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:32
Received 14 April 2003

Mr Richie Ahmat
Executive Director
Cape York Land Council
PO Box 2496
CAIRNS QLD 4870
☎07 4053 9250
E-mail:

Submission to Inquiry on National Native Title Tribunal conducted by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

INTRODUCTION

Justice Robert French, then-National Native Title Tribunal ("NNTT") President, wrote in 1996[1] that: "The mission of the NNTT is one constant in an operating environment that is continually changing and presenting it with new challenges". The mission at the time was s to "promote just agreements, informed discourse and fair outcomes about native title through mediation and arbitration".[2]

Interestingly, that mission is not entirely congruent with the role of the NNTT as currently defined on its website: " to resolve native title applications through mediation and make agreements that recognise everyone's rights and interests in land and waters." [3] Disturbingly, the NNTT's role as defined on the website seems to shift the focus of agreement making from one based on respect and protection of native title to one which hints that native title must be prepared to give way to accommodate all other interests.

And indeed there continues to be continual change in the operating environment.

But where are the just agreements? Where are the fair outcomes? Nothing.

The Cape York Land Council ("CYLC") recognises the individual efforts of the NNTT's President, members and staff, but the lack of agreements raises the question: "To what extent is the NNTT effective in influencing the operating environment?"

ROLE AND RELEVANCE TO CAPE YORK PENINSULA OF NNTT

Essentially the CYLC agrees that the NNTT's main non-registry functions are to make agreements, and to mediate native title applications to reach consent determinations. There has been no call upon the NNTT to exercise its arbitral role on the Cape.

The NNTT enjoys an annual budget in excess of $25M. The CYLC's representative body area (like Torres Strait Regional Authority's and North Queensland Land Council's) falls within the jurisdiction of the North Queensland regional office of the NNTT. The North Queensland regional office was established by the NNTT in 1999 in recognition of the volume of native title work in the region, particularly on Cape York Peninsula. At that time the native title determination process in the Torres Strait was - with the exception of the Kaurareg native title determination and ILUA - largely a straightforward formulaic

[1] National Native Title Tribunal, Annual Report, 1996/97, p5.
[2] Ibid, p9
[3] http:www.nntt.gov.au/

process, and for a variety of reasons many matters within the North Queensland Land Council's area many matters were not in a position to proceed.

CYLC represents over 10,000 people resident on Cape York Peninsula and others who reside outside the Cape, many of whom have been marginalised in society and disenfranchised from land ownership and economic prosperity. With clear links established between the ownership, management and use of land, with health and other socio-economic indicia, the extent to which the NNTT meets its mission is of critical importance to the CYLC.

If we strip away the flurries of activity, meeting tensions, and mounds of tracking documents which are part of the native title experience (at least on active matters) to observe raw data, we all see the number of NNTT-mediated agreements on Cape York Peninsula over the last 12 months is *zero*. The number of consent determinations that have been reached in the last 12 months is also *zero*.

It appears likely that there will also be none in Queensland – let alone Cape York Peninsula - in the next 12 months, except perhaps some Torres Strait determinations that have been delayed by disagreement over a point of law that is now being litigated.

That is appalling. The rate of agreement across the State is flat lining.

It is fair to recognise that on one or two matters there has been some progress towards mediated outcomes but these are still quite capable of remaining unresolved, and countless other claims or potential claims have not progressed at all.

There are two possible explanations for the absence of outcomes.

The first is that the NNTT has failed in its mission for reasons of internal inefficiency or inadequacy. The CYLC rejects this. In this submission CYLC staff have noted certain concerns which are recorded in this submission with a view to assisting this Committee and the NNTT.

However the likely reason for a blank scoreboard is that the NNTT has been unable to influence the operating environment: unable to influence the attitudes and behaviours and agendas of the non-indigenous parties and address power imbalances. The operating environment appears unresponsive to the NNTT. In CYLC's experience, it is this criterion which so crucially determines the effectiveness of the NNTT in assisting the parties to mediation of native title determinations and ILUAs.

For this reason, this issue will be addressed prior to those internal factors.

