



National
Native Title
Tribunal



Annual Report 2007–2008

Resolution of native title issues over land and waters.



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About this report

While required to report to the responsible Minister under s. 133 of the *Native Title Act 1993*, the primary purpose of the annual report of the National Native Title Tribunal is to inform and be accountable to, firstly, the Parliament and, secondly, its stakeholders about the services provided.

The Tribunal is a statutory authority and is therefore not compelled to observe the annual reporting requirements for government departments; however, it chooses to do so.

Copies of this annual report in book form may be obtained from any registry of the National Native Title Tribunal (see back cover for contact details) or online at www.nntt.gov.au in PDF format.

We draw attention to the online versions for those readers who prefer to enlarge the type and who may prefer to choose particular parts of the report for downloading. Upon request, the text of this report in whole or in part can be supplied free of charge in braille.

The National Native Title Tribunal encourages readers to make comment on the usefulness and contents of the report. Please forward any comments to Public Affairs Manager Tim Evans on freecall 1800 640 501 or email Tim.Evans@nntt.gov.au.

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National
Native Title
Tribunal



06 October 2008

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Dear Attorney

I am pleased to submit to you, for presentation to the Parliament, the annual report of the National Native Title Tribunal for the year ended 30 June 2008.

The report has been prepared in accordance with s.133 of the *Native Title Act 1993* (Cwlth).

Yours sincerely

Graeme Neate
President

Resolution of native title issues over land and waters.

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President's overview



Year in review

Introduction

It seems that every year change is the hallmark of the native title environment. The past year was no exception.

We saw the commencement or implementation of numerous amendments to the *Native Title Act 1993* (Cwlth) (the Act) that affected native title representative bodies, respondent parties, prescribed bodies corporate, the Federal Court and the National Native Title Tribunal (the Tribunal). Those and other changes were intended to improve the processes and institutions created to resolve native title issues and, most importantly, the outcomes of the native title system.

In November 2007, a new Australian Government was elected. Key ministers seek to ensure that the native title system produces a range of positive results, and that native title is not seen as an end in itself but as a means of reducing the economic and other disadvantages experienced by groups of Indigenous Australians.

With legislative, administrative, governmental and other changes occurring, there was a temptation to focus on the new and the novel, and risk forgetting or overlooking what has continued unchanged or has been enhanced or refined rather than replaced.

As required by the Act, this annual report ‘relates to the Tribunal’s activities during the year’. Accordingly, it deals with the range of registration, mediation, arbitration, assistance and other statutory functions performed by the Tribunal.

It provides a picture of how native title rights and interests are being recognised, often by agreement, alongside other rights and interests.

The Tribunal is uniquely placed to participate in and make observations about the native title system from:

- a whole-of-process perspective—because the Tribunal is involved at each stage from providing pre-claim assistance through the registration, notification and mediation of claims to the registration of determinations of native title, and assistance with the negotiation of associated agreements (including indigenous land use agreements (ILUAs))
- a national perspective—because the Tribunal operates in all areas where native title claims are made and other native title issues arise, and it deals with all parties and their representatives.

This overview deals in summary with:

- external factors affecting the Tribunal and its work
- trends within the Tribunal
- forecasts for facets of the native title system, particularly the resolution of native title applications.

The rest of the report includes information about various outputs and case studies that touch on some of the human aspects of negotiations and outcomes. The case studies give a broader picture of what native title delivers to particular groups, wider sectors and communities.

I gratefully acknowledge the contributions of each Tribunal Member, the Native Title Registrar and Acting Native Title Registrar (the Registrar), and the employees of the Tribunal during the year covered by this report.

External factors affecting the Tribunal

The ways in which the Tribunal meets its obligations are significantly influenced by numerous factors which the Tribunal does not control, including developments in the law, policies and procedures of governments; procedures and orders of the Federal Court; and the roles and capacity of native title representative bodies, native title service providers and prescribed bodies corporate.

During the reporting period, further legislative and administrative reforms were made to aspects of the native title system. Some reforms have already affected the way in which the Tribunal operates.

Developments in the law

Developments in native title law occur by way of legislation or from decisions of courts and tribunals. Both took place during the reporting period.

Legislation

As noted in last year's annual report, most of the *Native Title Amendment Act 2007* (Cwlth) (the Amendment Act) commenced on 15 April 2007.

The legislation made changes to:

- processes for the recognition or re-recognition of native title representative bodies for fixed terms and aspects of their operations, and the functions of native title service providers in areas where there are no native title representative bodies
- the claims resolution process
- some aspects of the operations and the governance regime of prescribed bodies corporate

- the scope of assistance which the Attorney-General may grant to include meeting legal and other costs associated with the development of standard form agreements and the review of existing standard form agreements.

The *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth) (the Technical Amendments Act) was passed by the Australian Parliament on 20 June 2007 and received the Royal Assent on 20 July 2007.

A few of the amendments commenced retrospectively on 15 April 2007. Most of the amendments commenced in the current reporting period—on 1 July, 21 July, or 1 September 2007. Others commenced on 1 July 2008.

Among the many changes made by the Technical Amendments Act was the capacity for an applicant to request an internal reconsideration of a registration test decision made by the Registrar, if their application failed to meet all the conditions of the test. The reconsideration is to be made by a Member of the Tribunal.

The Technical Amendments Act also reduced the number of circumstances in which the registration test will be applied to amended claims. Such changes should lead to claims being amended more readily and in ways that enable quicker resolution of them.

Amendments to ss 104 and 109 of the Act were made by the *Superannuation Legislation Amendment (Trustee Board and other Measures) (Consequential Amendments) Act 2008* (Cwlth).

Judgments and litigation

The Federal Court delivered about 50 written judgments on matters involving native title law during the year. Eight contained reasons for making consent determinations of native title. Most judgments, however, involved other technical issues in relation to the interpretation of the Act and aspects of native title practice and procedure, including matters relevant to registration testing undertaken by the Native Title Registrar and the Registrar's delegates.

The Full Federal Court delivered judgments on appeals in relation to judgments on native title claims to areas of land and waters in the Northern Territory (in the area of Timber Creek) and in Western Australia (in the areas of Perth and Broome), and the appeal against the judgment dismissing a compensation claim to land around the town of Yulara in the Northern Territory.

The volume and range of judgments continued the trend of the Federal Court to deliver scores of written judgments each year on native title matters. Consequently, the legal environment in which some negotiations occur, cases are argued and administrative decisions are made, is increasingly certain.

Although some litigation is necessary to clarify legal issues or determine apparently intractable disputes, it is worth noting that the length, cost and unpredictable outcomes

of native title trials are among the reasons for encouraging parties to attempt to negotiate outcomes.

Members of the Tribunal are also involved in the development of the law as they make future act determinations under the Act. A Full Court of the Federal Court reviewed one of these determinations during the reporting period, and upheld the approach taken by the Tribunal.

Summaries of the main points of significant judicial decisions and Tribunal determinations are set out in 'Appendix II Significant decisions', p. 113.

Policies and procedures of governments

Role of governments in native title proceedings

It is apparent that most, if not all, parties want agreed outcomes rather than to be engaged in native title litigation. Governments play a critical part in achieving those outcomes. The agreement-making processes administered by the Tribunal are more productive where the relevant government provides proposals for native title and other outcomes. Without the support of governments, consent determinations of native title cannot be made and many other options for settlement cannot be employed.

Attorney-General Robert McClelland said, in a speech on 29 February 2008, that all participants 'from governments down can do much better ... in resolving native title claims ... in creatively and innovatively using negotiations as a vehicle to achieve practical outcomes'. He has suggested that there is 'room for all parties to take a step back, and adopt a more flexible and willing approach to negotiations'.

The annual meeting of Commonwealth, state and territory ministers with responsibility for native title is one opportunity for governments to share experiences about how they can help to resolve native title issues. The 2008 meeting took place on 19 July, outside the reporting period. In anticipation of that meeting, the Attorney-General called on all governments to work together 'through cooperative federalism' to 'find a new approach to resolving native title claims' so that 'an enormous amount can be achieved'.

Roles of the Australian Government

The Australian Government has three broad roles in the native title system:

- it administers the Act and can initiate amendments to it
- it provides funding to many of the major participants in the native title system (and potentially, under s. 200 of the Act, to the states and territories in relation to various liabilities, costs and expenses)
- the Commonwealth Minister (currently the Attorney-General) is a party to some proceedings and is entitled to intervene in a matter arising under the Act.

Events in the reporting period are relevant to each role.

Administering the Act: One of the reforms in 2007 that attracted considerable interest and comment is the requirement that each party and each party's representative 'must act in good faith' in relation to the conduct of the mediation. That should provide an incentive to improve behaviour and to focus the attention of the parties and their representatives on the seriousness of the mediation process and the need to approach mediation in a professional manner and with a spirit of goodwill.

In October 2007, the then Commonwealth Attorney-General, the Hon. Philip Ruddock, issued *Mediation Guidelines: Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal* ('Mediation Guidelines'). The preface to the Mediation Guidelines states that they 'set out principles of best practice in standards of behaviour which parties to mediation' in the Tribunal and their representatives 'should seek to uphold'.

The Mediation Guidelines contain detailed provisions in relation to:

- the behaviour of parties (integrity, cooperation, courtesy, cultural courtesy, 'without prejudice', disclosure of information, and cultural confidentiality)
- preparation for mediation (identifying parties' concerns, timely production of relevant materials, and reading material)
- effective resolution principles (effective participation in mediation, genuine desire to reach agreement, and effective communication)
- timeline (unnecessary delay, obtaining instructions, mediation timelines, and shifting of position).

The Mediation Guidelines include a range of practical statements about the behaviour of parties and their representatives in relation to the preparation in conduct of mediation by the Tribunal.

I subsequently issued Procedural Direction No. 2 of 2007 which sets out the procedures to be followed by Tribunal Members when considering whether:

- a party or a representative of a party did not act or is not acting in good faith in relation to the conduct of the mediation of a proceeding referred to the Tribunal from the court, or
- to make a report that a party or a representative of a party did not act or is not acting in good faith in relation to the conduct of a mediation.

The procedural direction sets out a range of matters that the presiding Member should take into account in deciding whether he or she considers that a person did not act or is not acting in good faith in the conduct of a mediation. The presiding Member 'must also have regard to' the Mediation Guidelines.

In February 2008, the present Attorney-General, the Hon. Robert McClelland, set out the new Australian Government's objectives for the native title system as:

- wherever possible, resolving land use and ownership issues through negotiation, because negotiation produces broader and better outcomes than litigation
- facilitating the negotiation of more and better ILUAs and ensuring that traditional owners and their representatives are adequately resourced for this
- making native title an effective mechanism for providing economic development opportunities for Indigenous people
- avoiding unduly narrow and legalistic approaches to native title processes that can result in further dispossession of Aboriginal and Torres Strait Islander people.

Above all, he said, his objective was to ensure that native title was not seen as an end in itself.

Funding the participants: The Commonwealth funds many of the participants in the native title system including native title representative bodies and service providers (and, through them, applicants and prescribed bodies corporate), some respondent parties, the Federal Court and the Tribunal. Funding for the reporting period was part of a four-year program that commenced in the 2005–06 financial year. During the reporting period a review was commenced to assist the Australian Government to determine what Commonwealth moneys would need to be appropriated to those parts of the native title system for the four years from 2009–10.

The review was undertaken by the Native Title Coordination Committee, comprising representatives of the Attorney-General's Department; Department of Prime Minister and Cabinet; Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA); the Federal Court; and the Tribunal. The review was not complete at 30 June 2008.

