT's members are independent statutory officers. They are not subject to the President's direction in the manner in which they exercise their powers. The President may appoint a member to constitute the NNTT for the purposes of a particular inquiry and may give directions as to the procedure of the NNTT generally or at a particular place (s.123). The President (or his delegate) has issued *Procedures under the Right to Negotiate Scheme* which are applied as guidelines. These procedures are published and are available on the NNTT's website. They may be departed from in any case in which a member thinks it appropriate to do so (*Procedures* – Para. 1.2.2).

[97] The accountability of members is secured by the usual processes applying to judicial officers or those people, such as members of the NNTT, exercising administrative powers in the conduct of inquiries. The NNTT's proceedings are

[61] Submission no. 19, paras. [4.1] to [4.98]
[62] Submission no. 13 passim

usually conducted in public and reasons for determinations are required to be published.

[98] Future act determinations are published in full on the NNTT's website and can also be accessed in full at the Austlii website. Moreover, important decisions are reported in full in the *Federal Law Reports*. As administrative decision-makers, members are potentially subject to judicial supervision under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). The Act also provides for an appeal to the Federal Court on a question of law from any decision or determination of the NNTT (s.169(1)).

[99] In these circumstances, the NNTT does not consider it appropriate to respond in detail to the criticisms made of any individual member's decisions and determinations in particular proceedings. They are based on the facts of particular cases. Criticisms of individual decisions are also difficult to respond to without detailed knowledge of all the facts, and reference to selective quotations from reasons for decisions and determinations does not always reveal the full picture. Subject to any views which the Committee has on this issue, the NNTT considers it appropriate to respond generally to criticisms of the NNTT's procedures, and the policies which it has adopted based on what the NNTT considers is required by the Act. It is also appropriate to explain the relevant parts of the law which the NNTT applies to particular cases.

[100] This does not mean that the issues raised in relation to individual cases in the submissions have been ignored by the NNTT. WAANTWG and Mr Frith's submission have been drawn to the attention of members involved in future act inquiries and discussed by them. Regular meetings of those members are held at which comments on the NNTT's performance are discussed (most recently in Adelaide on 29 January 2003). These regular discussions assist the NNTT in achieving the acknowledged desirable aim of consistency in its decision-making and provide members with opportunities to analyse decisions in light of such critiques, and how they carry out their statutory functions. Nevertheless it is acknowledged by the President and members that the application of the law and decisions in particular cases is a matter for the member conducting the inquiry. Ultimately, accountability for the proper application of the law rests with the Federal Court.

Major issues

[101] *Issue:* The following are the major issues which are raised by the WAANTWG and to which a number of the other issues are related.

- *Preparation of Inappropriate Guidelines (para. 4.16-4.28)*: The issue here is whether compliance with Form 4 expedited procedure objection application of the *Native Title (Tribunal) Regulations* is a mandatory requirement under s.76 of the Act and whether the *Guidelines on Acceptance of Expedited Procedure Objection Applications – Issued 16 October 2001* by the NNTT in relation to the lodging of the Form are appropriate. This issue is dealt with in a Paper dated 5 March 2003 prepared by Deputy President Sumner (Attachment I).
- *Whether the NNTT should as far as possible process expedited procedure objection applications in a timely manner ('the timeliness issue')*: This issue underlines many of the complaints made by WAANTWG and is dealt with in a

Paper dated 5 March 2003 prepared by Deputy President Sumner (Attachment II).

[102] In addition to these major issues, the WAANTWG submission refers to a number of matters which are responded to as follows by reference to the paragraphs in that submission.

Issues relating to adjournments (WAANTWG Submission paras 4.37—4.64)

[103] *Response:* A number of issues relating to the granting of adjournments arise because of the NNTT's view about the timeliness of dealing with expedited procedure objections which is dealt with in Attachment II. The WAANTWG submission refers to a number of individual cases and for the reasons stated earlier, the NNTT does not propose to comment in detail on those determinations. However, the NNTT makes the following brief comments:

- the WAANTWG submission acknowledges that on many occasions requests for adjournments are granted;
- the NNTT regularly grants adjournments to enable objectors to meet timetables imposed by directions for a hearing. In Western Australia, in particular, this is common practice;
- the NNTT (where all parties agree and wish to negotiate) now allows a minimum 16 week period for negotiations to occur and may allow further time (usually at least a further month) if there is a reasonable prospect of agreement within a reasonable time; and
- it is common practice for the NNTT to permit adjournments and make arrangements which suit the convenience of native title legal representatives although in making such a decision the NNTT must also have regard to the wishes and submissions of other parties.

Recording directions hearings (WAANTWG Submission paras 4.65–4.66)

[104] *Response:* Whether to record and transcribe directions hearings is at the discretion of the presiding member. Transcripts are expensive and some members take the view that a transcript is not necessary for simple preliminary proceedings. Where a party thinks that issues may be raised which will warrant recording and a transcript they can inform the NNTT and the member will take the comment into account. Given the large number of direction hearings conducted, the number of disputes subsequently about what occurred at such hearings is very small.

Refusal to pay sufficient regard to problems caused by State Procedures (WAANTWG Submission paras 4.67–4.69)

[105] *Response:* The WAANTWG submission points out that it is the policy of the Western Australian Government to assert the expedited procedure in a blanket way for all prospecting and exploration licences. This approach has been challenged and the challenges were unsuccessful with the Federal Court finding that the approach taken was within the powers of the state and territory governments involved[63]. The submission says that the NNTT turns a blind eye to what it describes as the 'bad

[63] *Holt v Manzie* [2001] FCA 627 (Olney J); *Cheinmora v Striker* (1996) 142 ALR 21 (Carr J)

policy' of the Western Australian Government. This submission misconceives the role of the NNTT. It is not the role of the NNTT to decide on an issue of state government policy, especially where it has been accepted by the Federal Court. If the policy produces a workload which is difficult for the parties to handle then the NNTT may take that factor into account and has done so in the way already explained in Deputy President Sumner's paper on the timeliness issue (see above Attachment II).

Lack of sensitivity to Aboriginal cultural issues (WAANTWG Submission paras 4.70–4.87)

[106] *Issue:* This part of the WAANTWG submission attempts to demonstrate by reference to a number of determinations of the NNTT that the NNTT lacks sensitivity to Aboriginal cultural issues.

[107] *Response:* The NNTT has noted the submission but does not consider any further response necessary. The NNTT:

- is aware of s 109(2) of the Act whereby it may take account of the cultural and customary concerns of Indigenous people but not so as to prejudice unduly any other party; and

- offers cultural awareness training to its members and staff.

[108] Following the recent meeting of members in Adelaide, recent publications of the Australian Institute of Judicial Administration, prepared as part of its National Aboriginal Cultural Awareness Program, and other relevant material dealing with Indigenous cultural issues and courts and tribunals were made available to members.

Inconsistency in requiring evidence substantiating contentions in expedited procedure objections (WAANTWG Submission paras 4.88–4.94)

[109] *Issue:* The assertion is made that 'sometimes' the NNTT has adopted an inconsistent approach to the requirement to provide evidence as between the native title party and the grantee party. Reference is again made to a particular case on which the NNTT does not intend to comment.

[110] *Response:* As a general point, the NNTT's approach to evidence will depend on the circumstances of the case and the importance of the evidence to the findings which the NNTT is required to make for the purposes of a determination. The NNTT is not bound by the rules of evidence (s 109(3).

[111] Some evidence will be more important than other evidence to a decision. In *Western Australia/David Daniel & Ors (Ngarluma and Yindjibarndi)/Valerie Holborow & Ors (Yaburara and Mardudhunera)/Wilfred Hicks & Ors (Wong-goo-tt-oo)*,[64] the NNTT outlined the principles in relation to a future act determination inquiry which are equally applicable to the expedited procedure.

> '[27] An issue arose about the evidentiary status of the public submissions. The Government party submitted that they should only

[64] [2003] NNTTA 4 (21 January 2003)

be taken into account as evidence of the opinions held by their authors but not as proof of their contents unless the contents were verified on oath and the Government party given an opportunity to seek leave to cross-examine the authors. As a general proposition I reject this submission. All public submissions were admitted into evidence for whatever purpose the Tribunal considered appropriate. That is, I was not prepared to pre-judge the evidentiary status of the public submissions. The NNTT is not bound by the rules of evidence (s 109(3)) and has a preference for, as far as practicable, making a determination based upon written statements and documentary evidence (*Procedures under the Right to Negotiate Scheme* – para 5.10.8). This inevitably means that the Tribunal will receive documentary evidence which it will rely on as evidence of the facts stated therein. Indeed in this matter, the Government party provided a substantial number of documents where the contents were not verified on oath by their authors. I can see no reason for the same general procedure not to apply to the public submissions. Comments made in the *good faith decision* (at [26] to [28]) [*Western Australia/David Daniel & Ors (Yaburara and Yindjibarndi People); Valeria Holborow & Ors (Yaburara and Mardudhunera People; Wilfred Hicks & Ors (Wong-goo-tt-oo People*, NNTT WF02/17 & WF02/18, Hon C J Sumner, 12 November 2002] are apposite (esp [28]).

