Parliament of the Commonwealth of Australia

SECOND REPORT OF THE
PARLIAMENTARY JOINT COMMITTEE
ON NATIVE TITLE

The National Native Title Tribunal
Annual Report 1993-1994

March 1995

ISBN 0 642 22443 9

This document was produced from camera-ready copy and printed by the Senate Printing Unit, Parliament House, Canberra.

THE COMMITTEE

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Mr Latham, MP
Mr Nehl, MP
Mr Quick, MP

Secretary

Peter C. Grundy
S1.61
Parliament House
CANBERRA

Telephone: (06) 277 3598

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PREFACE

Pursuant to s.133 of the *Native Title Act 1993*, the President of the National Native Title Tribunal (NNTT) is required, as soon as practicable after the end of each financial year, to provide the Commonwealth Minister with:

(a) a report of the management of the administrative affairs of the Tribunal during the financial year; and
(b) financial statements for that financial year.

Section 206(c) of the *Native Title Act 1993* requires the Parliamentary Joint Committee on Native Title to examine each annual report prepared by the NNTT President and to report to both Houses of the Parliament on matters:

(i) that appear in, or arise out of, that annual report; and
(ii) to which, in the Parliamentary Joint Committee's opinion, the Parliament's attention should be directed.

The *National Native Title Tribunal Annual Report 1993/94* was tabled in both Houses of the Parliament on Tuesday 15 November 1994. For 1993-94 the NNTT report is not strictly speaking an 'annual' report, dealing only with the period 1 January-30 June 1994: the NNTT did not come into existence until 1 January 1994.

On Monday 21 November the Committee advertised in the national press seeking submissions relating to its consideration of the annual report. Appendix 1 lists the submissions that were received. While not all submissions are mentioned in the Committee report, they have been carefully taken into account.

In Perth on Thursday 24 November the Committee heard evidence on this matter from representatives of the NNTT (including the President, Mr Justice French), a Perth barrister and two academic lawyers. A further public hearing was held at Parliament House on 27 February when Mr Bruce Lloyd MHR met with the Committee. Details of those public hearings are contained in Appendix 2 to this report. The Committee expresses its gratitude to all those who gave evidence.

Various significant issues concerning the current operation of the NNTT were raised on 24 November by the witnesses who appeared after Justice French had met with the Committee. Accordingly, on 5 December the Committee Secretary wrote to Justice French drawing his attention to those matters and inviting his written response. On 7 December the Committee made public the submissions received; they were also provided to Justice French for any comment that he might wish to make.

Justice French responded to this correspondence on 10 January 1995. Given the significance of the matters that it covers, the President's letter has been received as a submission (No 9) and is reproduced in this report as Appendix 3.

CHAPTER 1

President's Overview

1.1 It is useful for annual reports such as that of the National Native Title Tribunal to begin with an overview statement by the principal officer. The President, Justice Robert French, has provided such an overview for the Tribunal's 1993-94 annual report.

Establishment of Tribunal

1.2 The overview, reproduced at Appendix 4 of this report, provides a factual account of the establishment of the Tribunal in part noting that:

- the legislation was enacted with effect from 1 January 1994 to provide a statutory mechanism for the recognition and protection of native title;

- the Tribunal has been established under the Act and the process of establishing long-term structures and procedures for the Tribunal was begun within the reporting period;

- a process of consultation was begun which revealed concerns about tenure histories, the identification of acts that have extinguished native title, the adequacy of land descriptions and maps, the notification of interested parties, the cost of involvement by non-claimants and the nature of evidence that should be brought forward.

In providing an account of his consultation initiatives, Justice French notes that an extensive process was begun involving Aboriginal representative bodies, governments, mining, pastoral and other interests.

Procedures

1.3 In addition to this factual account, in his overview the President gave some indication of the general approach that he would adopt in addressing Tribunal

procedures. He advised that where there are problems of a practical kind in the working of the legislation, and where some amendment may be beneficial, the Tribunal will not hesitate to suggest changes.

1.4 The President has taken the opportunity with his first annual report to repeat a suggested amendment to the *Native Title Act 1993*. Justice French had outlined this proposal in providing a private briefing to the Native Title Committee on 3 June 1994. It was canvassed on 16 June 1994 by Justice French at a conference at the University of Western Australia. In the annual report it is articulated in detail at Appendix 9; in this report it is reproduced as Appendix 5.

The Parliamentary Committee

1.5 Justice French recorded in his overview that the Tribunal has established a good working relationship with the Parliamentary Joint Committee on Native Title. He undertook to ensure that the Committee is kept informed about the Tribunal's work and procedures. (The annual report refers in more detail to the role of the Parliamentary Committee in Chapter 2 Administration, p.9.)

1.6 The Committee, in meeting privately with Justice French on 3 June 1994, agreed with him about the consultations that would proceed between the Committee and the Tribunal. Justice French has fulfilled his undertakings and the Committee is most satisfied with the level of cooperation with the Tribunal. The Tribunal has conscientiously provided all information required by the Committee, and the Registrar has facilitated the contact necessary. It is pleasing to note that the Aboriginal and Torres Strait Islander Social Justice Commissioner has reported a similar experience (Submission No 8, p.11).

Summary

1.7 The President's Overview provides a useful account of the establishment of the Tribunal and its initial approach. The President feels that it is too early to say that the Tribunal will succeed in finding resolutions to the claims lodged during the reporting period. However, he indicated his belief that the scheme set up under the Act may lead to a maturing of discourse between Aboriginal Australia and the wider community.

CHAPTER 2

Initial Progress of the Tribunal

2.1 The National Native Title Tribunal was established from 1 January 1994 under the *Native Title Act 1993*. For the initial six months or so, the period covered by the Tribunal's first annual report, the circumstances of its operation were difficult. A newly appointed Tribunal was to implement a new Act with little previous experience for guidance.

2.2 Further, for the first four months of its operation the Tribunal had an interim President (Justice Dierdre O'Connor, President of the Administrative Appeals Tribunal) and an Acting Registrar (Mr David Schultz, Registrar of the Administrative Appeals Tribunal). Staff for the Tribunal were seconded from the Administrative Appeals Tribunal on which the Native Title Tribunal depended entirely for administrative support.

2.3 There was a range of essential tasks that faced the Tribunal from the outset. In addition to setting up its administration, the Tribunal needed to:

- formulate guidelines and procedures for the processing of applications (s.123 refers);
- appoint a permanent staff;
- expand the presidential membership;
- commence the process of community consultation; and
- establish the basis of cooperation with State governments.

In addition to being covered in the President's Overview (p.2 of the annual report) these matters are referred to in Chapters 3, 4 and 5.

