

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

***OPERATION OF THE NATIVE TITLE ACT***

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

**Submission No:29**

**Received 7 January 2003**

**Mr Brian Stacey**

**Ag. Manager**

**Land and Economic Development**

**Group**

**ATSIC**

**GPO Box 2472**

**BRISBANE QLD 4001**

**☎ 07 3006 4800 📄 07 3012 8845**

**E-mail:**

Ms Maureen Weeks  
Secretary  
Parliamentary Joint Committee on Native Title  
and the Aboriginal and Torres Strait  
Islander Land Fund  
Parliament House  
Canberra ACT 2600

Dear Ms Weeks

**INQUIRY INTO THE EFFECTIVENESS OF THE  
NATIONAL NATIVE TITLE TRIBUNAL (NNTT)**

I have enclosed ATSIC's submission to the Committee's inquiry into the effectiveness of the National Native Title Tribunal ('NNTT').

I wish to apologise for the lateness of this submission and to thank the Committee for agreeing to extend the deadline for the submission.

The NNTT plays a central role in the operation of the *Native Title Act 1993* ('NTA') and the Commission welcomes the Committee's interest in this aspect of the Act.

ATSIC will give consideration to preparing a further submission to the inquiry once it has had an opportunity to consider and reflect upon submissions from a wide range of participants in the native title process, in particular the NNTT itself and Native Title Representative Bodies.

I look forward to progress in the Committee's inquiry with great interest.

Yours sincerely

Brian Stacey  
Ag. Manager  
Land and Economic Development Group

December 2002



ATSIC Submission to the Inquiry into the  
Effectiveness of the National Native Title Tribunal

by the

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

December 2002

<b>Contents</b>	<b>Page</b>
<b>Executive Summary</b>	<b>1</b>
<b>Introduction</b>	<b>4</b>
<b>Main objects of the NTA</b>	<b>5</b>
<b>Functions of the National Native Title Tribunal ('NNTT')</b>	<b>6</b>
<b>Members</b>	<b>10</b>
<b>NNTT's Role as Mediator</b>	<b>12</b>
<b>Notification</b>	<b>13</b>
<b>NNTT's Research Role</b>	<b>14</b>
<b>Resource Issues</b>	<b>14</b>
<b>Conclusion</b>	<b>15</b>

## Executive Summary

1. ATSIC is primarily concerned to ensure that the native title process delivers beneficial outcomes for Aboriginal people and Torres Strait Islanders through the recognition of their native title. That objective is reflected in the main objects of the NTA. The ‘effectiveness’ or otherwise of the NNTT has the potential to significantly impact on the achievement of those outcomes.
2. The NNTT is an integral part of the Commonwealth native title system, along with the Federal Court, the Native Title Representative Bodies (NTRBs) system, ATSIC and the Attorney-General’s Department.
3. ATSIC believes that what happens in one part of the system has a direct effect on the functioning of other parts of the system. ATSIC is concerned to ensure that all parts of the Commonwealth native title system are functioning effectively, not only in terms of their individual performance but also in terms of their impact on other parts of the system.
4. ATSIC considers it imperative that the Committee receives evidence from other parts of the Commonwealth native title system, in particular the NTRBs, about the effectiveness of the NNTT. ATSIC encourages the Committee to schedule hearings and to invite NTRBs to appear to provide evidence to the Committee.
5. ATSIC is puzzled that the NNTT continues to retain the recognition and protection of native title as its single outcome (in terms of its output and outcome structure) as this appears to go beyond the functions envisaged by the Parliament, at least in the post 1998 amendments environment.
6. An issue of importance to ATSIC and NTRBs which goes to the question of whether the NNTT has defined a role for itself beyond that envisaged by the Parliament is the apparently increasing role of the NNTT in seeking to resolve intra-Indigenous disputes. Dispute resolution is an explicitly stated statutory function of NTRBs under the NTA and ATSIC questions whether the NTA ought not ensure that a single entity has sole functional responsibility for resolving intra-Indigenous disputes and whether that entity ought to be the relevant NTRB.
7. ATSIC considers it would be preferable to build the capacity of Indigenous people themselves and their representative organisations to resolve intra-Indigenous disputes and that, as far as practicable, NTRBs should perform that function.
8. A further issue is the role of the NNTT in providing assistance to applicants to prepare non-claimant applications.
9. The Family Law and Legal Aid Division (FLLAD) of the Attorney-General’s Department already provides assistance to a number of non-claimants. ATSIC is concerned that provision of assistance to non-claimants by the NNTT may

constitute a form of double dipping which could unfairly disadvantage native title claimants.