> '[28] Given ss 109(1) and 109(3) of the Act and that the NNTT is an administrative body which as far as possible is required to carry out its functions in a non-adversarial way my general approach to the receipt of evidence is, unless it clearly has no relevance, to admit the evidence and allow the parties to comment on its relevance and the weight to be given to it (if any). Parliament has said that the NNTT should be able to discriminate between evidence which is unreliable without resorting to an unduly technical approach to its receipt. Different approaches may be adopted by the NNTT to making findings depending on the importance of the facts to the decision. It may choose not to act on hearsay evidence where there is a direct contest about its veracity from an opposing party or even serious concerns about it arising generally from the circumstances or other evidence. Parliament has said that the NNTT is capable of making these judgements using its experience. It is also to adopt a commonsense approach to evidence as explained in *McDonald v Director-General of Security* (1984) 1 FCR 354 (cited in *Ward v Western Australia* (1996) 136 ALR 557 at 567).'

[28] The NNTT will usually receive documentary evidence but the relevance and weight to be given to it will depend on the circumstances. When assessing evidence the NNTT must be mindful

> of how critical it is to its decision (taking account of the broad discretion which it has in considering the factors in s 39 of the Act). The NNTT should exercise care in accepting evidence vital to a decision solely on the basis of a document where the issue is in dispute. In those circumstances procedural fairness would usually require the evidence to be verified on oath and subjected to cross-examination. … .'

[112] In expedited procedure inquiries where no agreement is reached, the matter proceeds to a determination because the Government which asserts the expedited procedure and the grantee do not agree that the grant of the exploration or prospecting licence will cause the interference or disturbance referred to in s.237. That is, direct interference with social or community activities of the native title party, interference with sites of particular significance, or major disturbances to land. Obviously evidence about whether this is likely to happen will usually be within the knowledge of the native title party. The evidence is fundamental to a decision and it is in the native title party's interests, given that the facts are disputed by the Government and grantee parties, to produce relevant evidence in the best form available.

[113] In most cases the facts as asserted in documents provided by the Government and grantee parties are not disputed.

Flexibility towards hearing evidence on country (WAANTWG Submission paras 4.95–4.98)

[114] *Response:* The practice in Western Australia has developed to one of dealing with all objection inquiries 'on the papers'. There has not been a hearing on country for a number of years, a practice which has generally been supported by all parties. It is extremely rare for a native title party to request a hearing on country. The NNTT must hold a hearing if it appears that the issues for determination cannot be adequately determined in the absence of the parties (s 151(2) NTA). There is nothing to prevent a native title party from requesting such a hearing but the decision whether it is necessary rests with the NNTT. A hearing will take place on country if it is deemed necessary by the presiding member.

Angus Frith – Submission No 13

[115] *Issues:* Mr Frith's Paper was presented to the Geraldton Native Title Conference in September 2002 and constitutes his submission to the PJC. It deals with the expedited procedure in the Northern Territory. By reference to particular cases he is critical of the NNTT's approach in three major respects:

- failure to adopt reports made by Aboriginal Land Commissioners under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth);

- evidence relating to sites of particular significance; and

- evidence relating to major disturbance to land where the proposed exploration or prospecting licence is to be granted over land which is a national park.

[116] *Response:* Unless the PJC requests otherwise the NNTT does not propose to comment on these criticisms which arise from determinations made by individual members in particular inquiries. It is not clear whether Mr Frith is saying the NNTT has misapplied the law. If it has, the error can be corrected by the Federal Court.

[117] The NNTT notes that from 1 February 2002 up to 8 April 2003 the NNTT has handed down some 81 full expedited procedure objection inquiry determinations in the Northern Territory. In 78 of those matters the expedited procedure was held to apply. Yet despite that fact in not one instance has there been an appeal, pursuant to section 169, to the Federal Court against any of the determinations. Accordingly, if it is suggested that the NNTT has misapplied the law, the persons holding this view have not sought on any occasion to test that proposition before the Federal Court.

[118] Mr Frith's submission is in the form of a Conference Paper providing commentary on the law and practice of the NNTT which the NNTT has noted. It does not make specific recommendations for the law to be changed. The NNTT does not accept, nor does the Paper support, a conclusion that the NNTT has dealt with the expedited procedure 'in a manner characterised by complexity, evidentiary demands and legal intricacy'.

Meeting with WAANTWG

[119] At the Geraldton Conference, some of the participants from NTRBs made submissions to an officer of the NNTT. These were similar to the criticisms in the WAANTWG submission. Members involved in future act work have considered these submissions and on 12 March 2003 Deputy President Sumner, Member Dan O'Dea, Andrew Jaggers (WA State Manager) and Athol Prior (Future Act Unit Operations Managers) met with WAANTWG to discuss them and explain the NNTT's position.

(c) Correspondence with stakeholders

[120] Attachment III (letter dated 7 March 2003 from Chris Doepel, Registrar to Mr David Ritter of Yamatji Land and Sea Council) and Attachment IV (letter dated 7 March 2003 from Athol Prior, Operations Manager—Future Act Unit to Mr Cedric Davies of Yamatji Land and Sea Council and others) is correspondence sent by the Tribunal in response to issues raised in the HREOC Report 2000–2001 (Dr William Jonas, Social Justice Commissioner) and at the Geraldton Conference. They demonstrate the Tribunal's willingness to consider and respond to stakeholders about its activities.

(d) Indigenous Land Use Agreements

[121] *Issues:* In its main submission, the NNTT provides a comprehensive overview of its practice in relation to ILUAs.[65] Amongst the submissions lodged with the Committee that touched on ILUAs the NNTT notes the submission of the Northern Territory Cattlemen's Association.[66] In its submission, the Association asserts that while the NNTT promotes ILUAs as the main vehicle in the resolution of claims, it does not address the underlying issue of native title or resolve the long term rights and obligation of parties.

[122] *Response:* The NNTT notes that ILUAs are not the main vehicle for the resolution of native title claimant applications. An application for determination of native title must be dealt with by mediation, or if that fails, litigation in the Federal Court. ILUAs have emerged, however, as a useful vehicle to resolve a number of issues that cannot be resolved in the form of a native title determination, or need to be resolved before the determination process is concluded.

[123] It is the NNTT's experience that ILUAs are used in combination with native title determinations to resolve claimant applications. A determination of native title by the Federal Court will include a declaration of the rights and interests of various parties to the proceedings. Such a determination will not necessarily deal with day to day issues surrounding the exercise of those rights and interests and the relationships between the parties. Where ILUAs are used in advance of the determination of a claim, they are intended to provide a basis for establishing dealings between parties so that mining, development or other economic and social activities can proceed, rather than await the outcome of a mediation (or litigation) process that may take several years.

[124] Proponents of commercial and other ventures have a choice. If they wish to proceed with their ventures then they can use the ILUA provisions of the Act to advance their immediate interests, realising that resolution of any issues about native title rights and interests must wait until a determination is achieved. Otherwise, they can delay their venture until a determination is made. This is, however, not an attractive option for many proponents for sound commercial reasons.

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[65] Submission no.22, paras. [435] to [510]
[66] Submission no. 6, pp. 2–3

[125] *Issue:* The submission made by the Queensland Minister for Natural Resources and Mines notes concerns over the undue delay between receipt of an ILUA for registration and commencement of notification.[67]

[126] *Response:* In its main submission, the NNTT outlines the issues involved in managing the function of registration of ILUAs.[68] At para [506] of its main submission, the NNTT noted that it had introduced service standards to improve its performance in the handling of the registration of ILUAs and to assist in managing parties' expectations about the process. Since the implementation of these service standards, the NNTT has observed that:

- it is taking an average of four weeks for agreements to enter into notification, once they have met the requirements for notification—against a service standard of six weeks; and

- it is taking an average of three days for agreements to proceed from closure of notification to registration—against a service standard of five days.

[127] *Issue:* The Queensland Minister for Natural Resources and Mines has made the suggestion that the NNTT should provide a sealed copy of the registered ILUA to the parties upon registration to confirm its status.[69] The rationale for this suggestion is that, in the event of a dispute, the parties need to know that the agreement they are interpreting is the one that was assessed by the Registrar for registration.