Influencing the operating environment

Far more than the specific internal efficiency issues noted above, the CYLC is concerned with the capacity of the NNTT to influence the operating environment.

The CYLC spelled out concerns with the NNTT-managed negotiation process in its submission to this Joint Committee in October 2000 (with particular reference to the recently concluded Kaurareg mediation). Those concerns were described as follows:

- *The use by other parties of the ILUA process as a way of bringing issues that were only indirectly related to the process into the native title mediation forum, many of which in our view did not need to be resolved to enable determinations of native title to be made. For example, the advancement of local government projects beyond what would have probably otherwise been normal in terms of timing and resources;*

- *The imbalance in terms of power and resources as between the negotiating parties (i.e. the Applicants as represented by CYLC, with strictly limited funding and resources on the one hand, and a State Government, a local government authority and two corporate entities on the other hand) placed the Applicants at a serious disadvantage throughout the negotiations;*

- *Other parties at times clearly viewed native title rights as a negotiable commodity capable of being compromised to reach agreement, when Aboriginal law in most instances is not in the realm of a commercial interest. In the final result Kaurareg were forced to compromise their laws and customs significantly as they were slowly but surely worn down by the pressure to reach agreement. For example, the final outcome with respect to compensation in each agreement was for the Applicants to waive compensation entitlements for all past acts and most of the future acts specified in the ILUAs. The Applicants were not happy with this position, but were forced to agree in order to obtain the agreement of the other parties to recognition of native title;*

- *The Applicants were the only party with a real interest in obtaining a speedy outcome to the negotiations. For example, all of the other parties were, and still are, able to continue going about their business whilst the negotiations and registration process is ongoing. In comparison, the Applicants were under considerable pressure to obtain determinations of native title to establish not only their right to do things on the land but their right to be involved in the negotiations at all). During the final negotiations regarding the local government issues (which had little to do with recognition of native title), a number of key traditional owners died without seeing the fruit of the considerable efforts by the Applicants. This issue continues to cause problems with other parties delaying the execution of the agreements, often with no apparent*

reason and neither the Applicants nor the NNTT had the ability to insist on reasonable timeframes;

- *Until CYLC through the native title mediation process identified a number of possibly invalid acts, with consequences for the other parties in terms of continued operation of existing infrastructure and compensation ramifications, it was difficult to get the other parties to commit time and resources to the process. We note that the NTA does not enable the NNTT to obtain commitments or enforce agreed timetables or impose penalties for unreasonable behaviour;*

- *For all of these reasons, the Applicants had no real control over the process or the actions of the other parties (the consequence of the ILUA negotiations breaking down being that the native title claims would be referred to a full hearing in the Federal Court, with the Applicants again bearing the major burden of the cost, time, resources and emotional commitments required);*

- *There is no doubt that some of the delays and difficulties experienced, particularly in the final stages of drafting of the agreements, were the result of the newness of the provisions and processes, and the lack of precedents to follow. However, there were also many instances where things might well have been handled more efficiently and effectively if the other parties had had more of an incentive in reaching agreement (or at least faced consequences for failing to follow best practice);*

- *The complexity of the final agreements (which was necessary in order to comply with the provisions of the NTA) was cause for concern on the part of the Kaurareg people, CYLC and TSC. These are the parties who will be required to rely on the agreements on a daily basis, and yet it was conceded by all parties that the degree of complexity would make it difficult to comply with the agreements without further regular assistance and advice from legal and other specialist advisers. Again, the major long term burden of interpretation and implementation of the agreement will fall on the native title holders and their Representative Body in terms of funding and resources;*

Both the Applicants and TSC were victims of the classic problem in government contracting, where statutory discretions are involved. Because of the rule against fettering discretions, the State could only make best endeavours commitments, which was grossly unfair given the nature of the commitments made by the other parties. This power imbalance is largely unavoidable but could be rectified slightly by an amendment to the NTA that allowed a government to agree to conditions subsequent being imposed upon future acts (conditions properly so called, not just conditions precedent that are already allowed under NTA s. 24EB(1)(b)(ii)..."