Role as a party: In recent years, the Commonwealth has taken a robust role as intervener in litigation to argue points of law, but it remains to be seen whether (and, if so, to what extent and on what issues) the Commonwealth as a party will take a more flexible, creative and innovative approach to the resolution of claims.

Broad indications of how the new government sees the Commonwealth's role as a party in native title proceedings were provided by the Attorney-General in his February 2008 speech. The Attorney was critical of those who would 'bury native title in unnecessary complexity', and he urged a change of attitude on the part of all participants, including the 'purists intoxicated by their expertise in a technical and complicated system'. In his view, 'we need to move away from technical legal arguments about the existence of native title'.

In urging all parties to 'take a step back, and adopt a more flexible and willing approach to negotiations' and to adopt an 'interest-based approach to claims', he

referred to ‘the benefits that can be achieved if all parties take a flexible, creative approach and seek to resolve a range of issues within the context of native title negotiations’. After 15 years of experience of the native title system, parties should be able to accept that ‘an outcome does not have to be legally perfect to work in a practical sense’.

State and territory policies and laws

For some years, governments have been considering multifaceted settlements of native title claims. States and territories have explored ways to improve efficiency in the settlement of claims through a variety of related policy options (for example, management arrangements for national parks, strategies for economic development and cultural heritage management). Consideration of such options has the potential to assist in or otherwise affect the progress of negotiations occurring in specific applications, which may form part of the settlement packages negotiated.

Governments’ approaches to assessment of connection

There has been much debate about the best process to be adopted in (or outside) mediation for establishing a group’s traditional connection to the claimed area. Practices vary around the country. In 2003, Justice Robert French ruled that the Tribunal ‘has the responsibility ... to undertake mediation of all aspects of the application’ and that the mediation process covers the exchange of information between parties, including connection information (rather than the provision of connection evidence being outside or antecedent to the mediation process): *Frazer v Western Australia* (2003) 128 FCR 458 at [27]–[28]. Despite that judgment, the approach outlined by His Honour is not taken universally.

The role of the state and territory governments in assessing connection material remains the subject of ongoing debate and at least one government is reviewing its guidelines for making such an assessment.

The relevant state or territory government is the first respondent to each claimant application (although in some cases the principal respondent is the Commonwealth Minister). It has a role on behalf of the whole community in the negotiations. It has (or has access to) suitably qualified people to assess whether the claim group can establish the native title rights and interests asserted.

Some governments have published guidelines about the content and form of the connection material that they require in order to be satisfied that native title exists. Others (including the Commonwealth) do not have published guidelines. There are different processes for reporting on and assessing connection materials. Some governments require proof of connection as a pre-condition to entering into substantive negotiations with a claim group.

It is appropriate for the relevant governments to assess the strength of a claim. Other (though not necessarily all) respondent parties will follow, or be assisted by,

a government's assessment when deciding their approach to the resolution of the claim.

In some parts of the country, connection issues are dealt with bilaterally between the applicants and the relevant government, with little if any involvement by the Tribunal or other parties (each of whom must consent to any determination that native title exists, and some of whom will want to be satisfied independently that connection has been established).

The Tribunal has taken various initiatives to address this issue because it is relevant to all parties to native title proceedings. In July 2007, a workshop, jointly sponsored by the Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), was convened to focus on the requirements for establishing claimants' connection to country and the way in which that connection is assessed in the context of mediation.

The workshop involved 40 practitioners engaged by native title representative bodies, state and territory governments, and others with significant experience in native title. A survey of participants before the workshop indicated that most believe that problems encountered in resolving connection issues are systemic in nature. In other words, there is no one way to solve the problem and several approaches must be undertaken to effect change.

The report on the workshop and the various practical suggestions made by the participants was published with the title of *Getting Outcomes Sooner*, and it is available from the research section of the Tribunal's website, under specific issue reports.

According to that report, as at June 2007 there were approximately 78 connection reports, in a range of forms, awaiting assessment around Australia. Most were the product of a two to three-year research process and most will enter an assessment process that can take up to three years.

Among the practical obstacles to resolving connection issues more quickly are:

- the shortage of competent researchers (particularly suitably qualified and experienced anthropologists) available to prepare connection reports or assess them (e.g. to advise governments)—with consequent delays in researching and producing reports, or the preparation of some reports that do not address requirements of guidelines (giving rise to requests for revision or supplementation)
- the lack of interdisciplinary collaboration in preparing connection materials (including insufficient involvement of lawyers to ensure that reports are fit for the purpose for which they are prepared)
- limited resources generally to prepare and assess such material
- limited access to relevant state government records with information about people and places

- the practice of restricting access by other respondents to connection reports while they are assessed by governments, thereby limiting the scope of other respondents to participate in the process
- the general practice of restricting access to connection reports, thus limiting the opportunities to educate other researchers and to share understanding about how connection material was assessed.

Various suggestions for improving the current system were made at the workshop in the context of the stated preference of governments to reach mediated (rather than litigated) outcomes. Chief among these are:

- improving regional and operational planning (including claims prioritisation) between state and territory governments and native title representative bodies
- mitigating the adversarial nature of the relationships between parties
- clarifying the needs and expectations of all parties in relation to connection material as early as possible (e.g. at a plenary conference convened by the Tribunal).

Other suggestions included:

- arranging collaboration between external researchers, native title representative bodies and governments to:
 - scope the research that is necessary for each claim before that research is undertaken (e.g. by identifying matters that are not contentious and do not need detailed research and clarifying the information required in light of intended or possible outcomes), and
 - settle the form in which the material should be presented (including the best ways to incorporate more direct evidence from claimants)
- conducting tenure research, at least to major areas of land in question, before active connection research is undertaken
- providing simpler, cheaper access to government records and/or using limited discovery orders for easier access to relevant information
- revising government guidelines to ensure that they are flexible, clear (e.g. with checklists) and consistently applied
- incorporating the preparation and assessment of connection material as part of the mediation framework and not a precursor to it
- mediating connection and other issues in parallel rather than sequentially.

Some of the suggestions made at the workshop would require a significant shift in the policies of governments, including:

- some governments removing their requirement for comprehensive proof of connection *before* entering into negotiations
- developing a national framework and standards for the assessment of connection.

There are indications of support for some of these suggestions. In February 2008, Attorney-General McClelland suggested that, rather than start by considering connection with its attendant problems, there might be benefits in starting with a consideration of tenure and having a connection process run in parallel with discussions about a range of outcomes, native and non-native title.

Federal Court procedures and orders

The Federal Court has jurisdiction to hear and determine applications filed in the Court that relate to native title. The Court manages those applications on a case-by-case and regional basis, and supervises the mediation of native title determination applications and compensation applications. The case management practices of the Court can influence the practices of the Tribunal and the allocation of its resources.

Some of the legislative reforms made in April 2007 and during the reporting period have re-oriented aspects of the relationship between the Court and the Tribunal.

Immediate steps were taken by the Court and the Tribunal to implement the legislative and administrative reforms prompted by the Claims Resolution Review, discussed in last year's annual report.

On 13 June 2007, Chief Justice Michael Black issued a notice to practitioners and litigants about the revised arrangements for the conduct of native title cases in the Federal Court. Such cases are being managed regionally but within a national framework by Native Title List Judges. A Native Title List Judge has been nominated for each state, territory or region. Those judges coordinate native title work and will harmonise practice and procedure.

Building on models of regional management of the case load previously in place in the Court, there is a greater emphasis on the regional management of native title cases, allowing the progress of cases to be coordinated and streamlined across a region or regions. Such regional management practices are assisted by regional work plans and regional mediation progress reports prepared by the Tribunal.

The Federal Court's Rules were amended to reflect, among other things, the 2007 amendments to the Act. The *Federal Court Amendment Rules 2007 (No 2)*, which commenced operation on 4 January 2008, deal with matters of interest to the Tribunal, including:

- referral by the Tribunal of questions about whether a party should cease to be a party
- reports by the Tribunal about breaches of the good-faith requirement
- appearances on behalf of the Tribunal before the Court.

The Registrars of the Federal Court and the Tribunal negotiated and signed an administrative protocol.

The Native Title Registrar and the Registrar's delegates applied the registration test to claimant applications that fall within categories of the amending legislation, and reported to the Federal Court about scores of claims lodged in response to future act notices.

User group meetings, jointly convened by the Tribunal and the Federal Court, were held in Perth, Melbourne, Adelaide, Sydney and Darwin. Although the messages delivered on behalf of the Court and Tribunal were consistent on each occasion, each meeting with stakeholders had a different, local character.

Native title representative bodies and native title service providers

Functions, power and capacity

Native title representative bodies and native title service providers have important functions and powers under the Act.

For many Indigenous groups, their local representative body or service provider is the principal source of advice and representation on native title matters. It may represent people in mediations concerning applications, and may be involved in future act negotiations (e.g. in relation to the granting of mining interests) and the negotiation of ILUAs.

As I have stated in previous annual reports, properly functioning representative bodies (and, by extension, service providers) are not just important for the people they represent. The Tribunal and parties to native title proceedings or negotiations also benefit from them. If representative bodies, are not performing adequately, the Tribunal's capacity to do its work is diminished.

A set of measures to improve the effectiveness of native title representative bodies was one of the six interconnected aspects to the previous Australian Government's reforms of the native title system. The April 2007 amendments to the Act introduced a new regime for representative bodies under which:

- representative bodies would be recognised for fixed terms of between one and six years (rather than for an indefinite period as previously), with existing representative bodies being recognised during a transition period for an initial fixed term
- the criteria governing recognition and withdrawal of recognition from representative bodies, and extension, variation and reduction of representative body areas were simplified, with the Commonwealth Minister having new powers to extend and vary representative body areas
- bodies incorporated under the *Corporations Act 2001* (Cwlth) are able to be recognised as representative bodies

- previous requirements for representative bodies to prepare strategic plans and prepare annual reports for tabling in Parliament were removed
- native title service providers funded to perform representative body functions for an area for which there is no representative body are able to operate in the same way as representative bodies to the extent that this is appropriate.

Speeches by relevant Ministers in 2008 suggested that the resourcing of representative bodies is clearly on the Australian Government's agenda.

Regions where representative bodies operate

At the end of the previous reporting period there were 21 representative body areas with 14 recognised representative bodies for 15 of those areas. This position remained unchanged as at 30 June 2008.

There continued to be no representative bodies for southern Queensland, New South Wales or Victoria. Much of the representative body work, however, was undertaken by Queensland South Native Title Services Ltd, New South Wales Native Title Service Ltd and Native Title Services Victoria Ltd respectively.

As a consequence of amendments made to the Act in April 2007, those native title service bodies are able to operate in the same way as representative bodies to the extent that it is appropriate.

Implementation of some of the amendments resulted in representative bodies being offered recognition as representative bodies for various periods of one to six years from 30 June 2008. Some areas that were previously covered by representative bodies were, from 1 July 2008, serviced by native title service providers.

Proposals to amalgamate by 1 July 2008 some or all of the areas covered by three representative bodies in central and southern Queensland and the area covered by Queensland South Native Title Services Ltd were finalised. As a result, there were five areas at 1 July in place of the seven areas at 30 June 2008. The activity and some uncertainty surrounding the amalgamations affected the nature and amount of constructive work that could be done in some regions during the second half of the reporting period.

There remain three areas for which there was no recognised body and no current application for recognition being considered: Australian Capital Territory and Jervis Bay Territory, Tasmania, and External Territories (Heard, McDonald, Cocos (Keeling), Christmas and Norfolk islands and the Australian Antarctic Territory). The absence of representative bodies in these areas is of little or no practical significance to the Tribunal's operations.