10. In any event, ATSIC is strongly of the view that Government funding and assistance should not be made available to applicants seeking a determination that native title does not exist over a particular area. ATSIC had previously understood that funding provided to FLLAD was solely intended for the provision of assistance to respondents to an application for a determination of native title.
11. The ATSIC submission raises issues about the qualifications of some members of the NNTT to conduct effective mediation. Anecdotal evidence from some NTRBs supports the view that the relative skills and experience of members vary and that some members are better equipped than others in this regard.
12. ATSIC is also aware of concerns among some NTRBs about the apparently unconstrained ability of NNTT members to schedule and conduct mediation meetings without regard to the ability of the relevant NTRB to participate. The conduct and role of a number of NNTT members in mediation has been the subject of adverse comment in submissions to the Committee as well as in publications such as the Indigenous Law Bulletin.
13. It appears to ATSIC that more clarity is needed regarding the roles, functions and powers of NNTT members.
14. ATSIC questions the need for a mandatory mediation process and the appropriateness and effectiveness of a single mediation body for native title determination applications. ATSIC is not convinced that the efficient and effective functioning of mediation processes under the NTA is promoted through restricting the conduct of mediation to a single body.
15. The perceived inadequacy of some of the notices issued by the NNTT is a further issue that has been raised with ATSIC by a number of NTRBs, in particular the adequacy of the description of the relevant area.
16. Some NTRBs also consider that it is as “reasonably practicable” for the notifying party (whether it be the Native Title Registrar, the Commonwealth Minister or the government party) to identify and notify native title holders as it would be for the representative body, in particular given the resource constraints under which representative bodies currently operate. The Committee may wish to consider the scope for the NNTT to relieve the burden from NTRBs in this regard.
17. The issue of the adequacy of funding available for NTRBs to perform their statutory functions under the NTA, and funding imbalances within the Commonwealth native title system, are an issue of primary importance for ATSIC. Independent sources have concluded that NTRBs are under funded in terms of their capacity to perform their statutory functions under the NTA. There has been no increase in real terms to overall funding for NTRBs to perform their statutory functions since 1996-97.

18. The imbalance in funding between NTRBs and the NNTT is an issue of concern to not only ATSIC and the NTRBs themselves but to industry and government. Due to the interdependent nature of the relationships between the various components of the Commonwealth native title system, ATSIC asks that the Committee give particular attention to the issue of resourcing of all parts of the system.

## Introduction

19. ATSIC welcomes the attention that the Committee is giving to the National Native Title Tribunal (NNTT) in this inquiry. The NNTT is a central player in the native title process.
20. ATSIC asks the Committee to note that this submission has been drafted with the intention of highlighting some possible lines of inquiry for the Committee. It is not intended to be an exhaustive analysis of all aspects of the NNTT's performance but is, instead, an examination of some of the issues relevant to an assessment of the NNTT's "effectiveness".
21. The role of ATSIC with respect to the *Native Title Act 1993* ('NTA') is also a crucial one. ATSIC administers those provisions of the NTA for which the Minister for Immigration and Multicultural and Indigenous Affairs has responsibility. The relevant parts of the NTA are those that govern Prescribed Bodies Corporate (PBCs) and Native Title Representative Bodies (NTRBs), including the selection, recognition, operations and accountability requirements for NTRBs. ATSIC also funds the NTRB system.
22. In terms of the operations of the NTA, ATSIC is primarily concerned to ensure the achievement of beneficial outcomes for Aboriginal people and Torres Strait Islanders through the recognition of their native title over lands and waters to which the NTA extends. That objective is reflected in the main objects of the NTA set out at section 3, specifically paragraph 3(a). The NNTT is a key player (but not the only player) in many of the processes and procedures under the NTA and, in many instances, its activities have the potential to impact on the achievement of beneficial outcomes for Indigenous people.
23. It is important that the Committee conduct its inquiry into the NNTT from the point of view of it being part of the Commonwealth native title system. Other important components of that system are the Federal Court, the NTRB system, ATSIC and the Attorney-General's Department. There is a widespread recognition that, to a significant extent, the ability of the system as a whole to operate efficiently and effectively is dependent on the way in which its individual elements perform their functions: what happens in one part of the system has a direct effect on the functioning of other parts of the system.
24. ATSIC is concerned to ensure that all parts of the Commonwealth native title system are functioning effectively, not only in terms of their individual performance but also in their impact on other parts of the system. For that reason ATSIC believes that it is important for the Committee, in examining the effectiveness of the NNTT, to assess the impact of its operations on other parts of the system, in particular the NTRBs who are integral to the achievement of beneficial native title outcomes for Indigenous people.