[128] *Response:* The Registrar is considering the adoption of the Minister's suggestion in the ILUA registration procedures.

Conclusion

[129] In this supplementary submission, the NNTT has responded to issues raised in the written submissions of others to date (submissions nos. 1-21, 23-29) that the NNTT considered may be relevant to the Committee's inquiry.

[130] The NNTT would appreciate an indication from the Committee as to any other issues raised:

- in those submissions,

- in any other submissions received subsequently by the Committee, and

- by people appearing before the Committee in public hearings,

in respect of which the Committee would want a response from the NNTT.

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[67] Submission no. 24, p. 3
[68] Submission no. 22, paras. [495] to [506]
[69] Submission no. 24, p. 3

NATIONAL NATIVE TITLE TRIBUNAL

Acceptance of Expedited Procedure Objection Applications (Form 4) under s 76 of the *Native Title Act* 1993 (Cth)

Paper prepared by Hon C J Sumner AM, Deputy President
5 March 2003

Issues

Whether compliance with Form 4 of the *Native Title (Tribunal) Regulations* 1993 (an expedited procedure objection application) is a mandatory requirement under s 76 of the *Native Title Act* 1993 (Cth).

Whether *Guidelines on Acceptance of Expedited Procedure Objection Applications – Issued 16 October 2001* are appropriate.

Background

The *Native Title Report 2001* of the Aboriginal and Torres Strait Islander Social Justice Commissioner (Dr William Jonas – Human Rights and Equal Opportunity Commission) (HREOC Report) and the Western Australian Aboriginal Native Title Working Group (WAANTWG) submission of 15 October 2002 to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJC) (paragraphs 4.16-4.28) criticise the Tribunal's position that compliance with Form 4 (or at least with critical parts of it such as para 7) is mandatory before the objection application can be accepted.

Section 76 of the NTA says that an application (i.e. an expedited procedure objection application or future act determination application) 'must', among other things, be in the prescribed form and contain such information in relation to the matters sought to be determined as is prescribed by the Regulations.

Section 77 of the NTA says that if an application complies with s 76, the Tribunal 'must' accept the application. Regulation 4 says that an application for an expedited procedure objection application 'must' be in the form of Form 4.

Paragraph 7 of Form 4 requires:

> '7. *A statement why the objector(s) believes that the proposed act is not an act attracting the expedited procedure that includes a statement of the likely impact of the act on community or social activities of the native title holders, areas or sites of particular significance and any land or waters concerned.'*

Discussion

The following documents provide details of the criticisms made and the Tribunal's response and explanation of the approach it has taken:

- letter dated 5 November 2001 from Dr William Jonas AM to the Hon Christopher Sumner, Deputy President of the Tribunal which outlines his concerns which were subsequently included in the HREOC Report (Attachment A);
- letter dated 18 December 2001 from Mr Sumner to Mr Jonas in reply (Attachment B); and
- *Guidelines on Acceptance of Expedited Procedure Objection Applications – Issued 16 October 2001* and Explanatory Memorandum (Attachment C).

Members of the Tribunal engaged in future act work have considered this issue at three separate meetings (30/31 August 2001; 28/29 May 2002; 29 January 2003) and reaffirmed the position set out in Deputy President Sumner's letter of 18 December 2001.

Statistics relating to acceptance of Form 4

The Tribunal's position in relation to Form 4 requirements has led to the rejection of few objections.

2001/2002 Year (NNTT Annual Report)

In Western Australia 78 objections (affecting 82 tenements) of the 587 disposed of (affecting 750 tenements) were not accepted but only 4 of these were for failure to comply with paragraphs 7 or 8 of Form 4. In each of these cases the Tribunal, in accordance with its usual practice where time permits (i.e. the objection has not been lodged just prior to the closing date for objections) provided information to the applicants which would have allowed them to rectify the application. The other applications were not accepted because of such issues as the tenement not falling within the objectors claim area or the tenement application being withdrawn.

In the Northern Territory, 20 objections were not accepted and none of these related to failure to comply with paragraphs 7 or 8 of the Form 4. In addition to those 20 objections, another 10 objections were not subject to an acceptance decision because the tenement application was withdrawn prior to the formal acceptance decision.

2002/2003 Year (to 17 February 2003)

In Western Australia 42 objections were not accepted but none of these were because of failure to comply with paragraph 7 or 8 of Form 4.

In the Northern Territory 17 objections were not accepted six of which were because of failure to comply with paragraph 7 or 8 of Form 4.

Summary of Tribunal's position

Based on the attached documents and relevant statistics the Tribunal's position can be summarised as follows.

- The issue of the acceptance of a Form 4 was raised by one of the parties to an inquiry (the Northern Territory Government) in the *Roy Dixon* matter (*Roy Dixon & Ors/Northern Territory/Ashton Mining Limited & Ors*, NNTT DO00/1 – DO00/7, The Hon EM Franklyn QC, 23 April 2001) not by the Tribunal itself.

- Detailed argument was considered by a Deputy President of the Tribunal and former Justice of the Western Australian Supreme Court (the Hon E M Franklyn QC).

- Given his views and the objection by the Northern Territory Government to the Tribunal's practice, the Tribunal considered it should require proper compliance with the Form 4 and issued Guidelines to assist parties on 8 May 2001.

- On 5 July 2001, the Tribunal invited interested parties to make submissions on the issue and Deputy President Sumner convened a meeting with WAANTWG in Perth and considered submissions. The Guidelines were modified in response to those submissions.

- Future Act Members of the Tribunal discussed the issue at a meeting on 30/31 August 2001 where the opinion of Mr Wayne Martin QC and other submissions were considered. The Tribunal confirmed that it is entitled to issue guidelines to assist parties to comply.

- The modified Guidelines were issued on 16 October 2001.

- The issue relates to the proper construction of s 76 and 77 of the NTA and the Regulations made thereunder. On the face of it Parliament in using the word 'must' intended compliance with the Form 4 to be mandatory.

- In the event, very few objections are rejected on the basis of non-compliance with the Form. Native title parties must now provide more information in para 7 of the Form 4 than previously and they are complying with these requirements.

- The Tribunal is not concerned with purely technical issues relating to compliance with this Form but with issues of substance, particularly in relation to paragraph 7.

- The Tribunal reiterates that the question of whether s 76 is mandatory or directory is one about which opinions can legitimately differ and would welcome judicial clarification by the Federal Court. Alternatively Parliament may wish to consider amendment to the NTA to clarify the position.

NATIONAL NATIVE TITLE TRIBUNAL

Expedited Procedure Objection Applications – Timeliness

Paper prepared by Hon C J Sumner AM, Deputy President
5 March 2003

Issue

Whether the National Native Title Tribunal (the Tribunal) should, as far as possible, process expedited procedure objection applications in a timely manner.

Background

The *Native Title Act* 1993 (Cth) (NTA) gives to holders of native title and registered native title claimants a right to negotiate in respect of certain future acts, i.e. some developments (particularly the grant of mining tenements) over land where native title exists or may exist. It also provides for an expedited procedure (or fast tracking) of some tenements (in practice prospecting or exploration licences) where the future act is not likely directly to interfere with the community or social activities of the native title party (holders or registered claimants of native title) or interfere with sites of particular (special) significance to them; or cause major disturbance to land (s 237 NTA).

In giving notice of its intention to grant a mining tenement under s 29 of the NTA a Government may assert that the act attracts the expedited procedure. It is the practice of the Western Australian and Northern Territory Governments to assert the expedited procedure for all grants of prospecting and exploration licences. A native title party has four months within which to lodge an objection to the expedited procedure and if it does so the Tribunal must conduct an inquiry and make a determination either that the expedited procedure is attracted (and hence the Government can make the grant without negotiating) or that the expedited procedure is not attracted (the right to negotiate applies and the Government, grantee and native title party must negotiate in good faith with a view to reaching agreement about the future act).

If the right to negotiate applies and the parties have negotiated in good faith then, six months after the s 29 notice was given, any party may apply to the Tribunal for a future act determination. The Tribunal must take all reasonable steps to make a determination as soon as practicable (s 36(1) NTA) and is to report to the Minister if it does not do so within six months of the notice (s 36(3) NTA). There is also provision for the Commonwealth Minister to make a determination if there is delay in the Tribunal doing so (s 36A NTA).