Unfortunately, those concerns remain. Those experiences are repeated in current negotiations. Although the NNTT has initiated well-meaning strategies to address these concerns, such as the development of a prioritisation process supported by the CYLC, NNTT and State of Queensland (a policy of picking "winners" based on open and appropriate criteria), the NNTT seems unable to alter the operating environment.

Articulation of mediation policy

The NNTT does not seem to articulate a mediation policy or strategy. To our knowledge, the NNTT has never spelled out (except on a case-by-case basis):

- who it sees as the relevant parties;
- what mediation model it intends to adopt;
- what factors it sees as relevant in achieving outcomes;
- what strategies it will employ as a mediator to ensure equitable participation and fair outcomes.

The NNTT's website contains an extraordinarily tentative and minimalist definition of mediation. We must presume that this is how the NNTT sees its role and the limits of its usefulness:

"*Mediation is a way of reaching a final decision about native title. All people with an interest in the area covered by a native title claimant application are brought together to discuss their own interests in that area and the interests of others.*

This is called mediation, and it allows all people involved to explore ways to reach agreements. It can take a long time.

It's up to the National Native Title Tribunal to bring all parties together and to see that everyone gets a chance to have their say about the native title application."[4] Any mediation policy, which limits the role of the mediator to bringing the parties together for discussion, is unlikely to produce decent results (let alone within less than a very "long time"). The likelihood is further reduced in a native title atmosphere where there is likely to be anxiety, mistrust, varying qualities of legal advice, poor information levels, and a clash of vested interests, and different resource levels in a cross-cultural environment. Such a modest definition also provides cover for the fact that the NNTT's mediation process (although in practice more participatory than the website definition suggests) is essentially a non-Indigenous conventional mediation process, which unsympathetic to and ignorant of Aboriginal traditional dispute resolution practice. A mediation model that accommodates that practice is clearly spelled out by Larissa Behrendt:

- the aggrieved person /people state what the issue is
- Elders state what the appropriate law is
- the other side speaks
- others affected by the decision respond
- the person or people in conflict are questioned by the elders
- the elders work towards an agreement.[5]

[4] http:www.nntt.gov.au/– "What is mediation?"

[5] Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report, July 1994-June 1995, p124.

Mediation meetings on Cape York Peninsula are characterised by gatherings of an NNTT member, flanked by between one and three staff, representation of the State by a senior negotiator, flanked by a couple of assistants and supported by an invisible plethora of departmental administrative and policy staff, and Crown Law lawyers, and a lifeline to the boss. Other parties are represented by lawyers paid through the Attorney General's 'assistance to parties' program. Any workload pressure on those lawyers comes about through their firm's fee-generation targets. The CYLC usually produces a lawyer (who has worked at home or in the office through the night on that or another matter), an operations staff member juggling a raft of duties and sensitivities, and a representative group of traditional owners. The traditional owners have usually travelled for a day or so out of their country to a spot convenient for everyone else, often in hot and dusty conditions. They have taken leave from their jobs at the school or health program, and leaving their kids in the care of others, to make the meeting. Everyone else there is paid to be there. Everyone else there gets to speak in his or her first language.

Frequently, the CYLC has prepared cogent arguments to support a particular position. Major parties respond by saying either:

- "Well, we won't address your well-argued position: we just don't agree"; or
- "Well, we have Crown Law advice to the contrary, but we won't show it to you or provide details of it. Accept our negotiation position on this issue or the outcome could be worse for you"; or
- "There are political issues to be managed here. You may be right but we can't recommend an agreement which will result in protests to the member/Minister".

Mediation is supposed to operate as a low-cost alternative to litigation. All too often, the State relies upon the willingness of the CYLC to mediate. It offers unrealistic or unreasonable positions. In the absence of an articulated mediation strategy, the NNTT is unable to counter this. Tragically, this observation is not even close to new. Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Dodson said nearly a decade ago: "That the state and territory governments continue to resist accommodation of native title is particularly apparent with regard to mediation and negotiation processes established by the NTA. These procedures offer the potential to resolve claims and disputes in a way that is satisfactory to all parties without litigation. ...state and territory governments are yet to take full advantage of this potential and are instead preoccupied by uncertainty over legal issues rather than using the NTA process as an opportunity for reconciling all parties' needs. A legalistic approach to mediation and negotiation will only exacerbate uncertainty and lead to delays in the resolution of claims".[6]