2.4 From these beginnings the Native Title Tribunal has become well-established with Justice Robert French appointed President for three years from 2 May 1994 and the Registrar, Ms Patricia Lane, appointed from 11 July. Further, at Chapter 3 (p.12) the Tribunal annual report notes the appointment of two presidential members; Chapter 6 (p.20) and Appendix 4 (p.60) refer to the Tribunal's staff appointments.

2.5 As a consequence of its meetings with Justice French, observation of the operation of the Tribunal and advice from a range of people who have interacted with it, the Committee is satisfied that the National Native Title Tribunal has been soundly established. The next chapters deal with issues which have arisen in the course of the Committee's hearings on the Tribunal's annual report.

CHAPTER 3

Acceptance of Applications

3.1 The acceptance process for native title determination applications has been the subject of considerable comment. Section 63 deals with the acceptance of applications and provides:

> 63.(1) If the requirements of Section 62 are complied with in relation to the application, the Registrar must accept it, unless he or she is of the opinion :
>
> (a) that the application is frivolous or vexatious; or
> (b) that *prima facie* the claim cannot be made out.
>
> (2) If the Registrar is of the opinion mentioned in paragraph (1)(a) or (b), the Registrar must refer the application to a presidential member.
>
> (3) If the Presidential members is of the same opinion, the presidential member must:
>
> (a) advise the applicant in writing of the fact and give the applicant a reasonable opportunity to satisfy the presidential member that the application is not frivolous or vexatious, or that a prima facie claim can be made out, as the case requires; and
> (b) if the applicant so satisfies the presidential member - direct the Registrar to accept the application; and
> (c) if the applicant does not satisfy the presidential member - direct the Registrar not to accept the application.
>
> (4) If the presidential member is not of the same opinion as the Registrar, the presidential member must direct the Registrar to accept the application.

3.2 The Registrar's "*prima facie* assessment" does not require the applicant to make out a prima facie case that the claim can be made out. The President, on the other hand, has to be satisfied on the basis of submissions from the parties that "a *prima facie* claim" can be made out. This distinction is made clear in Justice French's

(interim) Reasons for Ruling in the Waanyi case: see pages 22-26, especially page 25 where he states:

> Whereas before the Registrar the applicant had merely to survive the possibility that prima facie the claim could be made out, now a positive case must be shown that a prima facie claim can be made out. There is a discrepancy between the two tests and the policy underlying that discrepancy is not readily apparent from the language of the Act. The applicant, having failed to cross a low barrier has to surmount a higher one.

3.3 In essence, then, the Registrar either accepts an application or, under the direction of a presidential member, does not accept an application. The Act does not refer to the Tribunal *rejecting* applications although that is what ultimate refusal to accept amounts to.

The Prima Facie Test

3.4 It is notable that the provision in s.63(1)(b) of the Native Title Act for the Registrar to make *prima facie* assessments of applications was not part of the original Native Title Bill. It was adopted by the Senate upon a proposal by Senator Chamarette (amendment 22A to the Bill, Hansard 16 December 1993, p.5410). The Leader of the Government, Senator Gareth Evans, explained the role of the Registrar under the amendment to the Bill:

> The registrar is not making a final determination about frivolity or vexatiousness or the absence of a prima facie case. The most that the registrar is doing is operating, in the first instance, as a vehicle for the presiding member making that decision if the registrar thinks there are grounds on which that might be an appropriate decision. (*Evidence*, pp.5417, 5418)
>
> ... if he is of the view that there is something so insubstantial about an application that it satisfies either of these descriptions, then he is the one who can trigger the action by the presiding officer [sic]...(*Evidence*, p.5419)

Senator Evans confirmed that the proposed amendment was accepted by the government (*Evidence*, p.5418) and it was subsequently adopted by the Senate. (*Evidence*, p.5421)

3.5 With regard to this acceptance 'threshold' the Federal Member for Murray, Bruce Lloyd MHR, has submitted that the Tribunal 'must tighten its first stage approval process for future claims' (Submission No 2, p.1). However, Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Dodson, has endorsed a low threshold test for acceptance of claims (Submission No 8, p.2). Mr Dodson referred to the contention of the applicants in the Waanyi ruling published by Justice French on 15 September 1994. They contended that no investigation is required on the part of the Registrar and no material, other than that accompanying the application, should be taken into account. In relation to this submission, Justice French stated in pages 23 - 24 of his reasons for his (interim) Reasons for Ruling in relation to the *Waanyi* application:

> The question then is whether on this construction the Registrar is precluded from making inquiries which may fundamentally affect the viability of the claim. Plainly the ordinary sense does not oblige her to undertake any investigation beyond a consideration of the application and the supporting affidavits and documents. However, that ordinary meaning of the words is in some degree metaphorical and does not, in my opinion, preclude some investigation by the Registrar for the purpose of determining whether it can be said at the outset that the claim could not be made out. She may, for example, conduct a current land tenure search and discover that part of the area under claim is freehold land which clearly extinguished native title. Having so found, she could rightly conclude that prima facie the application could not succeed... [Section 63] does not contemplate any resolution by the Registrar of contested questions of fact or arguable questions of law ... For the Registrar to accept an application which on the face of it, or in the light of the kind of investigations to which I have referred, could not succeed would be a waste of the time and resources of the Tribunal.

3.6 Despite the legislative basis of *prima facie* examination of applications, some indications are emerging about the need for care during pre-acceptance

examination. In this regard Commissioner Dodson has observed (Submission No 8, pp.2-3) that:

> pre-acceptance consultations have occurred between Tribunal staff *and non-claimants* despite the fact that s.63(3)(a) grants *an applicant* opportunity to satisfy the presidential member ...

3.7 Mr Justice French has argued the desirability of pre-acceptance consultations with government agencies. In his submission (no 9, p.5) he notes that paragraph 5.5 of the Tribunal's Procedures provides for communication between the Registrar and such agencies with a view to resolving, in consultation with the applicants, uncertainties or ambiguities in relation to the boundaries of the land or waters which are the subject of the claim. Justice French confirmed:

> The Tribunal makes no apology for arrangements with the relevant State and Territory agencies that are essential to the provision of basic information about current interests affected by applications and historical land tenures which may affect the legal viability of an application.

The President's point is valid. Nevertheless, care is required to ensure that such pre-acceptance consultations are confined to the securing of information and do not amount to mediation between parties.