25. Many of the comments contained in this submission about the operations and effectiveness of the NNTT are generally reflective of the views of a number of NTRBs and native title practitioners.
26. ATSIC does not have dealings with the NNTT on a day-to-day basis as a matter of course. Instead ATSIC tends to interact with the Registrar and employees (as opposed to members) of the Tribunal on an intermittent basis and chiefly in relation to policy issues. ATSIC, along with the NNTT, is a member of the Commonwealth's Native Title Coordination Committee (NTCC). The NTCC is a mechanism for coordinating the activities and funding of the native title system.
27. ATSIC encourages the Committee to actively seek the views of other parts of the Commonwealth native title system, in particular the NTRBs, possibly through the scheduling of hearings at which they might be invited to provide evidence to the Committee. ATSIC notes that at the time of preparation of this submission that the Central Land Council was the only NTRB to have provided a submission to the Committee in relation to the current Inquiry - although the Western Australian Aboriginal Native Title Working Group ('WAANTWG'), an unincorporated association of the five representative bodies in Western Australia, has also provided a submission.
28. ATSIC notes also at the time of preparation of this submission that the Native Title Division in the Attorney-General's Department, a key part of the Commonwealth native title system, has yet to make a submission to the Committee in relation to the current Inquiry. ATSIC is anxious to know the views of the Government in relation to the effectiveness of the NNTT and respectfully suggests that the Committee encourage the Attorney-General's Department to provide a submission to the Inquiry.
29. ATSIC will give consideration to preparing a further submission once it has had an opportunity to examine and analyse submissions received from other stakeholders, in particular Native Title Representative Bodies. ATSIC has also not had an adequate opportunity to fully consider the submission of the NNTT itself. Due to its lengthy nature it has not been possible to analyse that submission in detail between the time of its lodgement and finalisation of the ATSIC submission.

### **Main objects of the NTA**

30. The main objects of the NTA are set out at section 3 of the Act. They are:
  - (a) to provide for the recognition and protection of native title; and
  - (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
  - (c) to establish a mechanism for determining claims to native title; and
  - (d) to provide for, or permit, the validation of past acts, invalidated because of the existence of native title.

[See also 'overview' of role of NNTT at s.4(7)]