The State of Queensland's policy commitment to mediation as a means of resolving native title issues seems to be affected or driven by a legalistic approach. Perhaps as a consequence, it fails to deliver outcomes suitable to all. It is impossible to say whether that legalistic approach is the inadvertent result of bureaucratic inefficiency or actually

[6] Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report, July 1994-June 1995, p2

designed to disadvantage those non-State parties who stand to lose by delay. The NNTT presumably notes the fact that no consent determinations have been achieved across Queensland recently and that there is no certainty that there will be any in the foreseeable future. But it hasn't secured a less legalistic approach by the State.

Attorney-General's funding to non-Indigenous respondent parties

Of serious concern to the CYLC is the seemingly unlimited funding that is available to the non-indigenous parties to mediation despite, at times, their relatively insignificant nature of their interest. For example, a fossicking society has recently become a party to many native title claims in Cape York Peninsula and they have fully funded legal representation. As another example, although the CYLC, and NNTT, and even the State has each complained during the protracted Eastern Kuku Yalanji negotiations of the demands upon their limited resources. *Not one* of the Attorney-General's funded local government bodies, utilities, or grazing interests has ever complained during mediation that their legal representation is threatened or inadequate.

It is interesting to note that no Indigenous party is eligible for Attorney-General's funding. One effect is that a NTRB has to fund external legal representation in the event of conflict. This increases the pressure on already cash-strapped NTRBs.

The generous provision of funding from Attorney-Generals creates a risk that the legal representatives could have a vested interest in mediation continuing for as long as possible. That risk is mediated only by the practitioners' professional ethics. CYLC also asserts that some legal representatives keenly appreciate (and could be tempted to exploit) the great sense of urgency and need on the part of traditional owners to have their rights recognised and for any benefits of agreements to flow as soon as possible. There are also examples of Attorney-General's funded representatives to insist on being part of discrete aspects of mediation which have little or no relevance to their clients, and of participation in aspects of mediation which do not involve provision of legal advice.

CYLC contends that the NNTT must seek to legitimise the interests of the parties and restrict mediation proceedings to parties that have interests to mediate.

Inability to enforce reasonable or agreed timeframes

The native title/ILUA negotiation process is costly. Other submitters have noted the failure of the government to adequately resource representative bodies to participate effectively in native title negotiations whilst increasing funding to other parties.[7] Negotiation processes are littered with examples of non-indigenous parties failing to comply with agreed and reasonable timeframes.

[7] Submission to Inquiry on NNTT, Rio Tinto Limited, October 2002

Mediation Reports

The NNTT seems unable to deal with timetable non-compliance by influencing the behaviour or attitudes of the non-Indigenous parties. The only other option available to the NNTT is to clearly identify that obstruction in reports under s86 of the *Native Title Act 1993 (Cwealth)* to the Federal Court of Australia. Obviously, that option is a dire one given that a NTRB, which is resource-depleted through exhaustive mediation, is unlikely to be in a position to immediately litigate the matter.

The mediation reports that are provided to the courts often lack clear explanation of what has been occurring in mediation. The confidentiality of mediation probably precludes the parties at court from clarifying the true situation. This can result in orders being made that are not consistent with what has been happening in mediation, and detrimental to those parties who have been progressing the claims in good faith. It is frustrating to be in a directions hearing where a Registrar or Deputy Registrar appears to assume that the applicants are the procrastinators and the "confidentiality" of mediation precludes the explication of events. The CYLC feels that it would be preferable that the NNTT advise the Federal Court of the reasons for delays in mediation and the need to bind the non-Indigenous parties to tight timeframes.