3.8 In reference to the pre-acceptance process, Mr Dodson has drawn attention to the Tribunal's guidelines concerning leaseholds. The Committee's first report noted (p.16, para 3.40) that if a pastoral lease does not contain a 'reservation' in favour of Aboriginal people, then the Registrar will not usually accept the application but refer it to a presidential member. The wording of the guidelines is that such applications 'will *not ordinarily* be accepted by the Registrar' (emphasis added). Mr Dodson has advised (Submission No 8, p.4) that:

> The legal uncertainty as to the extent that pastoral leases extinguish native title even beyond the reservations leads me to query why the Registrar of the Tribunal is rejecting applications on this ground while this uncertainty persists.

3.9 The issue of the effect on native title of a grant of a pastoral lease is contentious. It was the subject of considerable argument before Justice French in the *Waanyi* application. In his decision on 14 February 1995 directing the Registrar not to accept the application, Justice French took the view that on the basis of the majority of judgements in the Mabo decision, the grant of pastoral leases over that area without reservations in favour of the Aboriginal inhabitants was inconsistent with the continued existence of native title and had therefore extinguished native title in that area. It is expected that the applicants will appeal Justice French's decision to the Federal Court. The effect of pastoral leases on native title is also before the Federal Court in the Wik case.

Points of Law

3.10 The issue of whether or not native title exists in relation to a particular area will frequently involve consideration of the effect of any prior grant on any native title; such consideration will necessarily involve a consideration of legal issues which may not have been addressed or resolved in the High Court's *Mabo(No. 2)* decision.

3.11 In the absence of a clear ruling on a particular point of law in the High Court's judgement, in order to carry out their functions under the Native Title Act the Registrar and the President form views on various legal issues, including matters of statutory interpretation and the common law on native title. In the Native Title Act this was understood to be the case - subsection 169(2) provides a specific right to appeal, on a question of fact or law, from a decision of a presidential member not to accept an application.

Principles for Acceptance

3.12 The Committee make the following comments about the acceptance process:

> The Tribunal President has confirmed that, in being able to make inquiries concerning an application, those inquiries 'may include land tenure and land tenure history searches and receiving advice on the plausibility of a claim from an anthropological perspective' (Waanyi application *Reasons for Ruling in Relation to Criteria* ..., p.32).

> Regard should be had for inconvenience caused to applicants in the pre-acceptance process. The development of an application, submission and preparation for mediation is onerous enough; the Tribunal needs to continue to be sensitive to the need to minimise inconvenience to applicants.
>
> The Tribunal should have some regard to the cost of presenting an application. Commissioner Dodson has confirmed (Submission No 8, p.8) that the potential cost of the Waanyi claim was estimated at $100 000 at the acceptance phase. Mr Greg McIntyre, a barrister, advised the Committee (*Evidence*, p.696) that in order for an application to be accepted, highly technical and expert legal advice was needed. The cost of an application, of course, bears no necessary connection to its validity. The Committee agrees with Justice French that the screening function under Section 63 is necessary to discourage hopeless applications.

Further Issues

Maps

3.13 The Committee's first report noted (pp.9-10) concerns about maps. Since then Mr Greg McIntyre has advised (*Evidence*, pp.696-697) that the descriptions of land in the Maduwongga and the Swan River applications were considered inadequate. Mr McIntyre stated that what was required for the application was a non-Aboriginal tenure map, that is, a cadastral map:

> Unless you can put a claim in which defines your claim in accordance with non-Aboriginal title, you are chucked out as the Maduwongga were because they define it in accordance with language boundaries.

Justice French has commented extensively on this issue at pages 3 and 4 of the submission reproduced in this report at Appendix 3. The Judge accepts that the extent of traditional 'country' according to Aboriginal law and the extent of native title recognised by the common law are two different things which reflect the interaction of two different kinds of law. Perhaps the most significant point made by Justice French is that:

> a description of the area the subject of an application as an area which extends beyond areas over which native title is claimed, does not meet the requirement of s.62.

Here the President has indicated the basis for the Tribunal Regulations concerning the description of the area that is the subject of an application. The Tribunal nevertheless needs to manage sensitively the dual requirement of recognising Aboriginal notions of 'country' and the formal description of the land tenure that is subject of the application.

Transcripts

3.14 In addition to expressing concern about the threshold for the acceptance of applications by the Tribunal, Mr Bruce Lloyd MHR has also noted a problem connected with the mediation process. In evidence at a public hearing on 27 February 1995, Mr Lloyd advised (*Evidence*, p.744) that the transcript of a mediation conference in Shepparton was available for $1 587 (although he was provided with two copies by the Tribunal for $486). This level of charge could preclude access to an important aspect of the process by a range of relevant parties. Where transcripts are made available by the Tribunal, the Committee considers that they should be provided to eligible parties without cost.

CHAPTER 4

Post-Acceptance: President's Proposed Amendment

4.1 Once a native title claim application has been accepted under section 63 of the Act, section 66 requires the Registrar to give notice of the application to all persons whose interests may be affected by a determination in relation to the application. If the application is unopposed, under section 70 the Tribunal may make a determination along the lines sought by the applicant if the Tribunal is satisfied that the applicant has made out a *prima facie* case for a determination in those terms and that such a determination would be just and equitable in the circumstances. If the application is opposed, then the matter proceeds to mediation.

4.2 Before making a determination under section 70, section 139 requires the Tribunal to hold an inquiry into the application. Section 148 provides that if, at any stage of the inquiry, the Tribunal becomes satisfied that the applicant cannot make out a *prima facie* case the application may be dismissed. However, with regard to opposed applications, section 139 does not apply. This means that there is no power to hold an inquiry into such applications before mediation. In order to address this matter, the President's proposed amendment to the *Native Title Act 1993* would:

> enable an inquiry to be held, on a discretionary basis, at any point after acceptance of the application to determine whether there is a *prima facie* case and in that context to allow for important points of law which may affect the negotiation process to be referred to the Federal Court. (annual report, Appendix 9, p.67; see Appendix 5 of this report).

4.3 One submission to the Committee, No 6 from Peak Hill Gold Project (NSW), considered from its experience that there was a clear need for the President's proposal. Mr Meates, the project manager, advised that the NSW Department of Mineral Resources gave notice of its intention to grant mining leases and that a subsequent claimant application on behalf of Wiradjuri families was lodged. Mr Meates contends that this application has been accepted over an area of land where there is a high degree of certainty that native title has been extinguished:

> The problem is that a claimant **without a *prima facie* case** has been given standing in the Right to Negotiate provisions and is able to lay claim to some part of the profits, etc of the proposed mine.

Mr Meates concluded that (Submission No 6, p.3):

> There is a clear need to strengthen the screening provisions of the Act (s.63), or alternatively adopt Justice French's proposal (Appendix 9 of the NNTT Annual Report 1993/94) concerning discretionary Inquiries. In this latter regard we would suggest that a party to a claim should also be enabled to initiate such an Inquiry.