The Tribunal has always taken the view that it should attempt, as far as possible, to deal with expedited procedure objection applications in a timely manner. That is, that a determination about the expedited procedure should be made as expeditiously as possible. The Tribunal has taken the view that, while there are no specific time limits for the expedited procedure set out in the NTA, it is not consistent with the purposes of the NTA for expedited procedure inquiries to be open-ended. The NTA establishes timeframes for the right to negotiate and it is contrary to the purposes of the NTA for there to be no requirement for timeliness to determine whether or not formal

negotiations must take place. The Tribunal's position is set out in an Explanatory Memorandum dated 8 February 2002 to its *Procedures under the Right to Negotiate Scheme* (Attachment A).

This approach has been criticised by Indigenous interests most recently in a submission by the Western Australian Aboriginal Native Title Working Group ('WAANTWG') in its submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJC) inquiry into the Tribunal's effectiveness.

Discussion

When the Tribunal commenced conducting inquiries into expedited procedure objection applications the original Procedures (issued on 7 June 1995 by the then President, Justice French), provided for notice of receipt of an objection application to be given within 7 days, a preliminary conference to be conducted within 14 days and for all reasonable steps to be taken to make a determination within 2 months of the preliminary conference.

This paragraph remained unchanged until 12 October 1999 when Interim Procedures were developed to meet changing circumstances. In particular, native title and grantee parties wanted time to attempt to negotiate an agreement within the context of an expedited procedure inquiry. In the case of grantee parties this was to avoid a situation where, if they consented to a determination that the expedited procedure was not attracted, they would face delays (in Western Australia) because of the backlog of matters subject to the right to negotiate and would be required to negotiate with all native title parties and not just those who had lodged objections. At the same time it had become apparent that objections were not being resolved in the timely manner originally anticipated as, increasingly, adjournments were being granted to enable negotiations to occur.

Following consideration of these issues the Interim Procedures were replaced with *Procedures under the Right to Negotiate Scheme – Issued 20 April 2000*. Features of the revised Procedures were to defer compliance with directions to enable the parties to negotiate if they wished. There was a period of 10 weeks allowed from the date of notification of an objection to the first date of compliance by the Government party to enable negotiations to occur and for an inquiry to be conducted within 15 weeks. If the parties did not wish to negotiate, time for compliance would be shortened.

On 8 February 2002 a further modification to the Procedures was adopted. These are explained in the Explanatory Memorandum (Attachment A). These Procedures allowed more time for negotiations (16 weeks from the closing date for objections but more if the objection is lodged before the closing date) and a Status Conference after 12 weeks to ascertain whether negotiations are likely to be successful before requiring compliance with directions.

The above amendments to the Procedures indicate that the Tribunal has responded flexibly to changed circumstances and the desire of parties to have time to negotiate. There is now a 'de facto right to negotiate' period of a minimum of 16 weeks as part of an objection inquiry provided all parties agree to negotiate. Where a Government

or grantee party does not wish to negotiate, the inquiry will proceed without the negotiation period.

It is also important to note that State Governments have supported the approach of the Tribunal to the timeliness issue. The Western Australian Government has submitted that expedited procedure inquires should be dealt with in a timely manner (in the early years they would not consent to a determination that the expedited procedure was not attracted even when the other parties agreed). We have received no indication that they object to the current Procedures or that they believe that time for objection inquiries should be open-ended. The attitude of the Northern Territory Government manifested in recent submissions to the Tribunal in inquiries is that objection inquiries should be concluded in a timely manner.

The 1998 amendments to the NTA introduced s 148(b), which empowers the Tribunal to dismiss an objection for failing to comply with directions. Those amendments indicate a Parliamentary intention that the Tribunal's directions should be complied with in a timely manner.

Another relevant factor has been that the Tribunal has not thought that an open-ended objection inquiry process fits in with the scheme of the NTA, which imposes time limits on the right to negotiate procedures. It would be a curious result if an inquiry to decide whether or not a grant of a mining tenement should be subject to the right to negotiate was to be open-ended, but the right to negotiate itself is subject to time limits.

Little v Western Australia [2001] FCA 1706

The WAANTWG submission to the PJC (para 4.10 FN20) says that in *Little's* case the Federal Court did not accept that the Tribunal was under an obligation to process objection applications promptly merely because the procedure established was referred to as an expedited procedure. The Tribunal however takes the view that *Little's* case supports its approach to processing expedited procedure objections. The grounds of appeal from the Tribunal's determination that the expedited procedure was attracted included that the Tribunal had erred in law in the reliance which is placed on ss 36(1) and 36(3) of the NTA. The Federal Court (RD Nicholson J) dealt with the issue (at [82]-[85]):

> '82 The case for the applicants in respect of this ground is that it was relied upon in error by the Tribunal. This is because ss 36(1) and (3) apply to an application for a determination under s 35 and s 38 of the Act in relation to whether a future act may be done rather than a decision upon an expedited procedure objection application under s 32(3) of the Act. It is submitted that due to its erroneous construction of the legislation, the Tribunal wrongly considered it was statutorily required to make a determination as soon as practicable. Consequently the Tribunal took into account an irrelevant consideration and erred in law.
>
> 83 For the Grantee it is submitted that if the Tribunal did not deny the applicants procedural fairness or the result would have been the same

> even if procedural fairness was not accorded, success on this ground of the appeal would not justify remitting the matter.
>
> 84 Furthermore, it is submitted that the Tribunal had an obligation to act promptly (see s 109 of the Act) which is emphasised by the presence of s 151(2) allowing the Tribunal to make a determination on the papers. This in turn is supported by the naming of the procedure by Parliament as the "expedited procedure" so that ss 36(1) and (3) were relevant in indicating a statutory intention to limit the more lengthy process provided for in ss 35 and 38 and hence by inference the expedited procedure.
>
> 85 In my opinion the reliance by the Tribunal on the ss 36(1) and (3) was in error in its terms but would not justify remitting the matter unless the procedural fairness ground was made out. The reason why it would not justify remittal is that expedition was appropriate in the circumstances for the reasons submitted on behalf of the Grantee including particularly the provisions in s 109 of the Act.'

The Federal Court found the Tribunal to be in error in relying on ss 36(1) and 36(3) as strictly they relate to timeframes imposed in the right to negotiate process. However the Court accepted that expedition was appropriate for the reasons submitted by the grantee. These reasons included particularly the provisions of s 109 but also the other factors advanced by the grantee. The Federal Court accepted that the Tribunal had an obligation to act promptly when processing objection applications.

Relevance of the Tribunal's corporate benchmarks

The WAANTWG submission to the PJC (paras 4.8-4.12) says that the Tribunal's approach to the expedited procedure is driven by its corporate goals set out in the Tribunal's Annual Report 2000-2001 (p 61) of 80% of objections being decided within six months.

In response the Tribunal points out that, in setting these performance standards, the Tribunal is acting in accordance with the Federal Government's requirements that agencies establish performance standards for budget purposes. However, it is not true to say that the corporate standards drive the Tribunal's approach to individual objections. The benchmarks were established taking account of what the Tribunal regards as its statutory responsibilities in dealing with objections to the expedited procedure set out above. The benchmarks did not pre-date the Tribunal's interpretation of its statutory obligations but is an estimate of what is reasonably achievable taking account of its practice based on that interpretation. In other words, it is the Tribunal's interpretation of its obligations under the NTA which has been used to establish the performance standard and not the other way around.

The resourcing of Native Title Representative Bodies

The WAANTWG submission to the PJC (para 4.29) asserts that the Tribunal refuses to treat the resource difficulties that representative bodies have in complying with the

expedited procedure as a relevant consideration in relation to either complying with the Guidelines (*Guidelines on Acceptance of Expedited Procedure Objection Applications – Issued 16 October 2001*) or directions.

In its Explanation of the Guidelines the Tribunal said:

> '9. Some submissions refer to a lack of resources to comply with the requirements of the Act and regulations. That is not, however, an issue for the Tribunal in applying the expedited procedure provisions of the Act. The Act is specific that the objection must be lodged within the relevant four month period and, in the Tribunal's view, the legislative intent is that the objection comply with the provisions of s 76, Regulation 4 and Form 7.'

This statement has been interpreted to mean that the Tribunal will never take into account the lack of resources in making decisions about the expedited procedure. The Tribunal acknowledges the ambiguity in that this statement could be seen to be of general application even though it is contained in an Explanation of Guidelines dealing with the acceptance of objections and refers to compliance with the Act and regulations.

It is therefore opportune to clarify the Tribunal's position. Where the issue is one of statutory interpretation, the Tribunal regards the lack of resources of representative bodies to comply as an irrelevant consideration. In other words the difficulty because of lack of resources in complying with a statutory requirement is not a factor which can influence the proper interpretation of the NTA. In this context the statement in para 9 is correct as the issue is whether s 76 imposes an obligation on an objector to submit an objection in the proper form.