Internal factors

These are hard for an outsider such as the CYLC to identify and judge. The CYLC recognises useful contributions by the NNTT. As the CYLC submission to this committee in October 2000 noted, the NNTT provided extremely helpful administrative support, particularly in the final stages of the Kaurareg ILUA negotiations, including:

- *facilitating and chairing meetings (thereby providing an independent person to assist in breaking deadlocks);*
- *recording and circulating details of all discussions, particularly issues agreed or still in dispute (thereby providing an independent record);*
- *following up parties to ensure agreed tasks were performed (thus keeping the pressure on all parties to comply with agreed timeframes);*
- *convening regular teleconferences and meetings (again allowing the discussions to keep moving forward);*
- *assisting with preparation and distribution of documentation, maps, etc (which allowed each of the parties to concentrate on progressing the substantive issues).*[8]

Since October 2000, the CYLC notes a continuing valuable contribution in that fashion from the NNTT. Rio Tinto's submission[9], which notes efficiency problems such as difficulties in obtaining specific information during case manager absence for example, seems to reflect an experience quite uncharacteristic of the North Queensland regional office of the NNTT. Generally, case manager assistance provided by the NNTT to the mediation process has been of a high standard and in some instances quite outstanding.

[8] Submission to Joint Parliamentary Committee on Native Title, CYLC, p6

[9] Submission to Inquiry on NNTT, Rio Tinto Limited, October 2002, p26

The particular concerns CYLC staff have noted with a view to assisting this committee and the NNTT are as follows.

Recruitment, retention, and utilisation of indigenous staff

Despite the NNTT's ability to offer more attractive terms and conditions than a NTRB, a State Public Service agency, or just about any employer bar a large mining or insurance company, the NNTT has failed to recruit and retain Indigenous staff. At a glance, it appears that while the North Queensland regional office actually sets the pace in employment of Indigenous staff for the NNTT, it too generally employs indigenous staff at lower levels. There is little indigenous representation at the NNTT decision-making levels: members, division heads and regional managers. The effect is that the native title holders remain marginalised in the process.

The NNTT seems to fail to recognise the role that could be played by the Indigenous staff it employs at junior levels. Those staff have valuable advice to offer about methods of effective communication between parties to mediation, ways of explaining terms or concepts relevant to the mediation, ways of ensuring effective participation by Indigenous parties to mediation, and cross-cultural issues in mediation.

It would assist all parties to mediation if the NNTT were to recognise, use and develop the strengths of its Indigenous staff.

Poor consultation/Reduction of native title holders to stakeholders

An issue frequently addressed on Cape York Peninsula is the use and access of traditional lands subject to a lease for pastoral purposes. Pastoralists are usually represented by their industry association of choice, which briefs a law firm funded through the Attorney General's assistance to parties program. Negotiations thereafter usually fail to even nod at the co-existence principle established in *Wik*[10], and treat the traditional owners/native titleholders as a subjugated party to arrangements for use of the land.

The CYLC strives to negotiate fair use and access agreements.

It was unhelpful for the NNTT to publish on its website - and thereby give some legitimacy and support to - a set of "optional clauses" for use in use and access agreements for grazing properties. Almost without fail, the optional clauses were inadequate, onerous and oppressive, and failed to recognise traditional owner/native title holder rights, needs, and perspectives. The overall tone of those optional clauses did not reflect the *Wik* coexistence principles.

The CYLC was not consulted on the terms of those optional clauses, and imagines that other NTRBs were not consulted. Consultation could have prevented the unbalanced approach, and the NNTT could have avoided giving the impression that it's anxiety to

[10] Wik Peoples & Ors v State of Queensland & Ors (1996) 141 ALR 129

produce agreements overbore the need for agreements to be fair, and to protect and respect native title, or that it saw no problem with the proposition that native title rights and interests should give way to everyone else's.

Too often within negations there is a tendency by major parties to negotiation to recognise and defend non-indigenous interests, and to assume that in order to achieve a negotiated outcome the native title interest must give way. - More than anyone else in the process the NNTT needs - to avoid contributing to that impression. The removal from the NNTT's website of that material within hours of its appearance tends to suggest an acknowledgment by the NNTT that the process and outcome was unsatisfactory, but such experiences precipitate a loss of trust and confidence which is difficult to restore.