4.4 The benefit of the proposed amendment would be that the Tribunal, by conducting the inquiry early, could identify issues affecting the application and, where necessary, refer them to the Federal Court for determination pursuant to s.145 of the Act. This process could expedite difficult cases.

4.5 While there are benefits in the President's proposed amendment to the Act, it is not without difficulty. Perhaps the most significant issue concerns the concept of mediation. Despite being termed a Tribunal, the NNTT is more accurately described by Justice French as a native title dispute resolution service. The Tribunal assists parties to native title claims to resolve those claims by agreement. However, because Justice French's proposed amendment could open the inquiry process at an early stage following acceptance of an application, one of the major benefits of the process envisaged under the Act could be put at risk. That is, the parties would have at least some elements of the claim dealt with in the *public* inquiry process at an early stage rather than in *private* mediation. This could hazard the chances of an agreed outcome. In his submission (No 8, p.12) Commissioner Dodson endorses the private mediation process:

> The adoption of interests-based negotiation by the Tribunal which recognises the possible need for confidentiality and is flexible in the consultation options available to parties is, I believe, a balanced method for dealing with claims.

4.6 Nevertheless, it is important to note that the President's proposal would not compel the Tribunal to conduct an early inquiry. Provided that this was the approach taken, and that every attempt was otherwise made to pursue mediation prior to the inquiry stage, the President's proposal could be useful because it would increase the flexibility of the Tribunal's procedures.

4.7 The practical implementation of the Act is still in its formative period. The Committee notes Commissioner Dodson's comments (Submission No.8, p. 14) to the effect that time should be allowed for experience of the Act to consolidate. However, if there is a need to amend the Act following the High Court's pending decision on the challenge to the Act, consideration should be given to addressing the matter raised by Justice French's proposed amendment.

CHAPTER 5

Conclusion

5.1 The Committee recognises that the Tribunal's acceptance process is consistent with section 63 of the Act. There is a need, however, for the Tribunal to ensure that pre-acceptance consultation is confined to questions of a factual nature and does not amount to mediation or negotiation with parties. The Tribunal also needs to continue to be sensitive to the inconvenience that can be caused to applicants in the pre-acceptance process. Regard needs to be paid to the cost of developing applications; the pre-acceptance process should not add to those costs unnecessarily.

5.2 The Committee feels that proposed amendments to the Act should not be considered until the High Court decision on the WA challenge has been handed down. The Committee believes that the President's proposed amendment should be considered in that context.

5.3 In the interim, the Committee perceives the need for the Tribunal to publish further guidance about the submission and treatment of applications; it would encourage the National Native Title Tribunal to publish a Practice Note on native title applications for the guidance of practitioners and interested parties.

Senator Chris Evans
Chair

APPENDIX 1

Submissions Received

Submissions Received

Sub No.	Organisation
1	Johnston, Mr P.W., WA
2	Bruce Lloyd, MHR, Federal Member for Murray, VIC
3	Wade, Mr J, WA
4	Action Aboriginal Rights, VIC
5	University of Sydney, Department of Government and Public Administration, NSW
6	Peak Hill Gold Project, WA
7	DCH Legal Group, WA
8	Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, NSW
9	National Native Title Tribunal, WA

APPENDIX 2

Public Hearings - 24 November 1994; 27 February 1995

Public Hearing - 24 November 1994

Conference Room
Commonwealth Parliamentary Offices
39th Floor
Exchange Plaza
2 The Esplanade
PERTH WA 6000

DAVIES, Miss Mary-Louise, Executive Officer, National Native Title Tribunal, Level 5, 1 Victoria Avenue, Perth, Western Australia 6000

FRENCH, Justice Robert Shenton, President, National Native Title Tribunal, Level 5, 1 Victoria Avenue, Perth, Western Australia 6000

LANE, Ms Patricia Margaret, Registrar, National Native Title Tribunal, Level 5, 1 Victoria Avenue, Perth, Western Australia 6000

JOHNSTON, Mr Peter Walter, Visiting Fellow, University of Western Australia, Nedlands, Western Australia 6009

MEYERS, Dr Gary Donald, Senior Lecturer, Murdoch University School of Law, Murdoch, Western Australia 6150

McINTYRE, Mr Gregory Malcolm Grant, Barrister-at-Law, Durack Centre, Level 3, 263 Adelaide Terrace, Perth, Western Australia 6000

Public Hearing - 27 February 1995

Committee Room 1S2
Parliament House
CANBERRA ACT 2600

LLOYD, Mr Bruce, MP, Parliament House, Canberra, Australian Capital Territory

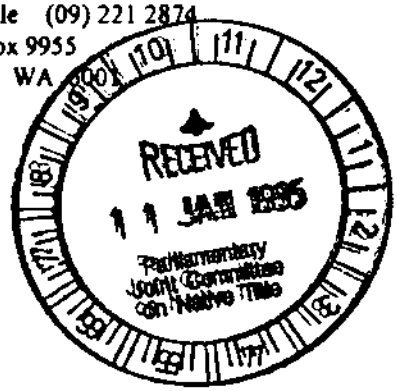
APPENDIX 3

Submission No 9 - Mr Justice French

National Native Title Tribunal

Level 5
Commonwealth Law Courts
1 Victoria Avenue
PERTH WA 6000

Telephone (09) 268 7164
Facsimile (09) 221 2874
GPO Box 9955
PERTH WA 6000



10 January, 1995

The Secretary
Parliamentary Joint Committee on Native Title
Parliament House
CANBERRA ACT 2600

Dear Sir,

Thank you for your letters of 5 and 7 December 1994 and your fax of 21 December 1994 which enclosed copies of submissions made to the Committee in relation to the Tribunal's Annual Report, including a submission prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner.

It should be said by way of general comment that the Tribunal has a duty to carry out its statutory functions in accordance with the Act. In so doing the statutory purpose must be respected. This is reflected in the Tribunal's mission statement:

> "The purpose of the National Native Title Tribunal is:
>
> 1. To facilitate the recognition of native title.
>
> 2. To promote just agreements about native title and the use of traditional Aboriginal and Torres Strait Islander lands and waters in ways:
>
> . that are fair, just, economical, informal and prompt;
>
> . that take account of the cultural and customary concerns of Aboriginal people and Torres Strait Islanders and the interests of all others who are affected by native title issues;
>
> . that promote an informed discourse between Aboriginal and non-Aboriginal Australians."