Prescribed bodies corporate

Where there is a determination that Indigenous people have native title, the Act requires that a body corporate be established to hold the native title rights and interests in trust for the common law holders or to act as their agent or representative. Importantly for the native title holders and those who may wish to negotiate with them, clear governance structures need to be in place, so that the procedural and other benefits conferred on native title holders can be enjoyed.

At the end of the reporting period there were 77 registered determinations that native title exists. As more such determinations are made and large areas of the country are subject to those determinations, prescribed bodies corporate are assuming increasing importance as the bodies with whom other people should negotiate in relation to use of those areas of land.

Even when such corporations are established, there are practical issues about how they will be resourced to function. This issue has arisen in the context of claim resolution and future act negotiations and involves the funding and skills capacity of prescribed bodies corporate. There have been concerns about the workability of native title in the absence of resourced and effective structures to support native title holders.

In last year's annual report, reference was made to administrative and legislative reforms. Although these reforms were primarily structural, there is a focus on identifying and providing access to various forms of assistance.

Trends within the Tribunal

Changes to Registrar and membership

Native Title Registrar

The term of the Registrar, Christopher Doepel, concluded on 31 December 2007. By that date he had completed 10 years of excellent service as Registrar. In the Australia Day Honours List in January 2006, Mr Doepel was awarded the Public Service Medal in recognition of his outstanding public service in the development and implementation of legislation and policy relating to native title. In January 2008 he took up the position of Faculty Dean in the Faculty of Law and Business at Murdoch University, Perth.

The position of Registrar was advertised early in 2008, but the recruitment process was not completed by 30 June 2008. Franklin Gaffney, the Director of Corporate Services and Public Affairs, acted as Registrar for that period and made a valuable contribution to the Tribunal in that role.

During his ten years as Native Title Registrar, Christopher Doepel oversaw significant changes to key aspects of the Tribunal's practice, particularly in relation to substantial amendments to the Native Title Act.



Members

Three Members were reappointed during the reporting period:

- Daniel O'Dea was reappointed as a full-time Member of the Tribunal for five years from December 2007
- Dr Gaye Sculthorpe was reappointed as a full-time Member of the Tribunal for six months from February 2008; and then in June 2008 she was further reappointed for six months from 3 August 2008
- Ruth Wade was reappointed as a part-time Member of the Tribunal for six months from February 2008; and then in June 2008 a further reappointment for six months from 3 August 2008.

In June 2008, Alistair (Bardy) McFarlane, a full-time Member of the Tribunal since March 2000, gave notice of his resignation effective 25 July 2008 so he could take a position in the resources sector. I acknowledge his eight years of excellent service as a Member of the Tribunal.

The Tribunal noted with sadness the death, in April 2008, of Professor Geoffrey Clark, who was a Member between 1998 and 2003.

At the end of the reporting period there were 11 Members—eight were full-time and three were part-time, the lowest number for a full year since the Tribunal was established. In order that the Tribunal can continue to perform its statutory functions and deliver its services, it is important that the number of Members not fall below this level. If sufficient Member strength is not maintained, it will become necessary to appoint presidential consultants to perform the mediation and other functions of a Member.

Other information about the Tribunal's membership is found on p. 40.

Shifts in volume of registration, notification and mediation of native title determination applications

The resolution of native title determination applications (or claimant applications) involves the Registrar, employees and Members of the Tribunal in three main processes—the registration testing, notification and mediation of each application. Under the Tribunal's output structure, notification is not reported as an output. Nevertheless, it is an indicator of the number of applications that will be referred to the Tribunal for mediation.

At 30 June 2008, there were 504 claimant applications at some stage between lodgement and resolution. The total was lower than the 532 current claimant applications at 30 June 2007. In the reporting period, 41 claimant applications were discontinued, dismissed, withdrawn, struck out, combined with other applications or were the subject of native title determinations, with the result that 963 (or 66 per cent) of the claimant applications made since the Act commenced have been finalised. Thirteen new claimant applications were filed in the reporting period, compared with 30 in 2006–07.

Registration

In the period covered by this report, 104 registration test decisions were made, 48 more than the 56 decisions made in the previous year. They included 78 registration tests made on applications for the second, third or fifth time. Many of the decisions were made as required by amendments to the Act in April 2007 (discussed in 'Registration testing', p. 19).

For further information about the registration testing carried out by the Tribunal, see 'Output 3.1—Registration of native title claimant applications', p. 67.

Looking further ahead, the level of registration testing may be reduced as a result of changes made by the Technical Amendments Act. Those provide that the registration

test will not be reapplied to registered claimant applications that are amended where the Registrar is satisfied that the only effect of the amendment is to:

- reduce the area of land or waters covered by the application and the information and map contained in the amended application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters
- remove a right or interest from those claimed in the application
- alter the address for service of the person who is, or persons who are, the applicant
- change the name of a representative body recognised for the area or replace it with a body funded to perform representative body functions (or vice versa).

Notification

The level of notifications continued to drop in 2007–08, with 14 claimant applications being notified, compared with 19 in the previous year. Thirteen non-claimant, and no compensation applications, were notified. The level of notification reflects a reduction in the backlog and the decline in the rate of new claimant applications. Approximately 92 per cent of current claimant applications had been notified by 30 June 2008.

Mediation

As more claimant applications are notified, the Federal Court is referring them to the Tribunal for mediation. At 30 June 2007, 279 current matters were with the Tribunal for mediation. At 30 June 2008, 270 current claimant applications had been referred to the Tribunal for mediation, including 20 matters that were referred to it during the reporting period.

Although 54 per cent of current applications have been referred to the Tribunal for mediation, many of them are not being substantively mediated because they are not sufficiently prepared for that purpose or parties lack resources to engage in mediation at that stage. Indeed, it may be that only half of those applications could be described as 'active' because mediation is occurring, or because the Tribunal is involved in developing research reports or undertaking geospatial analysis to assist the parties.

Forms of assistance offered by the Tribunal

Under the Act the Members, Registrar and employees of the Tribunal may provide various forms of assistance to help people on a case-by-case basis to prepare applications or help them at any stage in matters related to a native title proceeding, and help them to negotiate agreements such as ILUAs. The emphasis on assistance the Tribunal may give parties on a case-by-case basis, and to stakeholders on a sectoral basis, is reflected in the output structure at 'Output 1.1—Capacity-building and strategic/sectoral initiatives', p. 49 and 'Output 1.2—Assistance and information', p. 51 and in the Tribunal's *Strategic Plan 2006–2008*.

The nature and volume of the assistance provided by the Tribunal vary significantly over time, as well as between individual states and territories. Much of the work is

in response to parties who request Tribunal assistance. Various factors, including the negotiating stances of parties, make it difficult to predict accurately the forms of assistance to be provided, the number of agreements and when they will be finalised.

The Act contains a scheme that enables the negotiation of ILUAs that can cover a range of land uses on areas where native title has been determined to exist or where it is claimed to exist. The number of ILUAs registered in recent years has risen. During the reporting period another 57 ILUAs were registered, bringing the total as at 30 June 2008 to 337. Registered ILUAs covered about 1,004,900 sq km, or 13.1 per cent of the land mass of Australia. A further 2,300 sq km thereabouts, cover areas of sea. At 30 June 2008, 22 other agreements were in other stages of the process toward possible registration.

This report contains information about the level of ILUA activity and other agreements around the country. More ILUA outputs were generated in relation to native title determination applications than through 'stand alone' ILUA negotiations. That continued a trend identified in last year's annual report. For further information, see 'Output group 2—Agreement-making', p. 54.

Increase in the number of determinations of native title

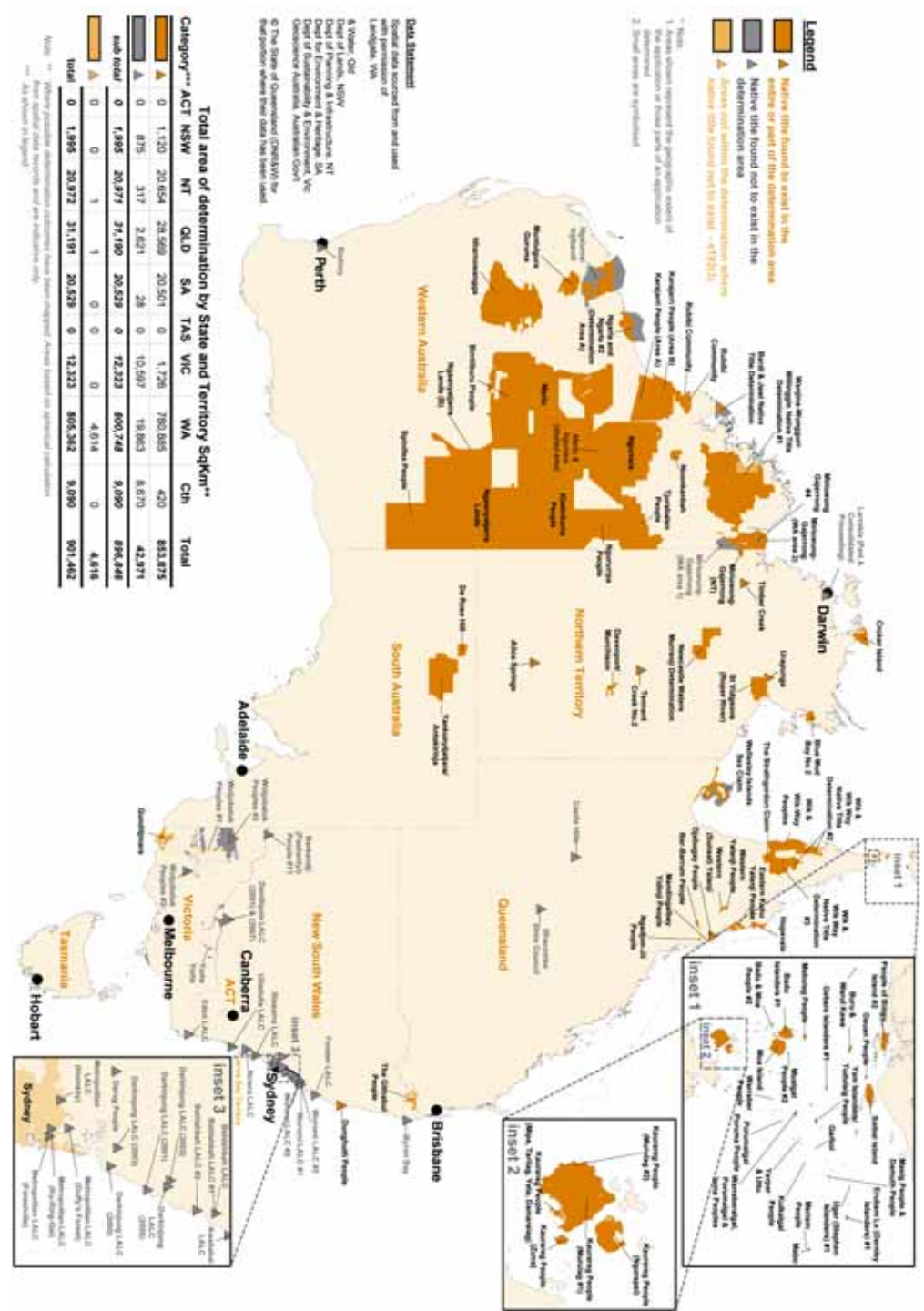
During the reporting period the Native Title Registrar registered nine determinations of native title, all of them that native title exists in relation to specific areas of land or waters. This was one more determination that native title exists than in the previous reporting period. Details of some determinations are discussed in 'Appendix II Significant decisions', p. 113.