## Functions of the National Native Title Tribunal ('NNTT')

31. The NNTT is a central player in the native title process. ATSIC believes that any examination of the effectiveness of the NNTT needs to have careful regard to the Tribunal's functions and way of operating as prescribed by the NTA, as well as to the main objects of the NTA itself.
32. The NTA 1993 established the NNTT to deal with uncontested claims to native title and uncontested claims for compensation. The Act envisaged that applications would initially be made to the Native Title Registrar and that, where an application was accepted, the Registrar would give notice of the application to a range of persons. The NNTT would be able to make a determination of native title which was then to be registered with, and had the effect of an order of, the Federal Court. The NNTT was to mediate contested claims, but if the mediation was unsuccessful, the matter was to be referred to the Federal Court.<sup>1</sup>
33. However, consequent upon the *Brandy* decision<sup>2</sup>, the role of the NNTT was substantially altered by the *Native Title Amendment Act 1998* ('NTAA'). A number of its functions were transferred to the Federal Court and it received a number of additional functions including additional mediation and assistance roles. Changes were also made to the NNTT's way of operating.
34. Applications for determinations of native title are now made to the Federal Court (or recognised State or Territory bodies). The NNTT's primary functions are now to mediate applications for native title or compensation, and to mediate and arbitrate disputes as to whether a future act may be done over land subject to native title<sup>3</sup>. While applications for native title determinations and compensation applications are filed in and managed by the Federal Court, applications regarding the exercise of the NNTT's future act functions are still lodged with and managed by the NNTT, unless a State or Territory law provides that these functions are to be performed by a recognised State or Territory body<sup>4</sup> or the Commonwealth Minister determines that they may be performed by an equivalent State or Territory body.<sup>5</sup>
35. A convenient summary of the NNTT's main statutory responsibilities is provided in its 2001-2002 Annual Report, which states that the President, deputy presidents and other members of the NNTT have statutory responsibility for:
  - mediating native title determination applications (claimant and non-claimant);

---

<sup>1</sup> Drawn from 'Commentary on the *Native Title Act 1993*' prepared by the Attorney-General's Legal Practice and published as a preface to the edition of the Act prepared by the Attorney-General's Department in 1993.

<sup>2</sup> *Brandy v Human Rights and Equal Opportunity Commission* High Court (1995).

<sup>3</sup> s.108, NTA.

<sup>4</sup> s.27, NTA.

<sup>5</sup> s.207B, NTA.

- mediating compensation applications;
- reporting to the Federal Court on the progress of mediation;
- assisting people to negotiate Indigenous Land Use Agreements ('ILUAs'), and helping to resolve any objections to area and alternative procedure ILUAs;
- arbitrating objections to the expedited procedure in the future act scheme;
- mediating in relation to the doing of proposed future acts; and
- arbitrating applications for a determination of whether a future act can be undertaken and, if so, whether any conditions apply.<sup>6</sup>

36. The Annual Report goes on to note that the NTA also gives the Native Title Registrar some specific responsibilities, including:

- assisting people at any stage of any proceedings under the NTA, including assisting people to prepare applications;
- assessing claimant applications for registration against the conditions of the registration test;
- giving notice of applications to individuals, organisations, governments and the public in accordance with the NTA;
- registering ILUAs that meet the registration requirements of the NTA; and
- maintaining the Register of Native Title Claims, the National Native Title Register and the Register of Indigenous Land Use Agreements.<sup>7</sup>

37. In addition to its inquiry functions under the Right to Negotiate and ILUA provisions (see later discussion), the NNTT must, at the direction of the Commonwealth Minister, also hold inquiries into any matter relating to native title ("**special matter inquiry**").<sup>8</sup> A special matter inquiry may include, but is not limited to, an inquiry into:

- The effect on Aboriginal peoples and Torres Strait Islanders of the validation of particular past acts or intermediate period acts;
- Alternative forms of compensation that could be provided in relation to acts covered by the NTA; and
- Action that could be taken to assist Aboriginal peoples and Torres Strait Islanders where native title has been extinguished.<sup>9</sup>

---

<sup>6</sup> NNTT, 2001-2002 Annual Report, page 25.

<sup>7</sup> *ibid.*

<sup>8</sup> ss.137, 139, NTA.

<sup>9</sup> s.137(2), NTA.