In doing these things, the Tribunal must not be overly sensitive to the winds of criticism which blow in different directions according to their origins. For example, some of those who have commented upon the operations of the Tribunal advance the view that the Registrar is not sufficiently rigorous in deciding whether or not to accept applications and does not impose sufficiently high standards on their preparation and presentation. Others take the view that the Registrar sets too high a threshold and imposes unreasonable burdens. There are those who complain that the whole process, especially the mediation aspect, takes too long and thereby prolongs uncertainty about land use rights. A variant of that view, is that the Tribunal engages in mediation for too long when applicants should have an early opportunity to test their case in court. On the other hand, the Tribunal has been criticised for putting undue pressure on applicants to engage in the mediation process before they are ready to do so and to define their objectives and interests at an early stage when extensive internal consultations remain to be undertaken in deciding who speaks for what elements of the country covered by the claim.

The preceding exemplifies some of the conflicting comments which have been offered to the Committee. The Tribunal will consider all constructive criticisms and, to the extent possible, address them in the development of its procedures. Some of the concerns expressed to the Committee may already be covered by the materials put to the Committee by the Tribunal on 24 November. These included a draft mediation strategy and a draft community liaison policy. Since meeting with the Committee, the Tribunal has conducted a cultural awareness course for its members and staff and for members of the Federal Court and other interested parties. It has also conducted a second round of liaison committee meetings in all States between 8 and 16 December culminating in a National Liaison Committee meeting on 16 December. One initiative which will emerge from that process is the establishment of a distinct system of committees in each State and Territory to allow for direct consultation with Aboriginal organisations in addition to the broader range of interests represented in the liaison committees. Whatever steps the Tribunal takes to improve its consultative processes or review its procedures, it must be accepted that there will always be those who will be unhappy with the way it operates. I do not include in that category what might be called fundamentalists who object to the whole concept of the Native Title Act and the establishment of the Tribunal. These are not limited to elements of the non-Aboriginal community.

I now turn to some specific submissions put to the Committee and identified in your letter of 5 December:

1. <u>The Acceptance of Applications.</u> The letter of 5 December identified a number of submissions relating to the acceptance process. The issues raised by those submissions were set out in the letter in the following terms:

   (i) Applications needing to be lodged in accordance with non-Aboriginal title, not Aboriginal language boundaries (697 , 709-710);

   (ii) Precision of maps (674, 688);

(iii) Applicants required to identify other tenures in the area (698);

(iv) Provision of resources (675, 689);

(v) Rejection of applications "over the counter" (708);

(vi) Passing of information to State Authorities (675, 689, 716-717);

(vii) Acceptance of representations during the screening process (715);

(viii) "Rejection" of pastoral lease applications (675, 681, 689);

(ix) Applications needing highly technical and expert legal advice (696);

(x) Registrar is making substantial decisions on questions of law in the "screening process" (704).

I will endeavour to deal with these points together. Section 62 of the Native Title Act requires that a native title determination application contain a description of the area over which the native title is claimed. While the content of the description is not specified by the Act, it must relate to land in which it is asserted native title subsists. It is accepted that the extent of traditional "country" according to Aboriginal law and the extent of native title recognised by the common law, are two different things which reflect the interaction of two different kinds of law. Under Aboriginal law, traditional country may encompass freehold and leasehold interests which may have extinguished native title at common law. But a description of the area the subject of an application as an area which extends beyond areas over which native title is claimed, does not meet the requirement of s.62.. The form of application specified in the National Native Title Tribunal Regulations requires "a description of the area of the land or water covered by the application and a map showing the geographical boundaries of the area - the description must include the indigenous name of the area and sites within the area". This must be read in the light of the requirements of s.62 that the application describe the area over which the native title is claimed.

As to the degree of precision required in the land description, some clue to this is derived from the notification requirements. The Act requires, under s.66, that the Registrar give notice of the application "to all persons whose interests may be affected by a determination in relation to the application". The land description in an application which has been accepted, must enable an assessment to be made by the Registrar of the persons whose interests may be affected by the claim. The range of those interests has to be determined by reference to the definition of "interests" in s.253. That includes a legal or equitable estate or interest in the land or waters; any other right, charge, power or privilege, over or in connection with the land or waters, or a restriction on the use of the land or waters. These are interests which arise under statute or by virtue of the common law or equitable rules and will generally be defined by reference to the land use information system of the State or Territory to which the application applies.

It is necessary also to have regard to the definition of a "determination of native title" in s.225 which involves a determination "whether native title exists in relation to a particular area of land or waters (emphasis added). The Act, in my opinion, does not contemplate the acceptance of applications which leave room for significant ambiguity or uncertainty about the description of the land over which native title is claimed. Although not identified as an issue in your letter of 5 December, it is to be noted that the Tribunal has been criticised for accepting an application without adequate boundary definition. The submission by the Premier of Victoria (submission number 21 dated 21 November 1994) referred to the adequacy of the land description contained in the application by the Yorta Yorta clans. The submission made was that "procedures for accepting applications over large areas of land should be tightened so that the land and resources under claim can be properly identified. There is, I think, also an element of that criticism underlying the submission made to the Committee by the Honourable Bruce Lloyd MHR, Federal Member for Murray, who contended that the Tribunal must tighten its first stage approval process for future claims. Having said all that, I am conscious nevertheless of the resource limitations of applicant groups. The Tribunal has prepared a draft Assistance to Applicants Policy which will be reviewed in light of the submissions made to the Committee and comments made in the course of the second round of liaison committee meetings to which I have already referred.

The "counter knockback" process is covered by paragraph 2.5 of the Tribunal procedures, and is designed to enable applicants to put their applications into proper form before they are assessed for acceptance. It is designed to avoid the possibility of applications being not accepted by the Registrar for formal deficiencies which can readily be cured without reference to a presidential member. I remain of the view that this is a useful procedure which enables applicants to address problems of form before paying the fee that is required with lodgment of the application. However, I accept that it is important to avoid misunderstanding about this process. I will therefore reformulate the terms of paragraph 2.5 of the Procedures to ensure that the so called "counter knockback" is treated as an advisory process and that applicants who wish to formally lodge an application will not be prevented from doing so. This will be achieved by adding the following words to the existing paragraph 2.5 of the Procedures:

> "The applicant may nevertheless insist upon the application being received by the Registrar and assessed for acceptance in accordance with the provisions of the Act and these procedures."

The statement was made by on witness (at 707) in connection with a claim over the Swan River that "...they just handed it back. In fact worse than that, we found out about it by reading it in the newspaper". The claim was said to have been "a limited claim to protect sites of significance". The claim was lodged by a firm of solicitors who were advised by telephone by a case manager that it was unsatisfactory in a number of respects. Upon inspection, it appeared that the claim picked up certain freehold as well as reserve land. Given the obvious public interest in the claim, it was quite reasonable that the press be advised of the initial response to it.