These determinations are on the public record held by the Tribunal in the National Native Title Register and available to be viewed through the applications and determinations section of the Tribunal's website under search determinations. They set out quite precisely the native title rights and interests that are legally recognised as well as the rights and interests of others in the same area of land or waters. They identify who the native title holders are. In other words, they provide a clear and comprehensive statement about the key features of native title and other legally recognised rights and interests for each area.

The number of determinations registered in the reporting period was, however, lower than the 16 determinations registered in 2006–07, and lower than the Tribunal had estimated. However, eight of the nine determinations that native title exists were made by consent of the parties. This indicated the strong agreement-making environment, which is also evident in the number of agreements that deal with issues or set out processes or frameworks for mediation. See Table 4 Number of agreements by state and territory, p. 58.

At 30 June 2008 there were 112 registered determinations of native title, including 77 determinations that native title exists. The determinations covered a total area of about 901,500 sq km, or 11.7 per cent of the land mass of Australia.

Figure 1 Map of native title determinations to 30 June 2008



Performing the additional functions of the Native Title Registrar

The Act was amended in 2007 to include a scheme for the potential removal from the system of:

- registered claimant applications that were made in response to future act notices (and hence attracted certain procedural rights) but which were not being progressed after the future act was complete
- unregistered claimant applications that do not meet (and are not amended to meet) the merit requirement of the registration test, and in respect of which, in the opinion of the Court, there is 'no other reason why the application in issue should not be dismissed'.

The Native Title Registrar reports to the Federal Court in relation to:

- applications lodged in response to future act notices where the future acts have been finalised over certain claimant application areas (ss. 66C, 94C)
- where a claimant application is not accepted for registration because it does not satisfy a 'merit' condition of the registration test (s. 190D(1)).

In each case it is open to the Court to dismiss the application if certain criteria are satisfied.

The Registrar began to implement these new functions as soon as practicable after the amending Act commenced on 15 April 2007.

Future act related applications

Two reports were made to the Federal Court in 2007, and further reports were provided in February and June 2008. In total, the reports have included 70 applications (of which 58 were in the Northern Territory).

The Federal Court has considered and noted the Registrar's reports. Although Justice French has stated that the 'mandatory dismissal power, in effect, provides a tool or sanction to be used by the Court to dispose of applications lodged to get procedural rights and not otherwise being pursued' (see *Webb v Western Australia* [2007] FCA 1342 at [12]), no applications were dismissed during the reporting period. The Court may use this power in relation to claims clustered behind 'lead' applications if they do not progress satisfactorily (see *Button Jones (on behalf of the Gudim People) v Northern Territory of Australia* [2007] FCA 1802).

Registration testing

The amended Act requires the Registrar, within one year after the amendments commenced, to use best endeavours to apply the registration test to categories of claimant applications that had been registration tested and were not on the Register of Native Title Claims, or that were on the Register but were not previously required to go through the registration test. Particular focus is on whether each application satisfies all of the 'merit' conditions in s. 190B of the Act.

The Registrar identified 128 claimant applications that required application or reapplication of the registration test under the transitional provisions of the Amendment Act and transitional provisions of the Technical Amendments Act, and reporting to the Court if they cannot be registered because they do not satisfy the merit conditions.

In consultation with applicants and their representatives, the Registrar settled a program of registration testing for these applications by the relevant dates under the respective Acts (15 April 2008 for 110 of the applications and 1 September 2008 for the remaining 18).

By 15 April 2008, 103 (or 93 per cent) of applications identified for registration testing under the Amendment Act had been tested or otherwise finalised. A further four (or 22 per cent) of the applications identified for testing under the Technical Amendments Act had been tested. Only 17 (or 18 per cent) of the applications tested by that date were accepted for registration.

At 30 June 2008, 113 applications identified for testing under the amending Acts had been tested or were otherwise finalised. Of those, 18 (or 16 per cent) were accepted for registration.

As a result of this process:

- some claimant applications were amended to comply with the registration test and hence be in better shape for substantive mediation
- some claimant applications were discontinued.

As yet there has been no discernible reduction in the number of claimant applications due to the implementation of these specific amendments. However, the Registrar's reports so far have established a flow of applications for the Court to consider for dismissal.

At 30 June 2008, no applications had been dismissed by the Federal Court in response to those reports. It remains to be seen whether some claimant applications will be removed from the system, with potential for better prepared claims to be made in the future. That will depend on the approach taken by the Federal Court.

Implementing the Tribunal's additional powers and functions

Amendments to the Act in 2007 were designed to effect improvements in the system, in particular emphasising the primacy of mediation as a means of resolving claims and improving the behaviour of system participants. The amendments also gave the Tribunal increased powers and responsibilities. These were listed in last year's Annual Report on p. 6.

Claims resolution process

The legislative changes reorient aspects of the relationship between the Court and the Tribunal, and confer additional and expanded functions on the Tribunal.

As noted earlier, the previous Attorney-General issued Mediation Guidelines which are endorsed in one of the procedural directions. Reports from some Tribunal Members suggest that the good faith conduct obligation has had a positive effect on the conduct of some parties.

The Court and the Tribunal have worked together to implement some of the legislative and administrative reforms that followed the Claims Resolution Review.

The amendments to the Act in 2007 that conferred additional powers and functions on the Tribunal created a need for procedural directions for Tribunal Members and employees about the administration of facets of the claims resolution process. During the reporting period, I issued the following procedural directions to achieve a greater consistency of practice within the Tribunal:

- Procedural Direction 1 of 2007—Directing a party to attend a mediation conference or produce a document
- Procedural Direction 2 of 2007—Party or party’s representative failing to act in good faith in relation to the conduct of mediation
- Procedural Direction 3 of 2007—Appearance by the National Native Title Tribunal before the Federal Court of Australia in relation to native title applications
- Procedural Direction 4 of 2007—Disclosure of mediation and other information where respondent parties are receiving assistance from the Attorney-General
- Procedural Direction 5 of 2007—Reference to the Federal Court of the question whether a party should cease to be a party to a proceeding
- Procedural Direction 6 of 2007—The conduct of a review of whether a native title claim group holds native title rights and interests
- Procedural Direction 7 of 2007—The conduct of a native title application inquiry
- Procedural Direction 8 of 2007—Regional mediation progress reports and regional work plans
- Procedural Direction 9 of 2007—Specific actions to be taken by the Registrar, members and employees of the National Native Title Tribunal in relation to native title applications
- Procedural Direction 1 of 2008—Reconsideration of claims against the registration test conditions.

These procedural directions are available from the Applications and Determinations section of the Tribunal’s website, under Procedures and Guidelines. They have been or will be reviewed from time to time as necessary or appropriate.

As a result of the extensive review of claimant applications in 2007 when implementing the national case flow management scheme, the Tribunal identified four critical tasks that need to be carried out to ensure the steady progress of applications to resolution. These are:

- timetabling and managing the preparation and assessment of connection material
- timetabling and working on tenure analysis to identify areas where native title has been extinguished
- resolving overlapping claims
- reducing the number of parties and clarifying their interests in an application.

Procedural Direction 9 of 2007 outlines ways in which the Tribunal can perform, or assist others to carry out, those tasks by directing Members and employees as appropriate to take action to:

- identify and analyse current tenures in each claim area
- identify and encourage the removal of parties who do not have a relevant interest in a claim area
- develop programs for the preparation, presentation and mediation of connection material where proof of traditional connection is likely to be relevant to the resolution of the claim
- consider whether to convene plenary conferences of parties
- resolve disputed overlapping claims.

The direction sets out some timeframes for actions to be taken in relation to particular categories of claimant applications and describes who is responsible for taking each step (e.g. Member and case manager) and when actions need to be taken.

Around the country, the Tribunal was more consistent and comprehensive in its regional planning. The Tribunal involved FaHCSIA and the Attorney-General's Department as the relevant funding agencies in that planning. It reported the progress, or lack of progress, and the reasons why to the Court. Some Tribunal Members and employees appeared before the Court on behalf of the Tribunal to improve communications between the institutions.

There was resistance to some of these initiatives in parts of the country, but I am convinced that such rigour is needed and that transparency and accountability is important as we deal with claims that are likely to be more difficult to resolve than some of the more straightforward claims dealt with to date.

The Tribunal took a more directive approach to convening and conducting mediation conferences, and reporting about them to the Court. This approach is supported by

amendments to the Act that, for example, gave the presiding Tribunal Member power to:

- direct a party to attend a mediation conference
- for the purposes of a mediation conference, direct a party to produce a document on or before a specified day if the Member considers that the production of the document (in the party's possession, custody or control) may assist the parties to reach agreement on any of the matters in ss. 86A(1) or (2).

It remains to be seen in what circumstances and how often such powers are used. They could be used to give effect to regional work plans that have been endorsed by the Federal Court at a regional directions hearing or case management conference. The general timetable having been set by the Court, the Tribunal could ensure that the timetable is met by directing that specified parties attend mediation conferences or produce specified documents. That would build on a coordinated approach between the Court, the Tribunal and the parties.

At the end of the reporting period, the Tribunal had not carried out a review of whether there are native title rights and interests or held a native title application inquiry. Consequently, it is not possible to say whether such an exercise would materially affect the outcome of mediation in a particular case, or significantly reduce the resources spent on securing an agreed (or litigated) outcome.

It is still too early to indicate whether these legislative and related reforms will achieve the improvements in efficiency and effectiveness that were envisaged. Nonetheless, early indications were that in some areas parties are engaging in a more productive fashion in mediation with the consequent possibility of claims being better progressed.

The Tribunal attempts to ensure that parties understand and are willing to use the range of procedural options, and Tribunal services, available to them under the Act.

Significant as they are, the expanded powers and functions alone will not expedite the resolution of native title claims by consent. Any improvement to the processes and practices of the Tribunal and the Court will have a negligible effect on the resolution of native title claims by agreement if the parties to the proceedings are unwilling or unable to participate productively or in a timely manner.

Reconsideration of registration test decisions

One of the changes made by the Technical Amendments Act was the capacity for an applicant to request an internal reconsideration of a registration test decision made by the Registrar that their application fails to meet all the conditions of the test. The reconsideration is to be made by a Member of the Tribunal.

Although no requests for internal reconsideration were made before 30 June 2008, the Tribunal prepared and documented the necessary procedures to be followed in relation to such requests.

National case flow management scheme

The Tribunal implemented the national case flow management scheme mentioned in the previous Annual Report. The scheme is independent of the amendments to the Act but was designed by reference to the amended legislation. It is an internal management tool to assist the Tribunal perform its statutory functions better and to align our resources to relevant needs, having regard to such external factors as Court orders and the attitude and capacity of parties to resolve native title applications.

The scheme has a strong regional focus. It introduced some new components to the administration of the Tribunal's mediation practice, namely:

- the creation of three separate lists of native title applications
- a process which operates from a regional basis for a nationally consistent approach to the allocation (and reallocation) of each native title application to one (or sometimes two) of the lists
- the appointment of Tribunal Members as regional Members or substantive Members in relation to specific categories of native title applications
- a process for the nationally consistent allocation (or reallocation) of the Tribunal's resources to regions.