38. The NNTT's Submission to the Committee indicates that there have been no such inquiries to date.<sup>10</sup>
39. The NNTT is also permitted to carry out research for the purpose of performing its functions. Matters for research may include, but are not limited to:
- The history of interests in relation to land or waters in Australia;
  - Anthropology; and
  - Linguistics.<sup>11</sup>
40. The NTA prescribes that the NNTT must pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way. It further provides that, in carrying out its functions, the NNTT *may* take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any party to any proceedings that may be involved. Finally, it provides that the NNTT is not bound by technicalities, legal forms or rules of evidence in carrying out its functions.<sup>12</sup>
41. The NNTT describes its main role as to assist people to resolve native title issues and that this is done through agreement making.<sup>13</sup> ATSIC notes, however, that the NNTT in commenting on its Outcome and output structure in its most recent Annual Report states that it "has retained, without change, its single outcome – the recognition and protection of native title".<sup>14</sup>
42. The Western Australian Aboriginal Native Title Working Group ('WAANTWG') in its submission to the Committee notes, in relation to that outcome, that the "inappropriateness of the reference has been commented upon by the Aboriginal and Torres Strait Islander Social Justice Commissioner". WAANTWG states that it concurs with the Commissioner's view.<sup>15</sup>
43. It seems curious to ATSIC that the NNTT continues to retain the recognition and protection of native title as its single outcome as its operations and activities, at least in the post 1998 amendments environment, do not appear to be focussed on the achievement of that outcome. In that regard ATSIC also concurs with the views of the Social Justice Commissioner that "in view of the performance indicators used to measure its achievement, the outcome may be better described as providing a procedure for recognition to occur, with the NNTT acting as a facilitator in this process, rather than the goal of achieving substantive recognition itself".<sup>16</sup>

---

<sup>10</sup> NNTT Submission, p.115.

<sup>11</sup> s.108(2),(3), NTA.

<sup>12</sup> s.109, NTA.

<sup>13</sup> NNTT Annual Report 2001-02, p.25.

<sup>14</sup> Ibid, p.28.

<sup>15</sup> WAANTWG submission, p.2.

<sup>16</sup> Social Justice Commissioner's Native Title Report 2001, p.66.

44. The Social Justice Commissioner comments in the Native Title Report 2001 at some length about the NNTT's performance measurements. In general, ATSIC is in agreement with those comments.
45. The perception that the NNTT's operations and activities are not entirely consistent with providing for the recognition and protection of native title is further reinforced through the NNTT having the function of providing assistance to applicants to prepare non-claimant applications.<sup>17</sup> It is not apparent from a reading of the NNTT's most recent Annual Report and its submission to the Committee what, if any, assistance is or has been provided by the NNTT in respect of non-claimant applications.
46. ATSIC would be most concerned if it emerged that the NNTT was actively providing assistance to applicants to prepare non-claimant applications. In the NNTT's own words, "(n)on-claimant applications are usually made for the purpose of obtaining a determination that native title does not exist or to enable a future act to occur without the need for negotiation with people who may hold native title in relation to the area" (emphasis added).<sup>18</sup>
47. ATSIC is aware of an instance where the Family Law and Legal Aid Division (FLLAD) of the Attorney-General's Department apparently funded a non-claimant application that resulted in a determination that native title did not exist over an area.
48. ATSIC is strongly of the view that Government funding and assistance should not be made available to applicants seeking a determination that native title does not exist over a particular area. ATSIC had previously understood that funding provided to FLLAD was solely intended for the provision of assistance to respondents to an application for a determination of native title.
49. Despite the paucity of information in the Attorney-General's Department's Annual Report 2001-2002 relating to expenditure by FFLAD on native title matters, ATSIC understands that some \$12 million was appropriated for that purpose in that financial year. ATSIC also understands that few, if any, applications for assistance with native title matters from programs administered by FFLAD were rejected in that year. That situation contrasts starkly with that of NTRBs where the majority of those bodies are forced to reject a significant number of applications for assistance from native title claimants due to the lack of available funding.
50. In these circumstances, ATSIC considers that the NNTT should not be able to also provide assistance to applicants to prepare non-claimant applications. Such a situation would in effect be a form of double dipping that reinforces the current resource inequities within the native title system (see also discussion under *Resources* below).

---

<sup>17</sup> See discussion of non-claimant applications at p.69-70 of the NNTT Submission to the Committee.

<sup>18</sup> NNTT Submission, p.69.