Submissions were made to the Committee about the provision of information to State agencies in connection with the acquisition of information concerning current and historical land tenure in the area the subject of native title determination applications. Given the attitude of the Government in Western Australia to native title issues, there was a concern expressed that information could be used by the State contrary to Aboriginal interests. There was also the concern expressed that the Tribunal was receiving submissions from State Government Departments about land claim matters generally and matters specifically which may impact upon the acceptance of particular claims.

Paragraph 5.3 of the Tribunal's Procedures provides that the Registrar will, wherever possible, enter into arrangements directly with State and Territory Governments in relation to the provision of current and historical land tenure searches. Paragraph 5.5 provides for communication between the Registrar and State and Territory Government Agencies prior to acceptance of any application with a view to resolving, in consultation with the applicants, uncertainties or ambiguities in relation to the boundaries of the land or waters which are the subject of the claim. The Tribunal makes no apology for arrangements with the relevant State and Territory agencies that are essential to the provision of basic information about current interests affected by applications and historical land tenures which may affect the legal viability of an application.

It must be accepted that State and Territory Governments are key actors in the resolution of applications for native title determinations. They hold the relevant land use information and they are parties to applications which are accepted. Information provided by such governments or their agencies is made available to applicants. It is necessary to provide Governments with the relevant information in order that appropriate searches can be conducted. Quite apart from that, the lodgment of an application is not a private act, nor is the application a private document. The Tribunal has no general mandate to keep applications secret or treat them as private. It would be quite improper of the Tribunal to withhold information from any State or Territory Government on the basis of a perceived adversarial attitude to native title issues on the part of such Government. To do so would compromise the independence and impartiality of the Tribunal.

That general observation is, of course, subject to the specific power of the Registrar under s.188 of the Act to keep a part of the Register of Native Title claims confidential, having regard to the public interest and cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders. If governments seek to make submissions in relation to particular applications, then applicants will be informed and given an opportunity to comment on those submissions. In some cases submissions will be invited under para. 6.8 of the Procedures where an application has been referred to a presidential member. It must be said, with respect, that some of the submissions to the Committee on this issue seem to give insufficient weight to the necessity for the Tribunal to be independent and impartial in respect of all parties who participate in its processes. It may have to be accepted, that in its quest for independence and even handedness, the Tribunal will be perceived by one or other group as not giving sufficient recognition to its interests. However it is nonsense to suggest that the Tribunal has been receiving covert submissions from government or as one written submission put it, "colluding with the State Government".

In oral submissions to the Committee (at 675), one witness referred to "the categoric rejection" of a number of applications affecting pastoral leases. He also referred to "outright rejection pending the determination in the Federal Court" as giving rise to a problem of "uneven handedness". These characterisations of the acceptance process in relation to applications affecting land which is or has been subject to pastoral leasehold interests, are based upon a misconception of the Tribunal's guidelines and practice. The guidelines are set out at Appendix 12 of the Annual Report. They do not provide for the final disposition of any application. They indicate that certain classes of application will ordinarily not be accepted by the Registrar but referred to a Presidential Member. As indicated in paragraph 7 of the guidelines:

> "Each case will be considered on its own merits. In any case where the Registrar does not accept an application, the application will be referred to a Presidential Member and if the Presidential Member is of the same opinion as the Registrar, the applicant will be invited to make submissions to the Presidential Member as provided for in s.63."

At the end of the reporting period and, indeed, at the time of the submissions to the Committee on 24 November 1994, no application had been rejected by the Tribunal on the ground of extinguishment by virtue of any past or present pastoral lease. One application had been accepted over pastoral leases in the Cape York area which would probably have been referred to a Presidential Member under the guidelines.

The misconception that initial non-acceptance by the Registrar amounts to a formal rejection of an application, was repeated in the evidence of another witness (at 697). The statement was made that the "registrar either accepts or rejects". That is not correct as a matter of law, nor does it reflect the policy of the legislation which is not to leave the final decision of non-acceptance in the hands of the Registrar. A fortiori, the words "chucked out" to describe the fate of an application referred to the President by the Registrar, were quite misleading.

The same witness referred to a claimant application lodged in response to a non-claimant application at Edmonton, near Cairns (at 702). He said that the Tribunal "determined it seemed to me as a matter of law, that there was no claim which could be made over any of the area". In that case, the application was referred to me by the Registrar, in part on the basis that some of the area under claim had been the subject of freehold grant and that prima facie the claim to native title could not succeed over the whole of the area covered by the application. I wrote to the applicant on 1 September 1994 inviting submissions on the acceptance question within fourteen days. By 27 September, no response had been received and the Registrar was directed not to accept the application.

The point was made (at 696) that in order to have an application accepted, applicants need highly technical and expert legal advice. The Tribunal's case managers have generally engaged in processes of consultation with applicants or their representatives about potential difficulties affecting particular claims before making submissions to the Registrar on the question of acceptance. Complex claims affecting or affected by an array of current and historical land tenures will not become easier because the Registrar and the Tribunal disregard the difficulties. The extent to which technical and legal advice is required in a

particular case will depend upon the nature of the application. I am, however, conscious of the need of some applicants for more assistance in the preparation of their claims than is presently provided. Such assistance is authorised by s.78 of the Act and is currently the subject of a draft policy to improve the accessibility of the Tribunal. The extent of such assistance, which is the statutory responsibility of the Registrar, will depend upon the Tribunal's own resources, those available to the particular applicants and the nature of the application.

The reasons underlying the present approach to the provisions of the Act relating to the acceptance of applications are set out in the Waanyi ruling, a copy of which has been made available to the Committee. There is no doubt that in the process of referral of certain applications to a Presidential Member, the Registrar is making judgments about whether, prima facie, the claim can be made out. That is what the Act requires the Registrar to do. If, in the course of making that judgment, the Registrar forms an opinion as to the law relating to the extinguishment of native title, she is only acting in accordance with her duty. And from a practical point of view, there is little point in trying to mediate an application which faces a substantial and unresolved legal obstacle. If the legal obstacle appears to the Registrar to be insuperable then it is appropriate that the difficulty be faced at the threshold and tested before a Presidential Member and, if necessary, on an appeal to the Federal Court.

The notification of parties in large and complex claims and the initiation of the mediation process require significant commitments of public and private resources. If it appears that the applicant's case is doomed to failure because of the limitations of the common law recognition of native title, it is better that the question be faced and determined earlier, rather than later. In particular, it is better that it be determined before the commitment of resources to notification and mediation. It should perhaps be noted that in addition to her administrative experience and skills, the present Registrar has Bachelors Degrees in Arts and Law and a Masters Degree in Law from Sydney University. She has a special interest in Real Property and has tutored and lectured in law at Sydney University. Since 1988 she has been the examiner in the subject of Real Property for the Barristers and Solicitors Admission Board of the Supreme Court of New South Wales.