The Tribunal reviewed every current application and allocated applications to one of three lists:

- a *substantive list* of applications that have been referred to the Tribunal for mediation and are likely to be resolved within the next two years by negotiation, withdrawal, strike-out or dismissal
- a *regional list* of applications that have been referred to the Tribunal for mediation and require considerable preparation with regard to key features such as connection, tenure and resolution of overlaps before they can move to the substantive list
- the *Registrar's list* of matters that require registration testing or notification, or that have not been referred to the Tribunal for mediation, future act affected applications, applications that are subject to Federal Court orders that the Tribunal not mediate, and applications that are subject of a determination that native title exists and that are awaiting the registration of a prescribed body corporate.

The periodic allocation (or reallocation) of each application to a list (or lists) is the responsibility of the President, assisted by advice and recommendations from the Registrar and Deputy President John Sosso. They draw on recommendations and information provided by Members and state managers for each state and territory. The scheme involves a review twice each year. The first comprehensive review of all applications was undertaken in the first half of 2007 and was implemented in

October 2007. These lists were reviewed in March 2008 and an indication of where matters stand is available from the allocations to the various lists as follows:

Lists	No.	Application type
Substantive list	53	52 claimant, 1 non-claimant
Regional list—advanced development	41	40 claimant, 1 non-claimant
Regional list—less advanced development	183	176 claimant, 4 non-claimant, 3 compensation
Regional list—mediation in abeyance	11	11 claimant
Registrar's list (not in mediation)	268	233 claimant, 28 non-claimant, 7 compensation

A significant refinement of the Tribunal's approach to case flow management is the appointment of a Regional Member (or Members) to manage a regional list of matters within a state or territory or (in the case of Western Australia and Queensland) one or more native title representative body areas. The Regional Member's role is to carry out regional planning in conjunction with the Court and to prepare applications on a regional list so that they can proceed to resolution on the substantive list. The regional Member serves as the critical point of contact for parties, particularly governments and representative bodies or equivalent services, in relation to the applications within a region.

This scheme has enhanced the Tribunal's ability to:

- develop and record the mediation strategy for each native title application (or cluster of applications)
- keep track of progress of each native title application (or cluster of applications)
- strengthen the regional focus of the Tribunal's mediation planning and practice
- report comprehensively to the Federal Court and the Australian Government about regional work plans and the progress (or the reason for lack of progress) in relation to applications across the country.

Future act work

Another important aspect of the Tribunal's work is the resolution by mediation or arbitration of issues involving proposed future acts (primarily the granting of exploration and mining tenements) on land where native title exists or may exist. Details of the future act work are set out later in this report, see 'Output 2.3—Future act agreements', p. 64.

This area of work was not changed by the 2007 amendments to the Act. Accordingly, it is possible to track some trends by comparison with workloads and outputs in previous years.

Future act consent determinations continued to be a common means of finalising negotiations. During the reporting period 81 of the 82 future act determinations were made by consent.

Eight of the 57 ILUAs registered in that period involved exploration or mining.

There was an increase in the number of objections to the use of the expedited procedure under the Act. The number of objections rose from 884 in 2006–07 to 1,273 in 2007–08. As in previous years, most of those objections were in Western Australia. For further information see 'Output 3.4—Finalised objections to expedited procedure', p. 77.

An increase in the number of objection applications lodged in Queensland reflected, among other things, an increase in the number of parties lodging objections to instigate or secure the negotiation of agreements as an alternative to the Native Title Protection Conditions. Numerous agreements have been negotiated. Of the 125 objections finalised in Queensland in 2006–07, 76 (61 per cent) were finalised by the withdrawal of the objection because of an agreement. By comparison, in the current reporting period, of the 170 objections finalised, 130 (76 per cent) were finalised by the withdrawal of the objection because of an agreement.

Recording native title history

In various ways, the Tribunal provides records and explanations of the unfolding history of native title in Australia. The Tribunal periodically publishes *Talking Native Title* (an illustrated newsletter about recent agreements, court judgments and other significant events) and *Native Title Hot Spots* (a summary and analysis of court judgments and legislative changes). Those publications and detailed conference papers presented by the President and others from the Tribunal are available on the Tribunal's website.

Late in 2007, the Tribunal finalised production of a new DVD titled *15 years of native title*. It tracks some key native title claims from *Mabo* to *Wik*, *Yorta Yorta* and *Noonkanbah*. By using archival footage and interviews with some key participants, it shows some of the main chapters in the ongoing story of native title. National Indigenous Television broadcast it on 14 January 2008 and in March. This professionally produced DVD is available as part of the Tribunal's suite of information products to give to stakeholders.

Budgetary outlook

In recent years, including the reporting period, the Tribunal has not used the entire amount appropriated to it. The Parliament appropriated \$32.97 million for the reporting period. Of that, \$30.13 million was spent.

The underspend of \$2.84 million was a consequence of internal and external factors unique to the reporting period. Details of the Tribunal's finances are set out later in this report, starting on p. 107.

Because the Tribunal was given additional powers and functions under the Act, we will assess whether there will be increasing pressure on the Tribunal's resources in the current or the next funding cycle. As noted earlier, the Tribunal participated in the 2008 review of Commonwealth funding of the native title system.

There has been some restructuring of the organisational side of the Tribunal, having regard to the Tribunal's task and client focus, the need to fit resources to needs, and the need to enhance the Tribunal's ability to do its core business and deliver its outcome of the resolution of native title issues over land and waters.

Future trends

In some previous annual reports I have attempted to predict trends in the native title system. In this Overview, I discuss five matters related to the resolution of native title applications currently in the system and those that are expected to be made in the years ahead:

- a forecast of how long it is likely to take to resolve those applications, and the context in which the forecast was made and against which it might be assessed
- the issues that are likely to arise in dealing with many of the remaining claimant applications and the options for resolving them by broader agreement-making
- some procedural implications of viewing native title claims in a broader context than conventional litigation
- human rights considerations
- the integrated nature of the native title system.

Forecast for the resolution of native title claims

As at 30 June 2008, there were 544 applications in the system, 504 of them claimant applications, as well as 30 non-claimant and 10 compensation applications.

Most of the claimant applications are in the Northern Territory (171 or 34 per cent), Queensland (146 or 29 per cent) and Western Australia (113 or 22 per cent). Most of the non-claimant applications (27 or 90 per cent) are in New South Wales.

The Tribunal estimates that, at the current rate of claim lodgement and claim resolution (averaged between 2000 and 2007), it will take about 30 years to resolve the current claims and those that are likely to be lodged in the next few years (e.g. by determination, withdrawal, amalgamation or dismissal).

The rate of resolution will not be uniform across the country. Indeed, it is likely that in some regions all the claims will be resolved much sooner.

The estimated period for resolving native title claims needs to be put in context.

Historical trends

There were relatively few determinations of native title in the early years of the Act's operation. The history of the Act, including amendments to it and judgments about it, shows that:

- many claims were made under the original Act when the law on native title was unclear and the process allowed multiple overlapping claims (often by members of the same family or group), all of which attracted procedural rights
- there was some reluctance to settle claims while the law was new, uncertain and politically controversial—in the first six years of the Act's operation there were eight determinations of native title, and after 10 years there were 46 determinations
- the High Court's judgment in the *Wik Peoples v Queensland* (1996) 187 CLR 1 meant that claims could be made to many pastoral lease areas of Australia where most people (including the Australian Parliament, it seems, from the preamble to the Act) had thought native title was extinguished
- there was little, if any, involvement of the Federal Court in relation to most claims until the Act was substantially amended from 30 September 1998
- all the claims at that date became proceedings in the Court and most were subject to the new registration test which, for some years, became the focus of the attention and resources of the claim groups, their representatives, state and territory governments, and the Native Title Registrar, and which led to a substantial reduction in the number of claims in the system
- it took years for various 'test' cases to work their way through the appeals processes so that significant legal issues could be resolved.

There has been a steady rise in the number of determinations in recent years, particularly following landmark decisions of the High Court up to 2002. The legal ground rules having been established, there is now a clearer framework for negotiating outcomes rather than going to a Court hearing.

Despite that change in circumstances, it usually takes years to resolve claimant applications. An analysis of the 110 claimant applications that had been determined as at 30 June 2008 showed that:

- for the 63 determined by *consent*, the average time for achieving a determination was 68 months (five years and eight months)
- for the 47 *litigated* determinations, the average time for achieving a determination was 84 months (seven years).

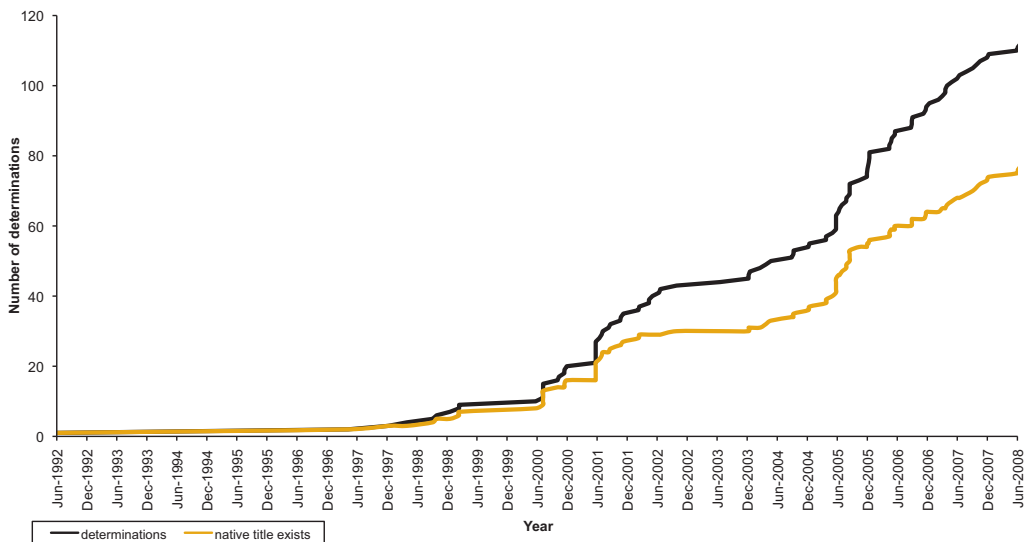
Those averages cannot be used to predict how long it will take to resolve a particular native title claim. The range of periods to finalise those claims was from 10 months to 13 years.

Given the length of time that has passed since many of the current claims were made, those averages are likely to increase rather than decrease in the immediate future.

Of the 504 current claimant applications as at 30 June 2008:

- 118 (or 23 per cent) were lodged in or since 2003, i.e. in the past five years
- 277 (or 55 per cent) were lodged between 1998 and 2002, i.e. in the past six to 10 years
- 109 (or 22 per cent) were lodged earlier, i.e. have been in the system for between 11 and 14 years.

Figure 2 Cumulative determinations of native title



Comparison with land claims in the Northern Territory

By comparison, it is worth noting that the land claim scheme under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) has been in operation since Australia Day 1977. Although not directly comparable, the land claim process is arguably more simple and straightforward than the process for resolving native title claims in at least the following respects:

- there is a statutory definition of ‘traditional Aboriginal owners’ which does not require people to prove that they have substantially uninterrupted continuity of traditional connection to land back to the date on which the Crown first asserted sovereignty
- the categories of land subject to claim are clearly delineated and have few, if any, tenures
- there are usually fewer parties than in native title proceedings
- there is an administrative inquiry about traditional ownership and related issues, which does not require the agreement of the parties before an outcome is reached
- land councils are established and funded to do this work under the legislation
- there is extensive knowledge and experience of the process and what the law requires.