51. Accordingly, ATSIC requests the Committee to examine the issue of the provision of assistance to non-claimants by the NNTT, in particular:
- the extent of any previous or current assistance being provided by the NNTT to non-claimants;
  - whether the NTA contemplates the provision of assistance by the Registrar to applicants to prepare non-claimant applications; and
  - whether the provision of assistance to non-claimants is consistent with, or contributes to, the ‘effectiveness’ of the NNTT.
52. In ATSIC’s view the “recognition and protection of native title” is an outcome for which the NTRBs are primarily responsible and the NNTT, in pursuing that outcome, risks duplicating the functions of NTRBs. It is the view of at least some of the NTRBs that the NNTT does in fact duplicate some of the functions of NTRBs. The NNTT’s own submission to the Committee refers to the submission of the Northern Land Council to the Committee Inquiry into ILUAs as an example of where an NTRB has made such an assertion.<sup>19</sup>
53. ATSIC is also aware that some NTRBs question the appropriateness of the NNTT’s involvement in the resolution of intra-Indigenous disputes. Their contention is that such dispute resolution functions are the province of the NTRBs themselves under section 203BF of the NTA and that the NNTT should only participate in the mediation of such disputes with the agreement of the parties. They view the involvement of the NNTT in such matters as not only a potential duplication of their own efforts, leading to the wastage of resources that could be better utilised elsewhere, but also as generating a significant risk of exacerbating the particular dispute or conflict.
54. ATSIC suggests that the Committee, as part of the current Inquiry, examine issues related to the NNTT’s involvement in the resolution of intra-Indigenous disputes. In particular, it ought examine what resources of the NNTT are being used for this purpose, and how effectively, and whether the NTA should be amended to ensure that a single entity has sole functional responsibility for resolving intra-Indigenous disputes and whether that entity ought be the relevant NTRB.

## **Members**

55. Membership of the NNTT is dealt with at Division 2 of Part 6 of the NTA. Members are appointed by the Governor-General for specified terms not exceeding five years. There are two classes of members, presidential and non-presidential, and the NTA sets out the qualifications for membership. Members may be appointed as either full-time or part-time members.
56. The NNTT’s latest Annual Report refers to the fact that the role of its members is defined in various sections of the NTA and states that members are involved in claim mediation, ILUA negotiations and future act hearings

---

<sup>19</sup> Ibid, p.101.

and processes, as well as providing assistance and information to parties involved in the native title process.<sup>20</sup>

57. The WAANTWG submission to the Committee states that the experience of some NTRBs in Western Australia is that “it is not always the case that the member conducting the mediation is sufficiently experienced or skilled to actively mediate and drive the parties in negotiations”.<sup>21</sup>
58. Anecdotal evidence from NTRBs in other parts of Australia supports the view that the relative skills and experience of members varies and that some members are better equipped than others to, in particular, conduct effective mediations.
59. In other instances, some NTRBs and native title practitioners have raised informally with ATSIC their dissatisfaction with the conduct of mediations by some members. They have asserted that some members schedule meetings through direct contact with claimant groups and without first consulting with the NTRB representing that group. Concerns have also been expressed about the frequency of mediation meetings and, in some instances, whether they are an efficient use of NNTT and NTRB resources. There is a view among some NTRBs that too often NNTT members seek to resolve intra-Indigenous disputation by the imposition of a solution through the mediation process.
60. Some NTRBs have also expressed concern that members are able to prepare reports on the progress of mediation for the Federal Court without reference to the relevant NTRB or without it being provided with an opportunity for input into the report.
61. The conduct of mediation by members of the NNTT was the subject of an article published in the Indigenous Law Bulletin in July this year<sup>22</sup>. ATSIC notes that the NNTT’s role in mediation also attracted adverse comment from the Local Government Association of Queensland Inc and the Queensland Minister for Natural Resources and Minister for Mines in their submissions to the Committee.
62. Some of the issues relating to members’ involvement in mediations are discussed by the NNTT in its submission to the Committee.<sup>23</sup> The submission indicates that members develop mediation-related policy for the NNTT as well as developing and directing the implementation of mediation programs in the claims for which they have carriage. The latter usually include a timeframe for mediation or for each stage of the mediation process.
63. The NNTT submission also refers to the provisions of the NTA relating to members and to the fact that members have voluntarily adopted a code of conduct and conflict of interest policy. Neither the NNTT’s submission nor its

---

<sup>20</sup> NNTT Annual Report 2001-2002, p.84.

<sup>21</sup> WAANTWG Submission, p.37.

<sup>22</sup> National Native Title Tribunal: Effective mediator or bureaucratic albatross? A user’s perspective. By Paul Hayes, Indigenous Law Bulletin, July 2002, volume 5 issue 18.