2. <u>The Mediation Process</u>

(i) The mediation process is attractive to those with a weak case and who are unlikely to succeed in Court (712-713);

(ii) The mediation process - providing an elegant and efficient solution (673, 687);

(iii) Time to mediate (673, 687);

(iv) The need for grass roots structures (673, 687-688);

(v) Status of Presidential Member (674, 688);

On the first point, the relevant oral submission seemed to proceed upon a view of mediation broadly dismissive of its possibilities for resolving any claim with a reasonable prospect of success. It must be accepted that there is a school of thought which questions the practical value of alternative dispute resolution techniques generally - see Ingleby - "Why not toss a coin? Issues of quality and efficiency in the evaluation of alternative dispute resolution". - Proceedings of Ninth National AIJA Conference August 1990, p.51. There is also a school of thought which sees possible disadvantage in extra judicial dispute resolution between parties of unequal power, particularly where questions of public interest are concerned. This is discussed in a paper I delivered in 1990 - "Hands on Judges and User Friendly Justice" (1991) 2 ADRJ 73 at pp.81-82 (copy attached). It is important not to adopt an evangelistic commitment to mediation as a universal solvent of disputes. However, in the experience of the Tribunal so far, the adversarial perspective which favours rapid referral to the Federal Court is not reflected in the attitude of Aboriginal groups involved in the process. What they are requiring is adequate time to prepare for mediation and to participate fully in a process spaced so that internal consultations can proceed about possible agreements. The pressure for referral to the Court has so far come principally from State and Territory Governments.

The next three points really go to the question whether the mediation process as applied by the Tribunal takes sufficient account of cultural concerns and the time required for Aboriginal people to properly consult amongst themselves. The submission suggested that the Tribunal had adopted a fly-in fly-out practice, and had not allowed sufficient time on the ground with applicants. As I observed in the course of my oral submissions to the Committee on 24 November, there has certainly been one case in which community tension in the town affected by the application required a firm commitment on the part of the applicant to commence the mediation process. The requirement for that commitment, which was effectively imposed by the Tribunal, was a matter of judgment. In making such judgments sensitivity to the concerns of the applicants is important, but not determinative of the right decision. There were in that case many parties and understandable anxiety and uncertainty. There is no principle or practice of fly-in fly-out of the kind described in these submissions. The Tribunal is required, among other things, to pursue the objective of carrying out its functions in an economical way. Its human resources are therefore to be used as economically as is reasonable. At the early stage of mediation or pre-mediation processes, applicants who are competently represented may be spending more time with their own advisors than with Tribunal staff.

Having said all that, it must be apparent from the papers placed before the Committee by the Tribunal and, in particular, the draft mediation strategy, that I accept the lessons derived from the experience of the Tribunal thus far in the mediation process. As the Committee will have noted, the draft mediation strategy recognises the need for applicants to undertake internal consultations, to identify their own interests and objectives and to come to grips with the mediation processes. It recognises the possibility of power imbalances in the process. It also specifically adverts to the desirability of providing adequate time for consideration of options to resolve an application. It recognises expressly that the subject matter of native title does not lend itself to speedy resolution by mediation in the same way as commercial disputes.

practical judgment in the light of the proper construction of the Act. I accept that there may be different views about what is a correct judgment in that regard. I do not believe there is any point in further canvassing issues concerning the acceptance process which have been canvassed before the Committee and in this letter.

So far as questions of legislative change are concerned, I would not wish to add to what I have already said publicly or comment on additional suggestions mentioned in the Commissioner's submission. The submission is, with respect, reflective of a balanced and legitimate perspective on the operation of the Tribunal. Although I cannot agree with all of the comments made in it, I cannot complain that any of them are unfair or unreasonable. Indeed, approaches of that character to the work of the Tribunal give cause for optimism that there can be a co-operative development and improvement of its operations involving the participation of all interested parties.

Yours sincerely,

Justice R. French
President

Encl.

Reference was made to the possibility of confusion derived from the status of Presidential Members as judges or former judges and the possibility that this will give a false impression to Aboriginal persons who may expect the Tribunal to effect determinations. I think this is a valid point and one which I have been very conscious of in dealing with Aboriginal applicants. Quite apart from the fact that the Presidential Member is a judge or retired judge, the very designation "Tribunal" can induce a mistaken belief about the nature of its processes, not only amongst Aboriginal people but also others. I have endeavoured in the mediation processes in which I have been involved to make clear that the Tribunal is not able to impose any outcome. You will also have noted in the Guide to National Native Title Tribunal at p.7 that the fact that the Tribunal is not a court is highlighted. This is a message, however, that needs to be repeated at every opportunity. There are still, in my opinion, significant misapprehensions about the nature of the Tribunal and its processes. The community liaison policy, a draft of which is among the papers provided to the Committee, seeks to improve understanding of the process both generally and in relation to specific applications.

3. Non-claimant applications

(i) There have been submissions by claimants "who are strictly not a part of the proceedings "(703).

A submission was made which related to a particular non-claimant application at Edmonton near Cairns. This was unopposed as a claimant application over the same area was not accepted. The non-acceptance of the claimant application was criticised but the submission appears to have gone on to suggest that the Tribunal member conducting the statutory inquiry into the non-claimant application should not have heard evidence from the unsuccessful claimant. When the Tribunal conducts an inquiry into an unopposed non-claimant application, it cannot make a determination that native title does not exist unless satisfied that there is a prima facie case for such a determination and that it is just and equitable that it be made. The fact that no claimant application had been made or that a claimant application had not been accepted does not of itself establish either of those propositions. It is open to the Tribunal to hear evidence on those issues from unsuccessful claimants or any other person (which might include a potential claimant) if the Tribunal can be assisted in arriving at its decision at the inquiry.

Reference should also be made to the optional procedure for unopposed non-claimant applications, an outline of which is included in the papers which were made available to the Committee.

4. Submission by Aboriginal and Torres Strait Islander Social Justice Commissioner

To the extent that the Commissioner's submission deals with Tribunal practices and procedures, the issues raised have been addressed either in the material already placed before the Committee or in the submissions made in the earlier part of this letter. The question of where to strike a balance between conflicting interests in the acceptance phase is a matter of

APPENDIX 4

NNTT Annual Report: 1993-94 - President's Overview

President's Overview*

The legal recognition of native title by the High Court in Mabo v. Queensland (No. 2) (1992) 175 CLR 1 began a new phase in the development of the relationship between Australia's indigenous peoples and the wider community. The decision dealt specifically with a claim relating to the Murray Islands, off the north coast of Queensland. It also laid down broad principles applicable to mainland Australia, but left open questions about the scope and content of native title in particular cases and the effects on it of legislative or executive acts. The potential for extensive and costly litigation arising from the High Court decision was obvious.