To avoid any misunderstanding arising from the ambiguity of the statement in para 9, the Tribunal has amended the relevant sentence to read:

> '9. Some submissions refer to a lack of resources to comply with the requirements of the Act and regulations. That is not, however, an issue for the Tribunal in ~~applying the expedited procedure provisions of the Act.~~ **the interpretation of s 76 of the Act**. The Act is specific that the objection must be lodged within the relevant four month period and, in the Tribunal's view, the legislative intent is that the objection comply with the provisions of s 76, Regulation 4 and Form 7.'

The Tribunal accepts that, in the performance of its functions and in the exercise of powers to conduct inquiries, the question of a lack of resources for a party may be a relevant consideration (for instance, on whether to grant adjournments). This does not mean that the expedited procedure inquiry process can be brought to a halt because a native title party lacks resources or is unrepresented. There is no principle of administrative law which requires the Tribunal to stay proceedings indefinitely on the basis that one party has not the resources to deal with the matter. Each case must be considered taking into account all the circumstances, the statutory purpose of the right

to negotiate provisions and s 109 of the NTA by which the Tribunal must pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way and s 142 which says that parties must be given a reasonable opportunity to present their case.

In practice the Tribunal has, in some circumstances, taken account of resource difficulties in deciding whether to grant adjournments and allowing more time to collect evidence. The current Procedures which incorporate a defacto right to negotiate, unhindered by the need to prepare for an inquiry assist native title parties cope with their resource difficulties. The Tribunal has in its determinations recognised the importance of adequate funding for representative bodies (*Dixon v Northern Territory* 169 FLR 103 at [17]). However, it has also made the point that the determination of priorities and allocation of resources is a matter for Representative Bodies and that failure by them to give priority to expedited procedure inquiries may mean that extensions of time for compliance are not given where the other parties oppose varying the Directions (*Michael Page (Jawoyn People)/Northern Territory/John Anthony Earthrowl*, NNTT DO02/29, DO02/38 & DO02/39, John Sosso, 18 July 2002 at [9]). The Tribunal accepts that objections have been dismissed for non-compliance with directions (s 148(b) NTA) where it considers that adequate time to comply has been given.

Whether an objection application should be dismissed involves the exercise of a discretion based on the facts of individual cases after hearing the parties. Nevertheless, the Tribunal has provided some guidance on how that discretion should be exercised and which Members may have regard to. In *Teelow v Page* (2001) 166 FLR 266; *Michael Page/Michael Teelow/Northern Territory,* NNTT DO01/22, Mr J. Sosso, 10 October 2001 the Tribunal said:

> '[13] These decisions are not directly applicable to expedited procedure inquiries, but some general guidance can be gleaned from them. The exercise of the discretion vested in the Tribunal by section 148(b) to dismiss an application on the basis that the applicant has failed to comply with a direction of the Tribunal should be guided by the following principles:
>
> (a) the exercise of the discretion should be informed by the object of the expedited procedure provisions of the Act, namely that the parties and the Tribunal are required to proceed expeditiously with a view to avoiding delays, expense and legal technicalities, and that non-compliance of Tribunal directions potentially warrants, as a matter of principle, the imposition of the sanction set out in section 148;
>
> (b) directions are made to achieve these objectives and, accordingly, non-compliance enlivens the power vested in the Tribunal pursuant to section 148;
>
> (c) whether the discretion vested in the Tribunal should be exercised, though, is dependent on a range of factors and circumstances that are not possible of being wholly outlined. However, one important factor, is that that the right to negotiate is a valuable right that should not be lightly dispensed with, and that the Act should be interpreted in a

beneficial manner for native title holders. That aside, the discretion in section 148 is unfettered and the exercise or non-exercise of the discretion depends on all the circumstances of each case. Amongst other matters, and by no means limiting them, the Tribunal could consider:

(i) (i) whether the failure to comply was as a result of the actions of the objectors or their representative, or due to some other cause;

(ii) whether there has been some reasonable explanation proffered for non-compliance, or rather that no explanation is given to the Tribunal. While the absence of an explanation may well prove fatal, the giving of an explanation does not of itself prevent the exercise of the discretion to strike out;

(iii) whether the failure of the applicant to comply with Tribunal directions has resulted in prejudice to other parties, and if so, the nature of that prejudice;

(iv) the history of the proceedings;

(v) the previous conduct of the applicant, such as previous failures by the applicant to comply with directions of the Tribunal;

(vi) whether the expedited procedure inquiry itself raises novel issues, or whether the inquiry is part of a series of inquiries involving the same native title party such that failure to meet direction timelines is explicable and not unreasonable;

(vii) the consequences of dismissal, particularly if the failure to comply has occurred by oversight or factors outside the control of the applicant.'

Statistics on disposal of expedited procedure objections - Western Australia 2001/2002 (Based on the number of objections, some of which may have covered more than one tenement.)

Outcome	No	Proportion
Agreement (Objection Withdrawn)	260	44%
Consent Determination - EP does not apply	82	14%
Dismissed - s148a No Jurisdiction	1	0%
Dismissed - s148a Tenement Withdrawn	123	21%
Dismissed – s148b	1	0%
Objection Withdrawn (No Agreement)	24	4%
Determination - EP applies	10	2%
Determination – EP does not apply	8	2%
Objection not accepted	78	13%
Grand Total	**587**	

2002/2003 (to 17 February 2003)

Outcome	No	Proportion
Agreement (Objection Withdrawn)	274	61%
Consent Determination - EP does not apply	87	19%
Dismissed - s148a Tenement Withdrawn	31	7%
Dismissed - 148a - No Jurisdiction	2	1%
Dismissed – s148b	0	0%
Objection Withdrawn (No Agreement)	5	1%
Determination - EP applies	4	1%
Determination – EP does not apply	5	1%
Objection not accepted	42	9%
Grand Total	**450**	

Of the 18 determinations made in 2001/2002, 10 objections (affected by 9 determinations) were lodged by the Yamatji Land and Sea Council, two by the Pilbara Native Title Service, three by the Goldfields Land Council, two by the Ngaanyatjarra Land Council and two by parties not represented by Representative Bodies. That is, only 17 objections made by Representative Bodies went to a hearing and determination in the whole of Western Australia in 2001/2002.

The WAANTWG submission to the PJC refers to individual cases to support its submission that the Tribunal is administering the expedited procedure in an inappropriate manner. Reference to recent statistics relating to the disposition of objections generally by the Tribunal tells another story. The above table demonstrates that in Western Australia:

- most objections are resolved by agreement (58% in 2001/2002 and 80% in 2002/2003);
- dismissal for failure to comply with directions (s 148(b)) is extremely rare (1 in 2001/2002, none in 2002/2003);
- the number of objections which go to hearing and determinations is small (4% in 2001/2002 (total 19) and 2% in 2002/2003 (total 9)). Representative Bodies in Western Australia were involved in 17 of these objections in 2001-2002.

Statistics on disposal of expedited procedure objections - Northern Territory 2001/2002

Outcome	No	Proportion
Agreement (Objection Withdrawn)	8	5.0%
Consent Determination – EP does not apply	0	0%
Dismissed	89	56.0%
Objection Withdrawn (No Agreement)	1	0.6%
Determination – EP applies	29	18.2%
Determination – EP does not apply	2	1.3%
Objection Not Accepted	30	18.9%
Grand Total	**159**	

With respect to objections lodged by the Central Land Council (CLC), 5 objections were dismissed and 6 objections were withdrawn with Agreement. The balance of the objections were lodged by the Northern Land Council (NLC).

2002/2003 (to 17 February 2003)

Outcome	No	Proportion
Agreement (Objection Withdrawn)	1	0.9%
Consent Determination – EP does not apply	0	0%
Dismissed	44	41.1%
Objection Withdrawn – No Agreement	0	0.0%
Determination – EP applies	44	41.1%
Determination – EP does not apply	1	0.9%
Objection Not Accepted	17	15.9%
Grand Total	**107**	

With respect to the CLC, 2 objections were not accepted. The balance of the objections were lodged by the NLC.

The statistics in relation to the Northern Territory do not follow the same pattern as in Western Australia. While the expedited procedure has been used in Western Australia since 1995, the Northern Territory Government only commenced giving s 29 notices in 2000 following the disallowance of its Alternative Provisions in the Senate.

