

Chapter 2

The National Native Title Tribunal Annual Report 2003-2004

The National Native Title Tribunal

2.1 The NNTT'S functions are set out in section 108 of the *NT Act*. They include:

- applications;
- inquiries;
- determinations;
- mediation in Federal Court proceedings;
- providing assistance or mediation when requested; and
- conducting research.

Formal reporting requirements

2.2 The President of the NNTT is required to prepare and give to the Commonwealth Minister 'a report of the management of the administrative affairs of the Tribunal' as soon as practicable after 30 June each year. The report must include:

- financial statements under section 49 of the *Financial Management and Accountability Act 1997* (the *FMA Act*); and
- an audit of those statements under section 57 of the *FMA Act*.

2.3 The NNTT is a Statutory Authority which, as a matter of policy, complies with the Requirements for Annual Reports (the Requirements) prepared by the Department of the Prime Minister and Cabinet.¹

2.4 The Requirements note that their purpose is 'accountability, in particular to the Parliament'.² They set five core items of compulsory information together with other mandatory information from specific statutory provisions.

2.5 The information prescribed by the Requirements includes:

- review by Departmental Secretary (or equivalent);

1 *Requirements for Annual Reports* approved by the Joint Committee of Public Accounts and audit under subsections 63(2) and 70(2) of the *Public Service Act 1999*. Department of the Prime Minister and Cabinet, June 2003.

2 *Requirements for Annual Reports*, p. 3

- departmental overview;
- report on performance;
- management and accountability;
- financial statements; and
- other mandatory information.

2.6 The Annual Report must include a letter of transmittal and aids to access – such as a glossary, index, table of contents and contact details.³

Compliance

2.7 The Tribunal's report for 2003-2004 complies with all of the formal requirements set out above.

The Report

The President's Overview

2.8 The Annual Report contains a detailed and comprehensive account of the reporting year. In addition, the public hearing provided an opportunity to expand on the information contained in the Annual Report. The President highlighted a number of matters in his overview and in evidence to the Committee. They include:

- developments in Native Title Law;
- establishment or discontinuance of alternative legislative regimes in states;
- policies and procedures of governments;
- the procedures and orders of the Federal Court; and
- the roles and capacity of native title representative bodies.

2.9 The President also made further observations regarding matters of significance to the Tribunal during the year. In particular:

- The 10th anniversary of the commencement of the Native Title Act and the establishment of the Tribunal occurred during the reporting year. Native Title has come to be negotiated in many ways within the structure of the Act.
- The Tribunal's work continues to be affected by external factors. For example, the pace of mediation, as well as the number of determinations registered in the Tribunal was affected by judicial decisions and appeals from significant judgements.

3 *Requirements for Annual Reports*, p. 5.

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- There was a steady increase in the number of ILUAS negotiated and registered under the Native Title Act.
 - In future act work, particularly in relation to mining and exploration, there have been shifts in the nature of the work and in the attitudes of the parties. Examples include the reduction in the number of objections to the use of the expedited procedure under the Act as well as the mining industry's development of partnerships with indigenous communities.
 - The Tribunal's role in assisting parties continues, particularly in relation to the provision of a range of geospatial mapping tools, predominantly to those in remote locations.⁴

Challenges

2.10 The Report notes a Federal Court decision acknowledging the continued uncertainty and complexity of native title in which the Court recognises that:

...it always takes time for the ramifications of new law to be worked out. This is because courts develop the principles underlying new legislation on a case by case basis. They must wait until the relevant cases arise.⁵

2.11 The Committee notes that the President, in his Report and in his remarks to the Committee highlights the fact that increasingly, both indigenous groups and governments are exploring a range of options to settle proceedings which may commence as native title proceedings but may be resolved in ways other than a native title determination.⁶ State and Territory governments also have a role to play in exploring options, especially those which do not involve a determination of native title.⁷

2.12 From this emerges a picture of an evolving understanding of what can be meant by native title. This has implications both for the nature of the business of the Tribunal and the way in which it undertakes that business.

Work of the Tribunal

2.13 The Tribunal has a single outcome: the recognition and protection of native title. Four output groups are used to deliver this outcome:

- registrations;
- agreement-making;
- arbitration; and

4 *Committee Hansard*, 9 March 2005, pp 1–2.

5 *National Native Title Tribunal (NNTT) Annual Report 2003-2004* p. 5 (case name not given)

6 *Committee Hansard*, 9 March 2005, pp 4–5.

7 *NNTT Annual Report 2003-2004*, p. 5

- assistance, notification and reporting.

Financial performance

2.14 The Report notes that the Tribunal's actual expenditure for the 03-04 financial year was \$32.22m which was close to the estimate in the Additional Estimates Statements for the Attorney General's Portfolio.⁸

2.15 At the public hearing, there appeared to be some discrepancies between the figures quoted in Table 1 (p. 39) and Figure 3. The Chair asked if the Tribunal could take the question on notice. The Tribunal responded promptly, and advised the Committee:

The figures in the top half of Table 1 on Page 39 of the Annual Report are appropriation only total. The other revenue is in the bottom half (line item; Total Revenue from other Sources).