<sup>23</sup> NNTT Submission, p.42.

most recent Annual Report provide any substantive information relating to the precise contents of the code or policy or of their application.

64. ATSIC is concerned to ensure that both NNTT and NTRB resources are put to the most effective use. ATSIC is not aware if there are any constraints on resource usage by members with respect to the conduct of mediation. Anecdotal evidence from the NTRBs suggests that the number and frequency of meetings associated with a particular mediation matter appear to be entirely at the discretion of the relevant member and that meetings are often scheduled by members without regard to the ability of an NTRB to participate.
65. It appears that more clarity is needed regarding the roles, functions and powers of NNTT members.
66. In light of the above matters, ATSIC encourages the Committee to examine:
  - the procedures and processes related to the selection of members for appointment to the NNTT, in particular whether sufficient weight is given to the dispute resolution qualification for members at section 110 of the NTA; and
  - procedures and processes related to the conduct of mediation by members and the provision of mediation progress reports to the Federal Court, in particular whether the roles, functions and powers of NNTT members are spelt out with sufficient clarity.

### **NNTT's Role as Mediator**

67. The NTA provides that, unless an order is made that there be no mediation, the Federal Court must refer every application under section 61 to the NNTT for mediation. Section 61 encompasses native title determination applications, revised native title determination applications and compensation applications.
68. The utility of making legislative provision for, what in practice amounts to, mandatory mediation in relation to native title determination applications has been the subject of discussion in recent times.<sup>24</sup>
69. The Central Land Council has put the view in its submission to the Committee that mandatory mediation at an early stage of proceedings does no more than provide the Federal Court with a progress report of the proceedings. It has recommended that the NTA be amended to remove the requirement for a mandatory mediation process and that mediation only be used in assisting settlement of section 61 applications on the application of the parties.
70. ATSIC questions the need for a mandatory mediation process and, if its mandatory nature is to be retained, the appropriateness of a single mediation body for native title determination applications. ATSIC is not convinced that

---

<sup>24</sup> National Native Title Tribunal: Effective mediator or bureaucratic albatross? A user's perspective. By Paul Hayes, Indigenous Law Bulletin, July 2002, volume 5 issue 18.



the efficient and effective functioning of mediation processes under the NTA is promoted through restricting the conduct of mediation to a single body.

71. In ATSIC's view it would be preferable to build the capacity of Indigenous people themselves and their representative organisations to resolve intra-Indigenous disputes and that, as far as practicable, NTRBs should perform that function.
72. ATSIC considers that these issues are worthy of consideration by the Committee as part of the current Inquiry.

### **Notification**

73. Section 66 of the NTA obliges the Registrar to notify certain parties about applications for a determination of native title (including a revised determination) and for a determination of compensation.
74. The NNTT's most recent Annual Report describes notification as "written notice given by the Registrar to the general public and those interested in an area affected by native title claims (both claimant and non-claimant applications), compensation applications or applications to register an ILUA. The Registrar also gives notice of amendments to native title claims".<sup>25</sup>
75. The report indicates that the main purpose of the notification of native title applications is to ensure that relevant people and organisations have the opportunity to become a party to Court proceedings and to participate in mediation.
76. The Registrar is also required to give notice of indigenous land use agreements (ILUAs) to certain parties and to notify the public in the 'determined way' (prescribed by the *Native Title Notices Determination of 1998*), as is also the case with native title and compensation applications.
77. ATSIC recently prepared a submission to the Attorney-General's Department regarding the operation of the *Native Title Notices Determination of 1998*. The submission was prepared after consultations with a number of NTRBs.
78. Whilst the submission deals primarily with notices issued by governments under section 29 of the NTA, a number of representative bodies commented on the perceived inadequacy of some of the notices issued by the NNTT. The adequacy of the description of the relevant area was a particular issue raised by a number of NTRBs.

---

<sup>25</sup> National Native Title Tribunal Annual Report 2001-2002, p.76.