The approaches of the two representative bodies (NLC and CLC) have been markedly different. The CLC has lodged very few objections. The NLC on the other hand initially objected to the expedited procedure in most cases. Although the same Procedures as in Western Australia applied (that is, a defacto minimum right to negotiate period of 16 weeks) there were many fewer agreements reached in the NLC area than in Western Australia and many more objections went to an inquiry or were dismissed. Of the objections determined, the great majority (73 out of 76) were that the expedited procedure applied. Of importance in making these determinations (apart from the nature of the evidence produced by the native title party) was the regulatory regime applicable to prospecting and exploration licences in the Northern Territory which attempts to deal with the issues raised by s 237 of the NTA. The figures show that the culture of agreement-making around expedited procedure objections evident in Western Australia has not yet developed in the NLC area of the Northern Territory.

More recently the NLC has changed its approach to lodging objections, and the Tribunal expects there to be fewer objections and less need for inquiries to be conducted in future.

7 March 2003

Mr David Ritter
Principal Legal Officer
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East St George's Tce
PERTH WA 6832

Dear Mr Ritter

Human Rights and Equal Opportunity Commission – Social Justice Commissioner - Native Title Report 2001 – National Native Title Tribunal's Future Act Unit

I refer to your letter of 3 October 2002 in which you ask for the Tribunal's response to the issues raised in the *Native Title Report 2001* of the Aboriginal and Torres Strait Islander Social Justice Commissioner (Dr William Jonas) – Human Rights and Equal Opportunity Commission (HREOC Report)

The Report was tabled in Federal Parliament on 14 May 2002 and considered by Members of the Tribunal involved in future act work at their meeting on 28/29 May 2002. Although there were other issues of relevance to the Tribunal, the Commissioner's principal issue of concern was the Tribunal's approach to the interpretation of s 76 of the *Native Title Act* 1993 (NTA) and the '*Guidelines on Acceptance of Expedited Procedure Objection Applications – issued 16 October 2002*'.

On 12 August 2002, the President of the Tribunal and the Commissioner had a meeting at which this issue was discussed. A further meeting was arranged for 8 October 2002 between the President, two Members and an officer of the Tribunal, and the Commissioner and relevant staff from HREOC. Again, the Guidelines issue was discussed along with other matters in the HREOC Report. While these discussions were useful they did not result in a change in the Tribunal's approach to the interpretation of s 76. The two organisations resolved to maintain contact at various levels.

Section 76 and the Acceptance of Form 4 Guidelines

This issue has been thoroughly dealt with in correspondence between the Commissioner and Deputy President Sumner of the Tribunal. The Commissioner's letter of 5 November 2001 to Mr Sumner contained the substance of the criticisms which were subsequently included in the Report. Mr Sumner's reply of 18 December 2001 was not referred to in the Report, I understand, because the draft Report had already been substantially completed. The correspondence was, however, placed on HREOC's web site and I understand that you are aware of it. The correspondence sets out in detail the

respective position of HREOC and the Tribunal. Future Act Members and the President have recently reviewed their response to the issues raised by the Commissioner and reaffirmed the position set out in Deputy President Sumner's letter of 18 December 2001.

This issue has also been raised in the Submission of the Western Australian Aboriginal Native Title Working Group (WAANTWG) to the inquiry into the Tribunal's effectiveness being conducted by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJC). The attached Paper entitled "Acceptance of Expedited Procedure Objection Applications (Form 4) under s 76 of the *Native Title Act* 1993 (Cth)" (Attachment I to the Tribunal's response to the WAANTWG and Frith submissions) was prepared by Deputy President Sumner on the Acceptance Guidelines issue in response to that submission and explains the Tribunal's position.

The relevance of international human rights instruments and the *Racial Discrimination Act 1975* (Cth) (RDA) to the carrying out of the Tribunal's functions.

The Commissioner in various parts of his Report says that State and Territory Governments and administrative tribunals should exercise their powers under the NTA consistently with relevant human rights instruments, and in particular the prohibition on racial discrimination found in the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) (see p 51).

This issue can be dealt with in two Parts:

- international instruments generally; and
- the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) which has been incorporated into domestic law by the RDA.

The relevance of international instrument generally

The Tribunal understands the position under Australian law to be as follows.

(i) Treaties do not have the force of law in Australia unless they are given that effect by statute (*Kioa v West* (1985) 159 CLR 550 at 570 per Gibbs CJ).

(ii) The ratification of International Covenant on Civil and Political Rights (ICCPR) by the executive government has no direct legal effect on domestic law (*Dietrich v The Queen* (1992) 177 CLR 292 per Mason C J and McHugh J at p 304-305).

(iii) In some cases there may be an expectation following ratification of an international treaty that decision makers will exercise their discretion in conformity with the treaty (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 in relation to an immigration decision and the Convention on the Rights of the Child). Following the *Teoh* judgment, the Federal Government made a 'clear and express statement … that entering into an international treaty is not reason for raising any expectations that government decision makers will act in accordance with the treaty if the relevant provisions of the treaty have not been enacted into domestic Australian law' (Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General Michael

Lavarch, Canberra, 10 May 1995, No M44). A similar statement was made by the present Minister for Foreign Affairs and Attorney-General on 25 February 1997. These statements would seem to throw doubt on the Commissioners' assertions about the relevance of international instruments to administrative decision-making, and I understand that there is a real chance that the *Teoh* decision, on this point, could be overturned if it were again considered by the High Court. (*Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam [2003] HCA 6 (12 February 2003)*

(iv) International instruments may be an aid to interpretation of a statute in cases of ambiguity in that they should be interpreted where possible in conformity with international law (*Chu Kheng Lein v Minister for Immigration* (1992) 176 CLR 1 per Brennan, Deane and Dawson JJ at 38; *Teoh* per Mason CJ and Deane J at pp 287-288; *WA v Ward* (2000) 191 ALR 1 per Kirby J at 157-158 per Callinan J at 273 (but only in the case of genuine ambiguity); s 15AB(2)(d) *Acts Interpretation Act* 1901 (Cth).

In summary, an international instrument not incorporated into domestic law may be taken into account in administrative decision-making (but whether there is a right to expect this is open to doubt) and in the interpretation of a statute in the case of ambiguity.

ICERD and the RDA

Different considerations apply to instruments such as the ICERD certain provisions of which are incorporated into domestic law by the RDA. The interaction between the *Native Title Act* 1993 (Cth) (NTA) and the RDA is dealt with in s 7 of the NTA:

> ***'Racial Discrimination Act***
>
> (1) This Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act 1975*.
>
> (2) Subsection (1) means only that:
>
> (a) the provisions of the *Racial Discrimination Act 1975* apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
>
> (b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity.
>
> (3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.'

The Commissioner's Report says that the Tribunal is not acting in accordance with s 7(2)(a) of the NTA and the applicable provisions of the RDA in its approach to s 76 and the acceptance of Form 4s in that its approach has a discriminating effect by not providing Indigenous people the right to effective participation about developments on their land. The assertion is not further analysed by reference to the rights of ordinary freeholders

The 1998 amendments to s 7 are explained in the Supplementary Explanation Memorandum to Government amendments moved on 3 July 1998. The Explanatory Memorandum says that the amendments are designed to clarify any confusion about the interaction of the NTA and the RDA and are to replicate in legislation the High Court's comments in *Western Australia v The Commonwealth* (1995) 183 CLR 373. Based on this Explanation the Tribunal understands the effect of these provisions to be that:

- nothing in the NTA is intended to affect the operation of the RDA;
- the RDA does not operate to override the specific provisions of the NTA which validate certain acts (including future acts) which affect native title even though these acts may affect native title rights differently to the way they affect other rights or even if they only affect native title rights;
- the RDA may be used as an aid to interpreting the NTA where ambiguity exists; and
- otherwise in the performance of the Tribunal's functions and exercise of powers under the NTA the RDA will continue to operate.

The Federal Court has, since the 1998 amendments, confirmed the decision of the High Court in *Western Australia v The Commonwealth* that the provisions of the RDA must yield to the specific provisions of the NTA (*Turrbal People v Queensland & Ors* (2002] FCA 1082; 194 ALR 53 at [36]; *Queensland v Central Queensland Land Council Aboriginal Corporation* (2002] FCAFC 371 (27 November 2002) per Kiefel J at [145]).

If the Tribunal is correct (and these issues have not been the subject of detailed argument before it) then the RDA is not applicable to the Tribunal's decision on the acceptance of Form 4s unless there is any ambiguity about how s 76 is to be interpreted. The Tribunal has decided (taking account of the overall purpose of the future act provisions) that Parliament intended that compliance be mandatory.

The Tribunal has previously explained its general approach to the administration of the right to negotiate provisions of the NTA. A summary of the approach appears in Deputy President Sumner's letter of 18 December 2001 to the Commissioner referred to above. The manner in which the Tribunal has dealt with the Form 4 issue arises from its understanding of what the NTA requires. There is a balance of interests involved. The NTA (s 3(a)) seeks to protect native title through the right to negotiate provisions which also provide for procedures to deal with the continuing grant of mining tenements over land where native title is claimed or has been determined.