Despite those factors, it has still taken more than 30 years to resolve most of the traditional land claims, and many claims have yet to be finalised, either by negotiation or following a hearing and report of an Aboriginal Land Commissioner. The Commissioner's Annual Report for the year ended 30 June 2007 listed 249 claims made between 1977 and 1997. The Commissioner noted that:

- 80 applications have been the subject of inquiries and reports
- 114 applications have been withdrawn or otherwise disposed of without an inquiry
- 57 applications have not been wholly disposed of.

The Commissioner expressed frustration at the current position whereby, after 30 years, one claim remained unresolved and other claims had remained dormant for periods in excess of 20 years.

Issues and options for resolving remaining native title claims

The figures and the estimates of time taken to resolve the outstanding native title claims should also be considered in the context that many of the claims that have been resolved to date have been relatively straightforward in terms of tenure and connection issues. Most of the areas involved are in the northern and more remote parts of Australia, where Aboriginal or Torres Strait Islander communities have maintained a physical and traditional connection with the land and there have been few, if any, dealings in land which have extinguished native title rights and interests.

Many of the remaining claims are in more densely settled areas where:

- it will be more difficult to demonstrate the continuity of traditional laws and customs and the native title rights under them, and
- native title has been extinguished (in part or in whole)

Proof of connection

If claimants want a determination of native title they need to convince other parties or the Federal Court of their traditional connection to the claimed area. Even if agreement is reached between the parties, judges will require some information about the native title claim group and its connection to the area before the Court will be satisfied that it is appropriate to make orders *in rem* in, or consistently with, the orders agreed by the parties.

It has been clear for many years (at the latest since the High Court's 2002 judgment in the *Yorta Yorta* case) that it will be difficult for many claimant groups to prove that they have native title rights and interests in relation to particular areas of land or waters. They have to satisfy the criteria in the definition of 'native title' in ss. 223(1) of the Act as those criteria have been interpreted by the High Court. The nature of what has to be proved was set out in detail in the 2008 reasons for judgment on the appeal in relation to the Noongar claim to the Perth metropolitan area, see *Bodney v Bennell* (2008) FCR 84, 167 FCR [2008] FCAFC 63 discussed in 'Appendix II Significant decisions', p. 113.

Extent of extinguishment

It has also been clear for many years, both from the provisions of the Act and judgments of the High Court and Federal Court, that:

- native title will *not* be recognised over large areas of Australia where, as a matter of law, native title has been extinguished completely by certain dealings as specified in the Act and in some High Court judgments
- in other areas (such as those subject to ‘non-exclusive’ pastoral leases), any native title right to exclusive possession has been extinguished, with the remaining ‘bundle’ of native title rights and interests being recognised and exercised alongside the rights and interests of other land-holders but subject to those other rights
- where there have been no prior dealings with the land, or where those dealings must be disregarded, and other conditions are satisfied, there may be a determination that native title rights and interests confer possession, occupation, use and enjoyment of that land on native title holders to the exclusion of all others.

Options for resolving native title claims

Given the legal requirements that must be satisfied before a determination of native title is made, each native title claim group must decide what it wants to obtain from the native title proceedings that it has commenced.

The answer may be different for different groups, and some groups who lodged claims for one purpose may have changed their minds.

The reason for asking the question and why different answers might be given can be summarised briefly.

As noted earlier, more than three quarters of current claims were lodged before claimant groups could have understood, or been advised comprehensively, about many of the legal issues that must be resolved before a claim can succeed.

For many claim groups, the most they could obtain is a determination that is limited to:

- a small proportion of their traditional country (perhaps a few parcels of land separated by significant distances)
- a few non-exclusive native title rights and interests.

To obtain even that limited result:

- the claimants will need to do (or have done on their behalf) a substantial amount of specialised research (potentially involving such professionals as anthropologists, historians, linguists and lawyers)
- other parties (including the relevant state or territory government) will need to be satisfied that the results of the claimants’ efforts are sufficient for them to agree to a consent determination of native title

- all parties will have to wait while the relevant state or territory government investigates current and historical tenures granted over the claimed area, and all parties agree on the effect of those tenures on native title rights and interests that would otherwise be recognised.

In short, for many claim groups the cost in time, money, specialist personnel and personal involvement that is necessary to obtain such a determination will be inversely proportional to the benefits to the group of obtaining it.

This stark picture might not have been clear when many of the claims were made. It still might not be clear to many groups, irrespective of how recently or long ago their claims were made or amended. They need to understand what is or is not potentially achievable, and what the alternatives to a determination of native title might be.

That is not to say that groups should be denied the opportunity to seek recognition of their native title rights and interests. But, on the basis of relevant information (such as a map of the claim area showing the extent of extinguishing tenures) and advice, groups need to decide what they hope (and can reasonably expect) to achieve from the native title proceedings that they have commenced.

Their aspirations might include:

- recognition of the community or group as the traditional owners of an area of land or waters
- the right to have a say in what happens on their traditional land or waters
- protection of areas of particular cultural significance to the group
- developing an economic base on which the community or group can build for itself and future generations.

Some of those aspirations might only be realised if there is a determination that native title exists. Other aspirations may be realised without the need to obtain a determination of native title but through other agreements such as ILUAs.

However their aspirations might be realised, it is important for native title claim groups whose claims are still in the early stages of negotiation (even though they may have been lodged many years ago) to obtain sound advice and make strategic decisions about how to proceed.

Some groups might withdraw their claims permanently or with a view to reformulating them to better accord with legal requirements and to enhance their prospects of a negotiated outcome.

The options which native title claim groups might consider seriously could be influenced by the attitude of, and approach taken by, the main respondents (particularly governments) to connection requirements and options for broader settlements. Having made native title claims which, in part at least, are assertions of group identity and rights, native title claim groups are unlikely to withdraw or

vary their claims significantly unless meaningful offers are made which meet their reasonable aspirations for themselves and their descendants.

It is not just native title claim groups who need to make informed and strategic decisions about the progress of claims. At some point (and possibly a number of points) in the native title claim process, each party needs to consider what they will accept as an outcome rather than have the matter heard and decided by the Federal Court. In other words, what outcome would they rather fashion for themselves than submit to a Court-imposed outcome. There are two important components to this:

- what will each party put on the table as an offer to, or request of, the other party or parties
- what each party will accept in order to settle.

Native title claim groups that want to explore broader settlements (including or instead of a determination that native title exists) should be specific about what they want to achieve and how they want to achieve it. They should not wait to see what others might offer.

Governments need to consider what they are willing to offer to native title claim groups to encourage settlement and what they will require in return, e.g. a lower standard of evidence from the claimants, the withdrawal of a claim, the surrender of native title (if any) or a determination that native title does not exist.

Whatever is being negotiated, there will be a time when each party needs to compromise.

The cumulative effect of such informed decisions in relation to hundreds of current claimant applications could significantly affect the rate of progress of the claims that are pursued and the cost of delivering just and enduring outcomes for the parties.

From its inception, the Tribunal has attempted to conduct interest-based mediation. The Tribunal's internal guide to mediation, for example, states that the Tribunal 'conducts multi-party, cross-cultural mediation in relation to areas of land or waters, and seeks to use a primarily interest-based model in a rights-based context'.

Although the mediation of native title applications is focused on matters specified in ss. 86A(1) of the Act, the parties may negotiate about those and other matters leading to creative and flexible solutions that deliver benefits beyond narrowly prescribed native title determination outcomes. The wide variety of options that have been agreed or considered as, or as part of, the settlement of claimant applications have been illustrated in previous annual reports.

The Commonwealth Attorney-General's recent encouragement to parties to adopt an interest-based approach is entirely consistent with the Tribunal's long-standing approach to native title mediation. In essence, the approach he advocated has elements that involve both process and outcomes.

- As to *process*, he suggested that, rather than commence by considering connection, the starting point could be the consideration of tenure. Early consideration of tenure may identify where native title may continue to exist and where it may have been extinguished. It may assist in resolving overlapping claims and provide parties with an opportunity to consider possible outcomes. A connection process could run in parallel with discussions about a range of outcomes.
- As to *outcomes*, the Attorney-General suggested that they could be native title (such as determination of native title) or non-native title outcomes, or a combination of the two. If native title is the desired outcome, then connection evidence will be required to determine the claim. If connection is not made out, the parties can consider whether alternative agreements can be reached.

In summary, the changes to practice or approach could include:

- all parties taking an interest-based approach to the negotiations
- native title claim groups making informed and early decisions about the option they want to pursue and the basis on which they will settle
- negotiations being conducted with tenure and connection materials informing the process, rather than the provision of connection reports being a precondition to negotiations
- governments actively and creatively exploring options for settlement, including alternatives to native title outcomes
- other respondent parties deciding whether, and to what extent, they need to be involved in the process, and then withdrawing or participating only to the extent necessary to protect their interests (e.g. by negotiating ILUAs).

The various amendments made to the Act in 2007 should create a more transparent claim resolution process and ensure that a spotlight is directed towards the mediation performance of all concerned, thereby providing some incentive to move matters forward.

If non-determination outcomes can be negotiated, at least some claimant applications will be withdrawn. That will dispose of the proceeding so far as the Federal Court is concerned, but will also lead to an outcome which gives a measure of substantive satisfaction to the parties.

Some procedural implications of viewing native title claims in a broader context than conventional litigation

For the reasons just outlined in this Overview, many parties (not just native title claim groups) see the proceedings as an opportunity to negotiate outcomes that may, but need not, include a determination of native title. The Act clearly contemplates that possibility, and provides in s. 86F for the Court to adjourn proceedings to allow for negotiations that might result in an application being withdrawn or amended, the parties to a proceeding being varied or some other thing being done in relation to the application, and an agreement may involve matters other than native title.

That specific provision aside, it is often the case that the progress of claims is delayed because the resources of the claim group and their representatives are directed to what (from their perspective at least) are more tangible, immediate and beneficial outcomes than a bare determination of native title (e.g. the negotiation of ILUAs or various future act agreements). For registered claim groups, the procedural rights which they have while their claim remains registered are as extensive as (if not more extensive than) those they might secure from a determination that native title exists.

In an ideal world, all native title claims would be resolved quickly, and the 'right people/right country' issues would be determined. Disputed overlaps would be no more, and miners, governments, infrastructure providers and others could negotiate with confidence that they were dealing with the proper people. Company boards and financiers could breathe more easily. But that is not the present situation for much of Australia, and such outcomes are unlikely for some years. Yet it is clear that major private and public corporations are willing to negotiate large deals on the basis that a registered claim or (better still) a registered ILUA gives them sufficient legal security to proceed with their enterprises long before, and independently of, any determination of native title.

An ongoing issue for the parties and the Federal Court is whether such approaches to resolving native title claims will affect case management practices of the Court or whether case management will affect the degree of flexibility (and amount of time) available to parties to negotiate settlement packages.

Whatever motivated the commencement, amendment or continuation of the claimant application, and whatever negotiations are taking place other than in relation to a possible determination of native title, parties must adapt their behaviour so that the proceedings remain in mediation and are not dismissed or listed for hearing before the Court. They need to demonstrate to the Court that real progress is being made toward a negotiated outcome of the claim.

The challenge for judges of the Court will be to manage applications in their lists in a way that optimises the prospects of settlement while preserving the proper role of the Court in case management, remembering always that 'case management is not an end in itself' and that 'the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim', see *Queensland v JL Holding Pty Ltd* (1997) 189 CLR 146 at 154-5, 141 ALR 353 at 359 per Dawson, Gaudron and McHugh JJ.

Human rights considerations

Native title issues are not just resolved within a domestic legislative framework. The Preamble to the Act states that the Australian Government 'has acted to protect the rights of all its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms'. Section 209 of the Act requires the Aboriginal and Torres Strait Islander Social Justice Commissioner to prepare an annual report on the operation of the Act and its effect on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders.