The amounts on Page 41 are appropriation and other revenue combined. The Revenue in 2003-04 was from three main sources; assisted register searches, geospatial mapping and conference/forum attendance charges.

Assisted searches revenue was attributed to outputs 1.1.1 (\$22,000) and 1.1.2 (\$1,000) accounting for the difference between \$3,726,000 and \$3,749,000 under output 1.1. Geospatial mapping and conference/forum attendance revenue was attributed to output 1.4.1 (\$212,000) – this accounts for the difference between \$11,497,000 and \$11,709,000 under output 1.4.⁹

2.16 The Committee observes that the costs set out on p.41 are inclusive of all revenue, not only Government contributions. In other words, the Tribunal spends its revenue from all sources, not just one, and this is reflected in the figures on p. 41.

Outcome and outputs

Output group 1.1: Registrations

2.17 The Registrar of the Tribunal is required to apply a registration test to most of the applications which come to the Tribunal. The Committee observed that the Annual Report states that 137 applications had not been accepted for registration.¹⁰ The Registrar explained that applications fail for a range of reasons, but the Tribunal gives written reasons for the failure of an application, and commonly, defective applications are amended and resubmitted.¹¹

8 *NNTT Annual Report 2003-2004*, p. 38.

9 Correspondence from NNTT to Committee Secretary 6 April 2005 responding to Questions on Notice from Committee hearing 9 March 2005.

10 *NNTT Annual Report 2003-2004*, p. 42.

11 *Committee Hansard*, 9 March 2005, p. 19.

2.18 The Committee notes that there were 59 applications registered in this reporting period, compared to 110 in the 2002-2003 year. The unit cost was \$44,269, compared with an estimated \$35,584 based on last year's unit cost. The overall cost was \$2,613,076 compared to an estimate of \$2,135,000.

2.19 The Tribunal estimated that 70% of its applications would be decided within two months of receipt from the Federal Court. The actual result was 31% of applications determined within the deadline. Last year the figure was 44.5%.

2.20 The Committee understands from previous years that estimating these costs and volumes is at best an inexact science. From year to year, the Tribunal appears able to absorb increases in costs over the estimates, and so its overall budgetary position is not compromised. However, the Committee remains concerned at a unit cost of \$44,269 per registration test, which presumably reflects the amount of time and resources which go into providing support for registration applications.

Output group 1.2: Agreement-making

2.21 Agreement-making is a growing area for the Tribunal. The categories of agreement-making are:

- indigenous land use and access agreements;
- claimant, non-claimant and compensation agreements; and
- future act agreements.

2.22 The cost and number in each category is set out below together with the estimate in each case.

Table 1: Agreement making

| Category of agreement | Estimated number | Actual Number | Estimated cost | Actual cost |
|--|-------------------------|----------------------|-----------------------|--------------------|
| Indigenous Land use and access | 15 | 15 | \$111,027 | \$177,702 |
| Claimant, non-claimant and compensation agreements | 150 | 198 | \$13,325,00 | \$9,010,516 |
| Future Act agreements | 15 | 55 | \$513,000 | \$1,937,315 |

2.23 While the overall financial result is positive, the Committee notes that as with the application registrations, it remains difficult to predict with any accuracy the cost

and number of agreements made. The Committee is aware that this has been a difficulty for the Tribunal over a period of time, and acknowledges that the extent and character of the Tribunal's work will continue to be difficult to predict at least in the short term. More positively, the Committee also observes that the cost of claimant, non-claimant and compensation agreements was significantly less than the estimate, with 48 more agreements than the predicted 150.

2.24 The Committee noted that Queensland in particular accounts for the majority of ILUAS registered (30 of 46) and the Northern Territory accounts for 13 of the remaining 16.¹²

2.25 There is no clear reason why Queensland figures so prominently in the registration of ILUAs, although the President of the Tribunal noted in his evidence that, in the case of Queensland in particular, the state government encourages them.¹³

Output group 1.3: Arbitration

2.26 This group includes future act determinations and objections to expedited procedure. In evidence, the President told the Committee:

Future act consent determinations are becoming an increasingly common means of finalising negotiations, and there has been a reduction in the number of objections to the use of the expedited procedure under the act — in part, at least, because heritage protection regimes have been negotiated in Western Australia and Queensland which are aimed at meeting a major cause of objections to the expedited procedure.¹⁴

2.27 The Committee has an interest in the arbitration process as used by the Tribunal. At the public hearing the President was asked his view about the references in the *NT Act* to negotiating 'in good faith'¹⁵, and how the Tribunal satisfies itself that negotiations in future act matters have in fact been undertaken 'in good faith'. The President indicated that the Tribunal has developed a body of law, about the criteria which evidence good faith negotiations.¹⁶ These indicia appear in Tribunal determinations and Court judgements and give potential parties a good idea of what is meant by negotiating 'in good faith'.

2.28 The Committee notes the importance of maintaining integrity of the process at all stages of proceedings, and commends the Tribunal for its achievement in this area.