The interrelationship between the NTA and the RDA has not been the subject of detailed submissions in cases before the Tribunal but the Tribunal does not accept that it has performed its functions and exercised its powers other than in conformity with the RDA. Whether the NTA is discriminatory in relation to the grant of mining titles on determined or claimed native title land compared to such grants on land owned by holders of freehold title will depend on specific legislation in each State or Territory governing the grant of mining tenements over freehold land. If the right to negotiate provisions have a discriminatory effect then this is something which Parliament must address. The Tribunal in administering the NTA has no authority to do so.

Taking all these matters into account, the Tribunal's position in relation to the Commissioners' comments is that it will, consistently with the requirements imposed on it by the NTA, seek to exercise its powers in a way which is consistent with relevant international human rights instruments and in particular the prohibition on racial discrimination found in the ICERD and the RDA. It should be obvious that, given its statutory mandate, the Tribunal would not seek to make decisions in a way that conflicts with those instruments. If a party appearing before the Tribunal considers that the Tribunal is not acting according to law in the way it administers the future act provision of the NTA, based on the impact of international instruments or the RDA then those arguments should be addressed in a particular case with specific facts so the matter can be properly considered by the Tribunal and, if necessary, be the subject of appeal to the Federal Court. The Tribunal has not had detailed arguments put to it in relation to these matters in an inquiry to enable it to consider the application of the legal principles to particular fact situations.

To conclude, many of the issues raised in the HREOC Report are matters of general policy for consideration by Parliament and Governments. The interrelationship between international human rights instruments and domestic law is a matter for the Courts and Parliament. The Tribunal responded in detail to the Commissioner's criticisms as soon as it became aware of them, has now reconsidered them, but does not consider that a change in its approach is necessary.

Given the general interest in this issue amongst representative bodies, I have taken the liberty of copying the letter to WAANTWG members and Dr Jonas.

Yours sincerely

Chris Doepel
Registrar

Tel: (08) 9268 7259
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Encl.

cc. WAANTWG members

Dr William Jonas
Aboriginal and Torres Strait Islander Social Justice Commissioner
Human Rights and Equal Opportunity Commission
GPO Box 5218
SYDNEY NSW 1042

7 March 2003

Mr Cedric Davies
Yamatji Land & Sea Council
P.O. Box Y3072
East St George's Tce
PERTH WA 6832

Dear Mr Davies

Following my meeting with you and Mssrs Choo, Rumler and Frith during the Native Title Conference in Geraldton, 3-5 September 2002, I can advise that Members of the Tribunal involved in future act work have considered your suggestions, as summarised by me in my paper headed "Native Title Conference: Future Acts Session – 4/9/02". Most of the issues you raised have also been covered in the Western Australian Aboriginal Native Title Working Group (WAANTWG) submission to the inquiry into the Tribunal's effectiveness by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJC). A copy of the Tribunal's response to that submission and Mr Frith's (Frith) submission (which has been prepared for a forthcoming meeting with WAANTWG and is likely to be included in the Tribunal's final submission to the PJC), is enclosed and sets out the Tribunal's considered position on a number of related issues. The following is the Tribunal's formal response to issues the four of you raised through me, relying where applicable on its response to the WAANTWG and Frith submission.

Timeliness in the conduct of expedited procedure objection inquires

This issue and the Tribunal's interpretation of the Federal Court's judgment in *Little v Western Australia* [2001] FCA 1706 at [82] to [85] is dealt with comprehensively in the Paper prepared by Deputy President Sumner as Attachment I to the Tribunal's response to the WAANTWG and Frith submissions.

The relevance of Representative Bodies resources (or lack of them) to the conduct of objection inquiries

Your concerns about para 9 of the NNTT's Explanation of *Guidelines on Acceptance of Expedited Procedure Objection Applications – 16 October 2001* is dealt with in Mr Sumner's Paper. The Tribunal has responded to your submission by amending the relevant sentence of para 9 to read:

> '9. Some submissions refer to a lack of resources to comply with the requirements of the Act and regulations. That is not, however, an issue for the Tribunal in ~~applying the expedited procedure provisions of the Act.~~ **the interpretation of s 76 of the Act**. The

> Act is specific that the objection must be lodged within the relevant four month period and, in the Tribunal's view, the legislative intent is that the objection comply with the provisions of s 76, Regulation 4 and Form 7.'

As Mr Sumner's Paper makes clear, the Tribunal's position is that resource difficulties are not relevant to how the *Native Title Act* 1993 (Cth) is interpreted but may be relevant to how the Tribunal exercises its powers to conduct inquiries, for instance on whether to grant adjournments or not. How a Member deals with requests for adjournments will depend on the facts of particular cases. In practice the Tribunal has taken into account the resource difficulties of Representative Bodies in programming inquiries. The amendment to the Procedures under the Right to Negotiate Scheme to establish a minimum 16 week defacto right to negotiate period is also a recognition of these difficulties.

Unequal evidentiary requirements

This issue is also dealt with in the Tribunal's response to the WAANTWG and Frith submission. More specifically you submitted that grantee parties are not required to submit contentions (if they rely on the Government party's contentions) and are not expected to submit affidavits. I point out that where the grantee party's contention is that it relies on the Government party's contentions then the Tribunal acts on the basis that the powers given under the *Mining Act* to the grantee (exploration or prospecting) will be exercised to the full and the Tribunal takes no account of the grantee's actual intentions. This cannot disadvantage a native title party.

With respect to the Government you say that it can rely on documents sourced from its own records. As far as the Tribunal is aware no objection has been raised to the acceptance of these documents in this form and it is rare for any argument to arise in relation to them.

With respect to a native title party's evidence you say that very high level evidence in affidavit form based on oral interviews is expected, which is highly resource intensive and may be culturally intrusive and inappropriate. There are a number of points to be made about this submission. First, the inquiry proceeds because no agreement can be reached between the parties. This means that both the Government party (which has asserted the expedited procedure) and the grantee party (which agrees with the Government) maintains that the grant will not cause the interference or disturbance referred to in s 237 of the NTA. The Tribunal can only determine this issue on the basis of evidence and the most critical evidence will be about the s 237 factors. Although there is no formal burden of proof on the native title party, in almost all cases, this will be evidence which is peculiarly within the knowledge of the native title party. Without evidence on these issues it is impossible for the Tribunal to make a determination in the objector's favour. Unless oral evidence is obtained, a written statement verified by affidavit is the best evidence. Second, the Tribunal's standard directions do not require the production of affidavits, although it is acknowledged that this practice has developed and there is now an expectation from the Tribunal and other parties that the evidence is verified by affidavit. Third, the Tribunal's directions attempt to deal with the issue of cultural sensitivity by ensuring that evidence can be received confidentially. Fourth, it is the general practice of other parties not to seek leave to cross-examine deponents of

affidavits in expedited procedure inquiries and the evidence is usually accepted without question by the Tribunal.

While it is clear that an affidavit constitutes the best documentary evidence, a native title party may consider it appropriate to submit a signed statement instead. If this happens the Tribunal, in the context of a particular inquiry, will be able to consider whether to accept a signed statement after hearing the other parties on the issue. Although not able to pre-judge the issue, Tribunal Members are of the preliminary view that, subject to submissions from other parties, this would be acceptable evidence.

Hearings on country

The practice in Western Australia has developed of dealing with all objection inquiries 'on the papers'. There has not been a hearing on country for a number of years, a practice which has generally been supported by all parties. It is extremely rare for a native title party to request a hearing on country. The Tribunal must hold a hearing if it appears that the issues for determination cannot be adequately determined in the absence of the parties (s 151(2)). There is nothing to prevent a native title party from requesting such a hearing but the decision whether it is necessary rests with the Tribunal. A hearing will take place on country if it is deemed necessary by the presiding Member.

Formality of NNTT hearings and lack of face to fact contact with Aboriginal people

While individual Members adopt somewhat different approaches to the formality of their hearings, the Tribunal generally does not regard them as overly formal. Extensive use is made of telephone conferences to remove the need for the representative parties to attend the Tribunal in person. Hearings are not usually conducted in a Courtroom but in a conference setting where legal representatives are not required to stand to address the Tribunal.