In the *Native Title Report 2007*, tabled in the Australian Parliament in March 2008, Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma said that the native title system 'has been successfully used in many parts of the country' and acknowledged a range of benefits and achievements. But he also suggested that the system is 'not delivering full recognition and protection of native title' and the Act 'tends to humiliate the people it should serve'. In the Commissioner's assessment, the native title system is too complex, legalistic and bureaucratic, and 'it hinders rather than helps Indigenous Australians towards their full realisation of rights'. Adopting an expression used by Justice Ronald Merkel in the *Rubibi* case, Mr Calma described the native title system as being in 'gridlock'. He called for a rethink of the native title system, with a focus on making the Act deliver on Australia's human rights obligations.

The capacity of the native title system to deliver substantive outcomes for Indigenous Australians (as well as the broader community) will continue to be the subject of critical analysis. That analysis may be informed by reference to the United Nations *Declaration on the Rights of Indigenous Peoples*, even though Australia is not a signatory to it.

Integrated nature of the native title system

It is essential to bear in mind that the native title system is an integrated whole, with the major participants being:

- native title representative bodies and native title service providers
- native title parties (most of whom are represented by or via those bodies)
- state and territory governments (as first respondents to native title applications)
- the Commonwealth Minister (currently the Attorney-General)
- other respondent parties
- the Federal Court
- the Tribunal
- the Commonwealth funding agencies—the Attorney-General's Department (which, among other things, administers respondent party funding) and FaHCSIA.

The performance of the *system* depends on the performance of the participants, most of whom are funded by the Commonwealth.

The performance of each *participant* is contingent to a greater or lesser extent on the performance of other participants. So, for example, much of the success of regional planning, and the progress of individual claimant applications, will depend on a coordinated approach between the Court and the Tribunal. For their parts, the Court and the Tribunal depend on the active involvement of applicants, governments and other parties in the process.

Each participant only has capacity to perform their functions and exercise their powers if they have, or have access to, appropriate levels of funding, professional employees or consultants, and the skills and knowledge required to engage in a positive and productive way with others. Consequently, neither the Court nor the Tribunal can

perform their functions adequately, or produce appropriate outcomes, if the parties or their representatives lack the capacity to engage effectively and in a timely way with each other and with the Court or Tribunal.

Conclusion

Some 16 years after the High Court's historic *Mabo v Queensland (No 2)* judgment, the native title system has provided a range of positive outcomes for many Indigenous Australians. Some of those outcomes are recorded in this annual report.

The native title scheme expressly favours resolution of native title issues by agreement. The process by which native title applications are resolved by agreement requires the active and positive involvement of applicants and governments. It also requires other respondent parties to have an incentive to consider and, where appropriate, negotiate options for settlement rather than proceed as if native title claims are necessarily headed for trial.

The Tribunal and other participants face significant challenges in the current operating environment. For example:

- at the rate that native title applications have been resolved to date, it will take about 30 years to resolve outstanding applications and many older Indigenous Australians will not see their claims finalised
- clients and stakeholders can become frustrated at delays and the high cost of participating in the native title system
- the negotiating positions of parties, especially government parties, remain pivotal to the timely achievement of quality outcomes
- native title determinations often deliver few direct benefits to Indigenous Australians and most determinations, in isolation, fall short of claimants' aspirations
- there are finite resources available within the native title system.

These challenges are not new. But despite them, the native title system is not in a state of gridlock. The traffic is not always moving as it should. Each party is in a driver's seat and should cooperate with others so that they are moving in the same direction, toward the timely resolution of claims. Not every party will end up at the same destination. Some claimants will end up with determinations that native title exists. Others will not. Some will settle for an alternative arrangement and may withdraw their claim.

All participants must work to find ways to reach outcomes in a timely and more efficient manner for the hundreds of current native title applications and those that are to come. The history of long and expensive litigation informs the need for a more rigorous agreement-making regime.

The challenges are many. Effective responses to them require innovation, leadership and commitment to achieving results across the native title system.

The Tribunal stands ready, willing and able to work with people to resolve native title issues over land and waters and so to achieve just and enduring outcomes.

Tribunal overview



Role and functions

The Native Title Act established the Tribunal and sets out its functions and powers. Following the commencement of the Amendment Act and the Technical Amendments Act further functions and powers were conferred on the Tribunal.

The Tribunal's purpose is to work with people to resolve native title issues over land and waters. This is done primarily through agreement-making. The Tribunal also arbitrates in relation to some types of proposed future dealings in land where native title exists or may exist (future acts).

The Act requires the Tribunal to pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt manner.

The President, Deputy Presidents and other Members of the Tribunal have statutory responsibility for:

- reconsidering decisions of the Registrar (or Registrar's delegate) not to accept a claimant application for registration
- mediating claimant and non-claimant applications and compensation applications
- conducting reviews on whether there are native title rights and interests
- conducting native title application inquiries
- reporting to the Federal Court of Australia (the Court) on the progress of mediation
- preparing and providing to the Court regional mediation progress reports and regional work plans
- assisting people to negotiate ILUAs, and helping to resolve any objections to area and alternative procedure ILUAs
- arbitrating objections to the expedited procedure in the future act scheme
- mediating in relation to the doing of future acts that are proposed to take place in areas where native title exists or might exist
- where parties cannot agree, arbitrating applications for a determination of whether a future act can be undertaken and, if so, whether any conditions will apply.

Under the Act, the President is responsible for managing the administrative affairs of the Tribunal, with the assistance of the Registrar. The President may delegate to a Member (or Members) all or any of the President's powers, and may engage consultants in relation to any assistance, mediation or review that the Tribunal provides. The Member (or Members) to act in relation to a particular mediation, negotiation or inquiry under the Act.

The Act gives the Registrar some specific responsibilities, including:

- assisting people at any stage of any proceedings under the Act, including assisting people to prepare applications

- assessing claimant applications for registration against the conditions of the registration test
- giving notice of applications to individuals, organisations, governments and the public in accordance with the Act
- registering ILUAs that meet the registration requirements of the Act
- maintaining the Register of Native Title Claims, the National Native Title Register (the register of determinations of native title) and the Register of Indigenous Land Use Agreements.

The Registrar has the powers of the Secretary of a Department of the Australian Public Service (APS) in relation to financial matters and the management of employees. He or she may delegate all or any of the Registrar's powers under the Act to Tribunal employees, and may also engage consultants. The Registrar, Christopher Doepel, did not seek reappointment and his term consequently finished on 31 December 2007. Mr Franklin Gaffney, Director of Corporate Services and Public Affairs, was appointed acting Registrar for an initial period of four months from 26 November 2007, so that the government could take the necessary steps for the appointment of a new Registrar. This period was further extended to 31 July 2008.

Applications for a native title determination (claimant and non-claimant applications) and compensation applications are filed in and managed by the Federal Court of Australia. Although the Court oversees the progress of these applications, the Tribunal performs various statutory functions as each application proceeds to resolution. For further information see Output 2.2—Native title agreements and related agreements', p. 56 in the in the Report on Performance.

Future act applications (applications for a determination about whether a future act can be done, objections to the expedited procedure, and applications for mediation in relation to a proposed future act) are lodged with and managed by the Tribunal. For further information, see 'Output 2.3—Future act agreements', p. 65, 'Output 3.3—Future act determinations and decisions whether negotiations were undertaken in good faith', p. 75 and 'Output 3.4—Finalised objections to expedited procedure', p. 77.

Tribunal Members

The Governor-General appoints the Members of the Tribunal for specific terms of not longer than five years. They are classified as presidential or non-presidential Members. The Act sets out the qualifications for membership. The role of Members is defined in various sections of the Act. For further information, see 'Role and functions', p. 39.

Some Members are full-time and others are part-time appointees. A biographical note on each Member is available on the Tribunal's website.



Members of the National Native Title Tribunal, March 2008 (front from left) President Graeme Neate, Ruth Wade, Daniel O'Dea, Graham Fletcher, (middle from left) John Sosso, Acting Registrar Franklin Gaffney, Gaye Sculthorpe, John Catlin (back row from left) Neville MacPherson, Christopher Sumner, Alistair (Bardy) McFarlane and Robert Faulkner.

At the end of the reporting period, there were 11 Members, comprising three presidential Members (all full-time) and eight other Members (five full-time and three part-time). For a list of Members, their terms of appointment and location see Table 17 Holders of public office of the National Native Title Tribunal as at 30 June 2008, p. 112. For information about the reappointment of Members see the President's Overview, 'Members', p. 14.

Early in February 2008 Special Minister of State, Senator John Faulkner, announced new arrangements for merit and transparency in senior public sector appointments, including for Members of the Tribunal.

Notices calling for expressions of interest in becoming a full-time Member of the Tribunal were published in the *Koori Mail*, *Australian Financial Review* and *Weekend Australian* in May 2008, with applications to be made by 6 June 2008. At the end of the reporting period the recruitment process had not been completed, and Dr Gaye Sculthorpe and Ruth Wade were reappointed for a further six months, to early February 2009.

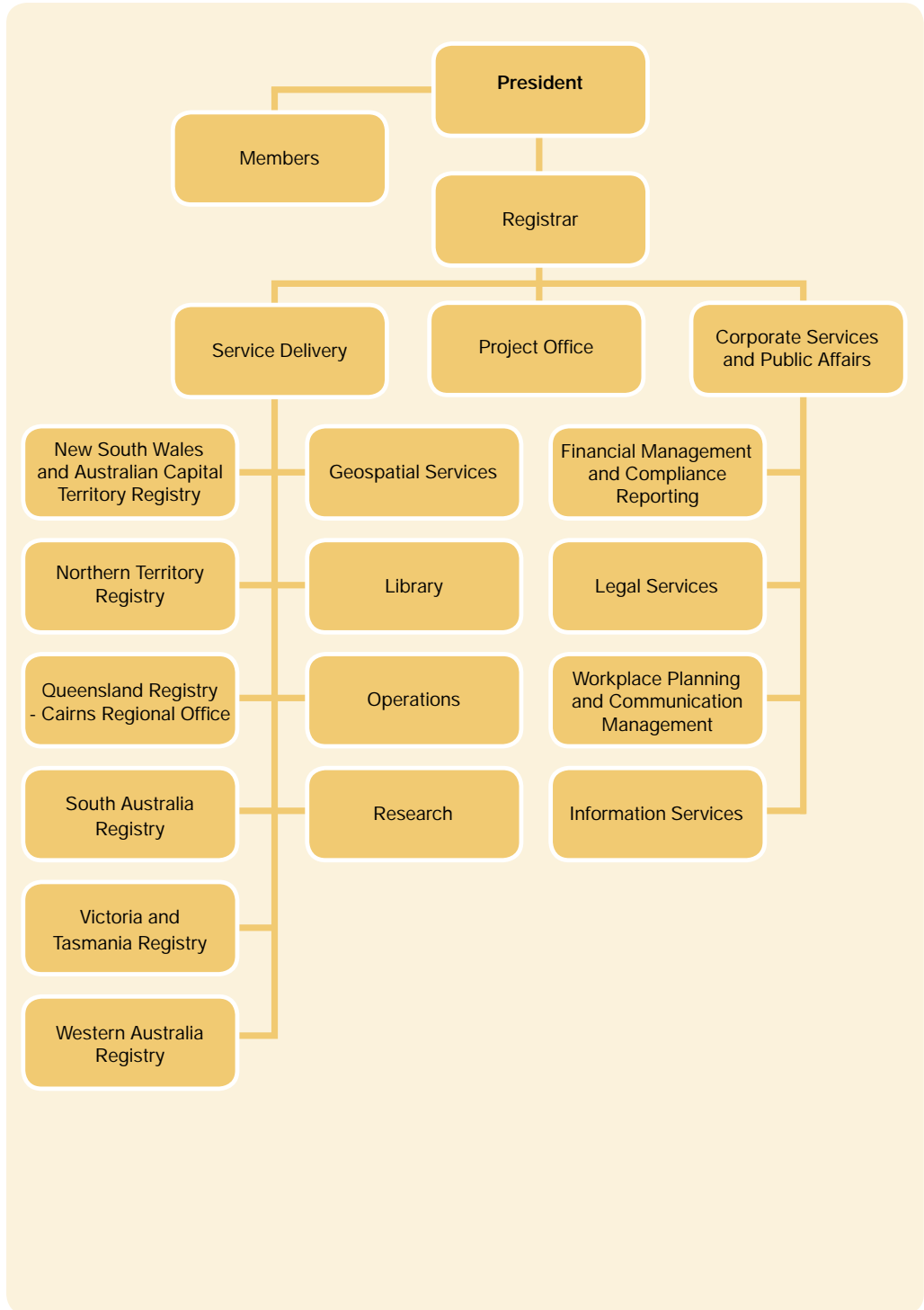
The Members are geographically widely dispersed. Members usually meet twice each year to consider a range of strategic, practice and administrative matters. Subcommittees of Members, or Members who work in the same state or territory, also meet as required.