NNTT-centricity

The CYLC recognises the value of eminent NNTT members and the value at times of formal proceedings. However, at times the NNTT appears to overestimate its own relevance to negotiations, resulting in overspending and inefficient use of resources. In particular, at various times (due to the fact that most native title mediation is not concluded within the term of the appointed member!), the need for transfer from one member to another arises. From an efficiency point of view, the CYLC contends that such a transfer is an internal matter for the NNTT. The CYLC presumes that the well-documented issues would be the subject of briefings within the NNTT. Under the circumstances, the fairly costly and largely irrelevant NNTT practice of departing members conducting resource-intensive meetings of parties simply for the purpose of handover to an incoming member is of concern. Our view is that parties and their representatives should - as a matter of professional responsibility – be capable of managing personnel transfer as an internal issue.

Approach to authorisation

The CYLC is also concerned about the application of the registration test to applications, particularly those
that are already registered on the Register of Native Title Claims after undergoing the registration test and are the subject of minor or other amendments that do not in anyway relate to changes to the description of the native title claim group, the person or persons who are the Applicant for the application or the authorisation of that person or those persons to make the application and deal with matters arising in relation to it.

In circumstances where the Registrar's delegate has previously been satisfied as to authorisation, the NNTT's Guidelines now appear to be applied somewhat inconsistently or, perhaps, with a greater emphasis on the provision of further evidence as to authorisation than has previously been required. This could have significant consequences for NTRB's, particularly if there is no further evidence that can be provided easily to the NNTT to satisfy them as to authorisation as it could mean that the application may fail the registration test (and thus lose procedural rights that it already holds) and, as a necessity, require the NTRB to fund

further meetings of the native title claim group to establish authorisation to the level seemingly now required by the NNTT. Such an approach by the NNTT places significant pressure on NTRBs not to amend applications, even in minor respects that might attract the re-application of the registration test, as to do otherwise could involve unnecessary expenditure of their already limited financial resources.

NNTT passivity on funding for representative bodies

Other submitters have noted the need for representative bodies to be appropriately resourced. As Rio Tinto Limited observed, NTRBs *"are a fundamental component of the native title system and constraints on their performance will necessarily impact on the effectiveness of the NNTT. Representative bodies drive the NTA processes that the NNTT facilitate (sic) – without that drive there is nothing for the NNTT to facilitate."*[11] The CYLC recognises that resource developers need to be prepared to fund traditional owners to respond to proposed developments, rather than cost-shift to the public purse. However, it is quite clear that positive outcomes of agreement making processes will frequently depend upon the level of resources available to the traditional owners and their representatives.

Although there seems to be some informal recognition of that principle by NNTT members, the NNTT has not been effective in influencing governments in particular to adequately fund NTRBs. The CYLC is not aware of any representations made by the NNTT on this issue.

Local experience/national issues

The observations above could be construed as criticism of the NNTT. For the record, the CYLC wants to make it clear that the issues of most concern to the CYLC are systemic, and the responsibility of the President or the Registrar. To a very large extent, the CYLC recognises that, despite the best efforts of the NNTT, not all those major parties to mediation (local, state and federal governments, utilities, grazing and other commercial interests) have simply not come to the NNTT's mediation process with clean hands and good hearts.

The CYLC notes in particular the personal and professional commitment of Mr Graham Fletcher, who is the NNTT member with responsibility for most issues on Cape York Peninsula. Mr Fletcher has made himself extraordinarily available to deliver professional and competent assistance across a range of issues over Cape York Peninsula and the CYLC recognises and is grateful for his assistance. The CYLC also notes that Mr Fletcher is assisted by staff of the North Queensland office, and the Brisbane, Sydney and Perth registries, some of whom are particularly creative and diligent in seeking to achieve that mission the NNTT articulates for itself. Staff from administrative assistant to case manager level have developed innovative tools for supporting the mediation process and provided sound and reliable information and assistance to all parties.

[11] Submission to Inquiry on NNTT, Rio Tinto Limited, October 2002, p7

CAPE YORK LAND COUNCIL
April 2003

Contact: Jim Brooks – Senior Legal Officer
07 4053 9222
0412 353735
jbrooks@cylc.org.au
PO Box 2496, CAIRNS FNQ 4870