The Native Title Act was enacted with effect from 1 January 1994 to provide a statutory mechanism for the recognition and protection of native title. The National Native Title Tribunal was established under the Act to receive applications seeking determinations of the existence or non-existence of native title or for compensation and to endeavour to achieve consensual resolution of such applications. The courts remain the ultimate decision-makers in contested cases as to the existence or non-existence of native title or entitlement to compensation. Nevertheless the Tribunal has an important role in the resolution of applications in ways that may avoid litigation.

The Act requires the Native Title Registrar, who is a statutory office-holder, to receive and consider for acceptance applications for determinations that native title exists, applications for determinations that native title does not exist and applications for compensation arising out of the extinguishment or impairment of native title. There is, at this point, a role for the Registrar and the Tribunal in screening out hopeless applications.

The Act requires public notification of applications which have been accepted and creates the opportunity for persons who have interests that may be affected by an application to become parties to it. It authorises the Tribunal to make determinations in relation to unopposed applications, subject to an inquiry process. Where applications are opposed, the Tribunal is required to convene a mediation conference to endeavour to resolve them. If a determination is agreed, the Tribunal is required to make a determination according to the agreement subject to an inquiry to ensure that what is agreed is within its power and is appropriate. If no agreement is reached, the application must be referred to the Federal Court for decision.

The Tribunal also has a function as an arbitral body in deciding whether or not certain categories of proposed government action which affect native title should be permitted to proceed and, if so, under what conditions. In this it is subject to an overriding ministerial power. Where a State or Territory sets up its own arbitral body that function is exclusive to the State or Territory body concerned. At the end of June 1994 no such body had been established.

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* Reproduced from pp.1-3 of the *NNTT Annual Report: 1993-1994.*

For the first four months of its operation, the Tribunal comprised Justice Dierdre O'Connor, President of the Administrative Appeals Tribunal (latterly President of the Industrial Relations Commission) as President of the Tribunal. Mr David Schulz, the Registrar of the Administrative Appeals Tribunal was appointed as Acting Native Title Registrar until a permanent appointment could be made. Staff of the Administrative Appeals Tribunal and others were seconded to the Tribunal. Administrative support was derived entirely from the Administrative Appeals Tribunal. The principal activities of the Tribunal in the reporting period included liaison with user groups, the development of procedures and the receipt and initial processing of applications.

The work of Justice O'Connor and Mr Schulz and their staff in setting up the framework for Tribunal operations in the first four months of its existence was an important beginning. The appointment of Mrs Patricia Lane, Senior Deputy Registrar in the Federal Court, to the office of Native Title Registrar was announced within the reporting period. She was to take up that appointment from 11 July. My own appointment as President commenced on 2 May 1994. I am grateful to Justice O'Connor and to David Schulz for their initial work.

The process of establishing long term structures and procedures for the Tribunal was begun within the reporting period. As appears from the later pages of this report, important initiatives were taken in expanding the membership and staffing of the Tribunal and promulgating a set of procedures describing the approach to be taken to the acceptance and resolution of applications. An extensive process of community consultation was begun involving Aboriginal representative bodies, State and Territory Governments, mining, pastoral and other interests. This yielded useful information about practical issues associated with the processing of applications and the interests and concerns of those affected by the work of the Tribunal. This form of information gathering and exchange of views about operations and procedures is valuable to the Tribunal and will be continued.

Among the issues which were raised with the Tribunal were concerns about the need for tenure history searches to be undertaken by the Tribunal, the identification of legislative or executive acts which extinguished native title, the clarity and adequacy of land descriptions and maps accompanying applications, the mode and extent of notification to interested parties, the cost of involvement in the process by non-applicants and the nature and quantity of evidence which parties should bring to the Tribunal.

During the reporting period I delivered two major papers which set out the initial directions of the Tribunal. The second paper addressed the difficult issue of the interaction between pastoral leases and native title. Draft guidelines to deal with the acceptance of applications affecting freehold and leasehold interests were circulated to user groups for comment. (See Appendix 12)

I have made it clear from time to time during the reporting period that where there are problems of a practical kind in the working of the legislation that come to the attention of the Tribunal and where some amendment to the legislation may be beneficial to its operation without affecting the balance of interests that it achieves the Tribunal will not hesitate to suggest changes.

APPENDIX 5

President's Proposed Amendment

APPENDIX 9*

A PROPOSAL IN PRINCIPLE FOR AN AMENDMENT TO THE ACT IN RELATION TO INQUIRIES INTO THE EXISTENCE OF A PRIMA FACIE CASE AND REFERENCE OF QUESTIONS OF LAW TO THE FEDERAL COURT

An inquiry into an application for a determination of native title or for compensation can only be held if the application is unopposed or the subject of agreement either with or without mediation - see s.139(a). Section 145 provides for the Tribunal in conducting an inquiry to refer a question of law which may arise to the Federal Court for decision. Sections 147 and 148 provide that the Tribunal may dismiss an application if at any stage of the inquiry it is satisfied that the application is frivolous or vexatious or that the applicant is unable to make out a prima facie case in relation to the application.

It is a curious feature of the Act that the possibility of dismissal arises in respect of opposed applications only after agreement has been reached between the parties. There is merit in a provision which would enable an inquiry to be held, on a discretionary basis, at any point after acceptance of the application to determine whether there is a prima facie case and in that context to allow for important points of law which may affect the negotiation process to be referred to the Federal Court. It is not suggested that such an inquiry would be required in every case. If an applicant were to establish that it had a prima facie case by that mechanism, such a determination might well facilitate the negotiation process. Questions of law relevant to that process could be determined by the Federal Court without the need for an exhaustive investigation of native title in the particular case. For example, a test case on the impact of a pastoral lease with a statutory reservation in the area the subject of the claim, could be considered in this way. If a prima facie case were found not to exist and appeal rights had been exhausted, the application could be dismissed and the applicants look to alternative possibilities such as the Land Acquisition Fund.

This proposal would not affect the statutory test for the acceptance of applications and their placement on the Register of Native Title Claims. That is because it would only arise after acceptance. It could well, however, have benefits for all parties to an application enabling them to achieve greater certainty about the basis of their negotiations.

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* Reproduced from p.67 of the *NNTT Annual Report: 1993-1994.*