The question of more face to face contact with Aboriginal people would, in part, be dealt with by more oral hearings on country as discussed above. The Tribunal has no objection in principle to this occurring, although a decision to do so would need to be made by an individual inquiry Member or collectively by the Tribunal if it were thought that regular sittings outside Perth were desirable. Consideration of this issue would involve assessing whether there is sufficient inquiry work to warrant it and whether resources of the Tribunal, Representative Bodies and Government should be diverted to regular hearings outside Perth. The Tribunal is prepared to discuss this issue further with WAANTWG.

Limited extent of cross-cultural understanding by NNTT Members

This issue is related to that of more face to face contact with Aboriginal people addressed above. I would simply add that the Tribunal:

- is aware of s 109(2) of the NTA whereby it may take account of the cultural and customary concerns of Indigenous people but not so as to prejudice unduly any other party; and
- offers cultural awareness training to its Members and staff.

Following the recent meeting of Members in Adelaide, recent publications of the Australian Institute of Judicial Administration, prepared as part of its National Aboriginal Cultural Awareness Program, and other relevant material dealing with Indigenous cultural issues and Courts and Tribunals were made available to Members.

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This issue is comprehensively dealt with in the Tribunal's response to the WAANTWG and Frith submission and in particular the Paper prepared by Deputy President Sumner (Attachment I).

Adjournment of matters sine die where the grantee party does not participate in the inquiry process

This matter has already been acted upon and the Tribunal has, for the time being, established a holding list for these objections.

Yours sincerely

Athol Prior
Operations Manager – Future Act Unit

Tel: (08) 9268 7347
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cc.	Mr Simon Choo PO Box 1007 WEST LEEDERVILLE WA 6007	Mr Mark Rumler Legal Officer Northern Land Council PO Box 42921 DARWIN NT 0811	Mr Angus Frith Barrister Duncan's List 525 Lonsdale Street MELBOURNE VIC 3000

7 March 2003

Mr Simon Choo
PO Box 1007
WEST LEEDERVILLE WA 6007

Dear Mr Choo

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cc.	Mr Cedric Davies Yamatji Land & Sea Council P.O. Box Y3072 East St George's Tce PERTH WA 6832	Mr Mark Rumler Legal Officer Northern Land Council PO Box 42921 DARWIN NT 0811	Mr Angus Frith Barrister Duncan's List 525 Lonsdale Street MELBOURNE VIC 3000

7 March 2003

Mr Angus Frith
Barrister
Duncan's List
525 Lonsdale Street
MELBOURNE VIC 3000

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While individual Members adopt somewhat different approaches to the formality of their hearings, the Tribunal generally does not regard them as overly formal. Extensive use is made of telephone conferences to remove the need for the representative parties to attend the Tribunal in person. Hearings are not usually conducted in a Courtroom but in a conference setting where legal representatives are not required to stand to address the Tribunal.

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Limited extent of cross-cultural understanding by NNTT Members

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- is aware of s 109(2) of the NTA whereby it may take account of the cultural and customary concerns of Indigenous people but not so as to prejudice unduly any other party; and
- offers cultural awareness training to its Members and staff.

Following the recent meeting of Members in Adelaide, recent publications of the Australian Institute of Judicial Administration, prepared as part of its National Aboriginal Cultural Awareness Program, and other relevant material dealing with Indigenous cultural issues and Courts and Tribunals were made available to Members.

Guidelines on Acceptance of Expedited Procedure Objection Applications (16 October 2001)

This issue is comprehensively dealt with in the Tribunal's response to the WAANTWG and Frith submission and in particular the Paper prepared by Deputy President Sumner (Attachment I).

Adjournment of matters sine die where the grantee party does not participate in the inquiry process

This matter has already been acted upon and the Tribunal has, for the time being, established a holding list for these objections.

Yours sincerely

Athol Prior
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7 March 2003

Mr Mark Rumler
Legal Officer
Northern Land Council
PO Box 42921
DARWIN NT 0811

Dear Mr Rumler

Following my meeting with you and Mssrs Davies, Choo and Frith during the Native Title Conference in Geraldton, 3-5 September 2002, I can advise that Members of the Tribunal involved in future act work have considered your suggestions, as summarised by me in my paper headed "Native Title Conference: Future Acts Session – 4/9/02". Most of the issues you raised have also been covered in the Western Australian Aboriginal Native Title Working Group (WAANTWG) submission to the inquiry into the Tribunal's effectiveness by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJC). A copy of the Tribunal's response to that submission and Mr Frith's (Frith) submission (which has been prepared for a forthcoming meeting with WAANTWG and is likely to be included in the Tribunal's final submission to the PJC), is enclosed and sets out the Tribunal's considered position on a number of related issues. The following is the Tribunal's formal response to issues the four of you raised through me, relying where applicable on its response to the WAANTWG and Frith submission.

Timeliness in the conduct of expedited procedure objection inquires

This issue and the Tribunal's interpretation of the Federal Court's judgment in *Little v Western Australia* [2001] FCA 1706 at [82] to [85] is dealt with comprehensively in the Paper prepared by Deputy President Sumner as Attachment I to the Tribunal's response to the WAANTWG and Frith submissions.

The relevance of Representative Bodies resources (or lack of them) to the conduct of objection inquiries

Your concerns about para 9 of the NNTT's Explanation of *Guidelines on Acceptance of Expedited Procedure Objection Applications – 16 October 2001* is dealt with in Mr Sumner's Paper. The Tribunal has responded to your submission by amending the relevant sentence of para 9 to read:

> '9. Some submissions refer to a lack of resources to comply with the requirements of the Act and regulations. That is not, however, an issue for the Tribunal in ~~applying the expedited procedure provisions of the Act.~~ **the interpretation of s 76 of the Act**. The

> Act is specific that the objection must be lodged within the relevant four month period and, in the Tribunal's view, the legislative intent is that the objection comply with the provisions of s 76, Regulation 4 and Form 7.'

As Mr Sumner's Paper makes clear, the Tribunal's position is that resource difficulties are not relevant to how the *Native Title Act* 1993 (Cth) is interpreted but may be relevant to how the Tribunal exercises its powers to conduct inquiries, for instance on whether to grant adjournments or not. How a Member deals with requests for adjournments will depend on the facts of particular cases. In practice the Tribunal has taken into account the resource difficulties of Representative Bodies in programming inquiries. The amendment to the Procedures under the Right to Negotiate Scheme to establish a minimum 16 week defacto right to negotiate period is also a recognition of these difficulties.

Unequal evidentiary requirements

This issue is also dealt with in the Tribunal's response to the WAANTWG and Frith submission. More specifically you submitted that grantee parties are not required to submit contentions (if they rely on the Government party's contentions) and are not expected to submit affidavits. I point out that where the grantee party's contention is that it relies on the Government party's contentions then the Tribunal acts on the basis that the powers given under the *Mining Act* to the grantee (exploration or prospecting) will be exercised to the full and the Tribunal takes no account of the grantee's actual intentions. This cannot disadvantage a native title party.

With respect to the Government you say that it can rely on documents sourced from its own records. As far as the Tribunal is aware no objection has been raised to the acceptance of these documents in this form and it is rare for any argument to arise in relation to them.

With respect to a native title party's evidence you say that very high level evidence in affidavit form based on oral interviews is expected, which is highly resource intensive and may be culturally intrusive and inappropriate. There are a number of points to be made about this submission. First, the inquiry proceeds because no agreement can be reached between the parties. This means that both the Government party (which has asserted the expedited procedure) and the grantee party (which agrees with the Government) maintains that the grant will not cause the interference or disturbance referred to in s 237 of the NTA. The Tribunal can only determine this issue on the basis of evidence and the most critical evidence will be about the s 237 factors. Although there is no formal burden of proof on the native title party, in almost all cases, this will be evidence which is peculiarly within the knowledge of the native title party. Without evidence on these issues it is impossible for the Tribunal to make a determination in the objector's favour. Unless oral evidence is obtained, a written statement verified by affidavit is the best evidence. Second, the Tribunal's standard directions do not require the production of affidavits, although it is acknowledged that this practice has developed and there is now an expectation from the Tribunal and other parties that the evidence is verified by affidavit. Third, the Tribunal's directions attempt to deal with the issue of cultural sensitivity by ensuring that evidence can be received confidentially. Fourth, it is the general practice of other parties not to seek leave to cross-examine deponents of

affidavits in expedited procedure inquiries and the evidence is usually accepted without question by the Tribunal.

While it is clear that an affidavit constitutes the best documentary evidence, a native title party may consider it appropriate to submit a signed statement instead. If this happens the Tribunal, in the context of a particular inquiry, will be able to consider whether to accept a signed statement after hearing the other parties on the issue. Although not able to pre-judge the issue, Tribunal Members are of the preliminary view that, subject to submissions from other parties, this would be acceptable evidence.

Hearings on country

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