79. Some NTRBs also suggested that it is as “reasonably practicable” for the notifying party (whether it be the Native Title Registrar, the Commonwealth Minister or the government party) to identify and notify native title holders as it would be for the representative body, in particular given the resource constraints under which representative bodies currently operate.
80. ATSIC encourages the Committee to examine as part of the current inquiry the adequacy of notices issued by the NNTT as well as the issue of whether it would be desirable or practical for the Native Title Registrar to undertake some of the identification and notification functions currently performed by NTRBs and whether the performance of those functions might contribute to the “effectiveness” of the NNTT.

### **NNTT’s Research Role**

81. The NNTT’s research functions are cast very broadly, reflecting the broad role that the NNTT perceives it has of recognising and protecting native title. ATSIC is concerned about the potential for duplication in research efforts across the Commonwealth’s native title system, and believes that the NNTT’s research needs to support its core functions.
82. In assessing the effectiveness of the NNTT’s research role, regard ought be had by the Committee to a major research project undertaken by the NNTT on the Prescribed Bodies Corporate (PBCs). To some extent this project exemplifies the difficulties ATSIC has with the NNTT’s research role
83. The research was undertaken without prior consultation with ATSIC which advises its Minister on the administration of the PBC provisions in the NTA. The research took some two years to complete and the result was a very complicated book, which because of its complexity was very difficult for the NTRB system or native title claimants to use effectively. In particular, ATSIC had hoped that the research would provide a basis for considering reforms to the legislative framework for PBCs but unfortunately that was not case.

### **Resource Issues**

84. ATSIC has been concerned for a considerable period of time about the adequacy of funding available for NTRBs to perform their statutory functions under the NTA and about what it considers to be funding imbalances within the Commonwealth native title system.
85. An independent report commissioned by ATSIC in 1999 found that NTRBs were under funded by some \$30 million per annum in terms of their capacity to perform their statutory functions under the NTA.<sup>26</sup> Overall funding to the NTRBs for that purpose has not increased since that time.

---

<sup>26</sup> ATSIC Review of Native Title Representative Bodies, Corrs Chambers Westgarth and Senatore Brennan Rashid, March 1999.

86. The issue of the under funding of NTRBs and the imbalance in resources between NTRBs and the NNTT is dealt with by Rio Tinto Limited in its submission to the Committee. ATSIC considers that many, if not all, NTRBs would support Rio Tinto's contentions that "Representative Bodies drive the NTA processes that the NNTT facilitate – without that drive there is nothing for the NNTT to facilitate" and that "(i)t is essential that the current imbalance between the funding of the NNTT and of Representative Bodies be rectified".<sup>27</sup>
87. ATSIC is aware of a strong perception within the NTRBs that the NNTT is over-resourced and that the imbalance in funding between NTRBs and the NNTT has led the NNTT, in some instances, to duplicate the functions of NTRBs (in particular in relation to the resolution of intra-Indigenous disputes) and to, on occasion, engage in inappropriate mediation practices. The significant boost to funding received by the NNTT in 2000-01 and beyond is perceived by the NTRBs as having exacerbated those problems.
88. ATSIC has received a number of informal complaints from NTRBs about the cost of participating in NNTT mediation processes and that the NNTT sometimes schedules mediation processes without regard to other work in which NTRBs might be involved.
89. In general, ATSIC is not persuaded that the NNTT adequately integrates and coordinates its work with the work of NTRBs, and other parts of the Commonwealth native title system.
90. Given the interdependent nature of the relationships between the various components of the Commonwealth native title system, ATSIC considers that the Committee should give particular attention to the issue of resourcing of not only the NNTT but also other parts of the system.

## **Conclusion**

91. The Committee will be aware that ATSIC has a new Board of Commissioners as a result of elections conducted in October 2002. A Chairman will not be elected until the new Board meets on 19 December.
92. Accordingly, this submission does not have the endorsement of the new Board. ATSIC will seek the formal endorsement of the submission by the new Board at the earliest opportunity. That opportunity is likely to arise at the meeting of the Board in February 2003. ATSIC will advise the Committee once that endorsement has been obtained along with any additional or varying views that the new Board may form in relation to the current Inquiry.

---

<sup>27</sup> Submission No:17, Rio Tinto Limited, para 2.1.