12 *Committee Hansard*, 9 March 2005, pp 22–23.

13 *Committee Hansard*, 9 March 2005, p. 23.

14 *Committee Hansard*, 9 March 2005, p. 2.

15 See for example, Parts 2,3, and 15 of the *Native Title Act 1993*

16 *Committee Hansard*, 9 March 2005, p. 6.

2.29 The Tribunal estimated 35 future act determinations and there were 34 for the year. The target of determining 70% within six months of application was well exceeded – 94% were determined within the time set.

2.30 The second element of this output is the objections to the expedited procedure. The Tribunal's report notes that this is used in Western Australia, the Northern Territory and Queensland, with the other states either using their own procedures or opting not to use the expedited procedure provisions at all.¹⁷

2.31 There were 761 objections finalised, compared to 917 in the previous reporting period. In this reporting period the costs exceeded the estimate, while in the last period they were less.

Output group 1.4: Assistance, notification and reporting

2.32 Under section 108 of the Act, the Tribunal has the function of providing assistance, or mediating, in accordance with any provision of the Act (section 108 1B). The Tribunal complies with this in three ways:

- through contacts – assistance given over the telephone or by letter;
- through events – education programs, information sessions, fact sheets and research for parties on agreement-making; and
- through initiatives – these include capacity building for participants in the native title process.

2.33 The Committee found the breakdown of the types of assistance shown in Figure 9 (p. 77) to be particularly useful in identifying the areas of demand. It is clear that the Application/Registration process attracts the most requests for assistance followed by the Future Act process and Mediation. Also notable was the significant increase in the use of the Tribunal's website in the reporting period.

2.34 The geospatial assistance available from the Tribunal includes map preparation, register search services, and three dimensional visualisation of overlapping applications and agreements. In particular, the Committee notes a pilot project involving the Federal Court to enable the visualisation of native title matters on the internet. The Committee looks forward to hearing of further developments in this area in the next Annual Report.

Corporate Governance

2.35 The Committee notes that the Tribunal has a number of internal groups which support the members' professional role and the strategic management areas of the Tribunal. In particular, the Committee notes that the Agreement-Making Strategy Group has prepared a guide to Tribunal practice titled 'Mediating Native Title

17 NNTT Annual Report 2003–2004, p. 73.

Applications', which has been 18 months in preparation. The group also developed a curriculum for members and employees who are engaged in native title mediation.

2.36 The Tribunal also has a National Future Act Strategy Group, an ILUA Strategy Group, a Research Strategy Group and an Information and Knowledge Management Strategy Group.

2.37 This last group has been created from a new Information and Knowledge Management Division which the Tribunal advised the hearing will integrate the existing technology to:

allow us to ultimately link all the operating systems within the organisation. For example, you would have the future act systems interacting with the claimant application systems, with the assistance database, with the Indigenous land use agreement database, so that you would integrate all the tribunal systems...

2.38 The Committee considers that the governance structures described in the Report, allow the Tribunal to inform itself thoroughly regarding the Tribunal's needs in all of the relevant areas, and to act on that information in a positive way. The ongoing training and support for Members is particularly noteworthy, as the nature of the mediation work appears to require continuously expanding expertise in a specialised area.

Human Resources

2.39 The Committee was advised of the engagement of the Chief Information Officer at the SES Band 1 level, who will be responsible for the Information and Knowledge Management Division.¹⁸

2.40 The Tribunal has undertaken a number of learning and development strategies for staff including corporate compliance, skills development and professional and career development.

2.41 The Committee notes that there continues to be a relatively high turnover of staff, reaching 10 per cent in the reporting period.¹⁹ The report does not advance any reason for this, although in past years the Committee has been advised that given the length of time the Tribunal has been operating, some movement in long term staff is to be expected.

2.42 The Committee considers that some analysis of staff resignations should be undertaken by the Tribunal, and reported in the next Annual Report, given that the figure has been close to, or at, ten per cent for the last two reporting periods.

18 *Committee Hansard*, 9 March 2005, pp. 25–26.

19 NNTT Annual Report 2003-2004, p. 100.

Indigenous employees

2.43 The Committee notes that of the Tribunal's ongoing employees, 13.8 per cent are Indigenous. This has increased by 0.9 percent over the previous reporting period. There are Indigenous study opportunities, and the Tribunal maintains an Indigenous Advisory Group. It is not clear from the Report exactly where in the Tribunal the Indigenous employees are located, and the Committee would be interested to know for example, how many, are involved in case management, or in other areas which have direct contact with Indigenous clients.

Clients

2.44 The Committee observes from the Annual Report that the Tribunal undertook an evaluation of its external communication during the reporting year. The report indicates that stakeholder satisfaction varied according to the length of time that person or organisation had been in the system. The Committee is interested in the initiatives which will flow from this, and looks forward to seeing the results in the next annual report together with the results of the 2004-05 client survey.

Conclusion

2.45 The Committee commends the tribunal on its comprehensive and accessible Annual Report 2003-2004, and looks forward to the Report 2004-2005, incorporating the Committee's suggested inclusions.