Organisational structure

The Tribunal has two divisions: Service Delivery and Corporate Services and Public Affairs. The Director of Service Delivery is Hugh Chevis and the Director of Corporate Services and Public Affairs is Franklin Gaffney.

During the period of Mr Gaffney's appointment as acting Registrar, the position of Director of Corporate Services and Public Affairs was filled by a number of the Tribunal's senior managers. Over mid-December to end-January, the position was filled through short-term secondments, by the New South Wales State Manager, Northern Territory State Manager, Western Australia State Manager and the Manager of Legal Services. These secondments enabled state managers to gain a greater insight into the corporate functions carried out in Principal Registry. For all other periods, the Manager of Workforce Planning and Communication Management, Tim Evans, acted as Director Corporate Services and Public Affairs.

Figure 3 National Native Title Tribunal organisational structure



Outcome and output structure

The Tribunal forms part of the ‘justice system’ group within the Attorney-General’s portfolio. The Tribunal’s outcome and output framework complies with the Australian Government’s accrual budgeting framework.

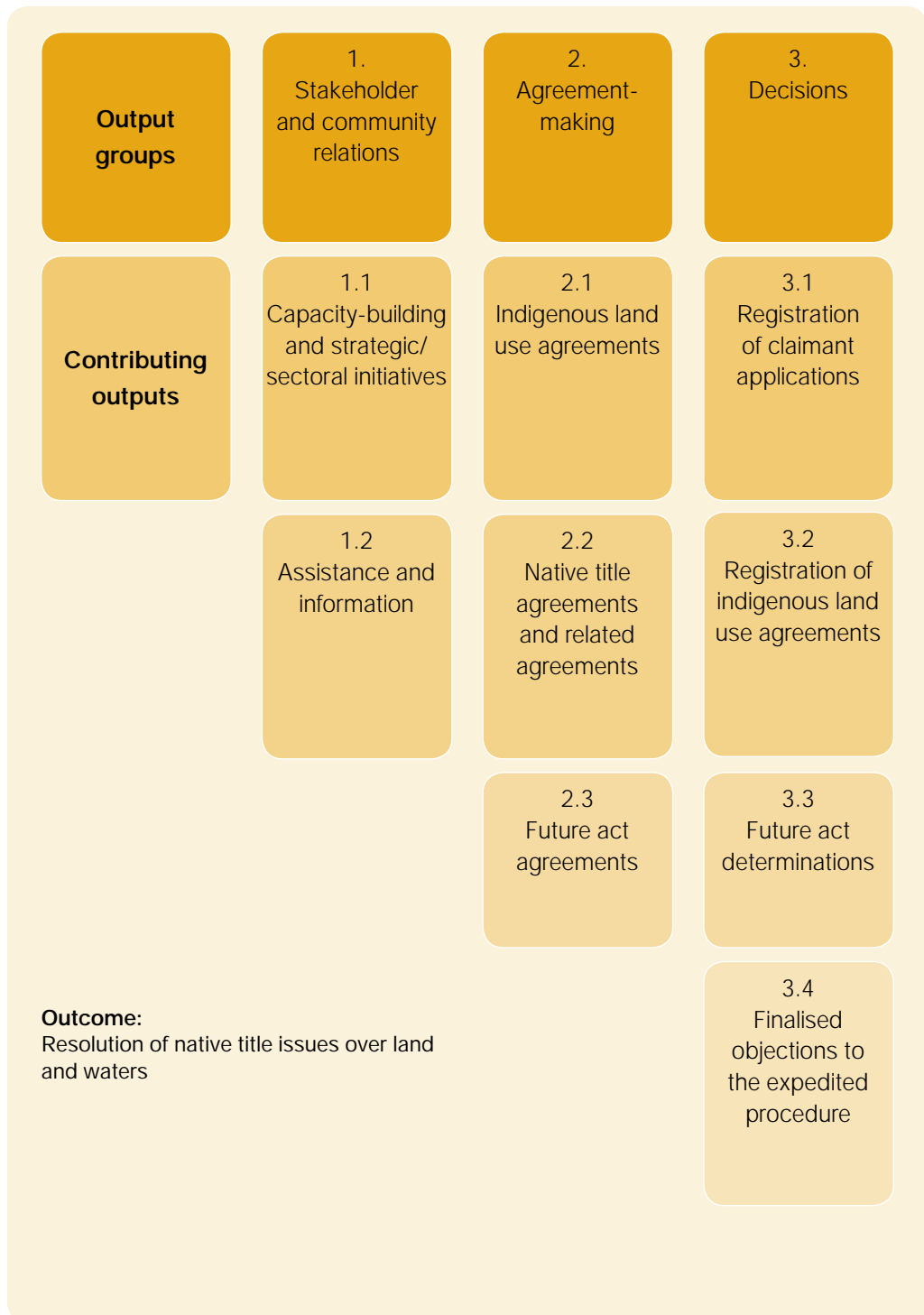
Outcomes are the results, impacts or consequences of action by the Australian Government—in this case, the Tribunal—on the Australian community. Outputs are the goods or services produced by agencies (the Tribunal) on behalf of the Australian Government for external organisations or individuals, including other areas of government. Output groups are the aggregation, based on type of product, of outputs.

For the current reporting period, the Tribunal’s outcome was ‘Resolution of native title issues over land and waters’ and three output groups are applicable. This outcome statement and outputs structure came into effect on 1 July 2005. The output groups are:

- stakeholder and community relations
- agreements
- decisions.

Details of the Tribunal’s performance and costs in accordance with this framework are provided in ‘Measuring performance’, p. 105.

Figure 4 Outcome and output framework



Report on Performance



Performance overview

Price

The total price for the Tribunal's outputs was \$30.13 million. The price for each output is set out in the performance at a glance tables in the following sections. Detailed information is provided in 'Tribunal finances', p. 107.

Client satisfaction

The Tribunal, as part of corporate performance management, is required to identify clients' needs and monitor its performance in delivery services. Client satisfaction is one of the accountability measures attached to the Tribunal's outputs. During the reporting period the Tribunal undertook the commissioned research (Client Satisfaction Survey) that had been deferred from the 2006–07 reporting period. The results of this research enable the Tribunal to report against its outputs (as set out in the performance report).

Performance against effectiveness indicators

The Tribunal's outcome and outputs structure includes three effectiveness indicators for the single outcome of 'Resolution of native title issues over land and waters':

1. improvement in the quality of native title and related agreement-making
2. increase in the proportion of native title and related agreements by:
 - increase in agreement-making as an alternative to litigated outcomes
 - increase in indigenous land use and future act agreement-making as alternatives to arbitration
3. less than five per cent of decisions successfully appealed or reviewed.

In addition, the Client Satisfaction Research report informs reporting and benchmarking against the first of its effectiveness indicator. The results for the second and third effectiveness indicator are drawn from quantitative outcomes achieved in the reporting period.

Results

The Tribunal met all three effectiveness indicators.

Satisfaction with the Tribunal's agreement-making service has improved since 2005. The overall satisfaction is now 89 per cent (the number of clients rating the Tribunal above the minimum acceptable level of five). This equates to 6.42 out of ten. In 2005 the satisfaction was 81 per cent, which equates to 5.94 out of ten.

During the reporting period, there was an increase in the proportion of native title and related outcomes, as follows:

- eight of the nine determinations (88 per cent) that native title exists were made by consent of the parties, which is an increase over the 2006–07 reporting period, in which seven of the sixteen (43 per cent) determinations that native title exists were made by the consent of the parties
- ninety-three concluded agreements (21 ILUAs and 72 future act agreements) compared to one arbitrated future act determination application.

Eight requests for appeal or review of a decision were made. At the end of the reporting period one request was awaiting outcome and two were successful, less than the effectiveness indicator of five per cent.

Decision type	Number of decisions made	Number appealed/ reviewed	Outcome*	Number
Registration of claimant applications	104	6	2 decisions set aside 4 appeals dismissed	2
Registration of indigenous land use agreements	58	1	Process outstanding	-
Future act determinations	84	-	N/A	-
Finalised objections to the expedited procedure	1275	1	Appeal dismissed	-

* See Appendix II Significant decisions for further details

Outcome and output performance

The President's Overview sets out the external environment and major influences in which the Tribunal operates to deliver its services. The acquittal of the Tribunal's performance for 2007–08 is set out under its output and performance framework, the details of which are provided in the following performance report.

The tables below provide an overview of the number of matters on the three registers maintained by the Register and active applications as at 30 June 2008.

Table 1 Overview of public registers maintained by the Native Title Registrar

Register	Number
<i>National Native Title Register</i> —approved native title determinations (77 where native title does exist and 35 where native title does not exist)	112
<i>Register of Native Title Claims</i> —native title determination applications that have met the requirements for registration	410
<i>Register of Indigenous Land Use Agreements</i> —indigenous land use agreements accepted for registration	338

Table 2 Current applications as at 30 June 2007

Table 2: Current applications as at 30 June 2007					
Native title applications	Future act applications		Indigenous land use agreements		
Claimant	504	FA determinations (s. 35)	17	Lodged	5
Compensation	10	FA mediation (s. 31)	111	Accepted for notification	5
Non-claimant	30	FA objection	991	In notification	10
				Notification ended-objection	2
Total	544		1,119		22

Output group 1—Stakeholder and community relations

Output 1.1—Capacity-building and strategic/sectoral initiatives

Description

Initiatives in this output category comprise large-scale projects and activities contributing to strategic planning of native title activities with stakeholders and building the capacity of participants in the native title process.

These are part of the Tribunal's key role in informing stakeholders about, and assisting them with, the native title processes and establishing relationships with, and between, stakeholders.

Performance

Performance indicators for capacity-building and strategic/sectoral initiatives are:

- Quantity—the number of initiatives and projects completed in the reporting period
- Quality—80 per cent of respondents are satisfied with the initiative
- Price—average price per unit and total price of output.

Performance at a glance		
Measure	Estimate	Result
Quantity	12	7
Quality	80% of respondents are satisfied with the initiative	99% of stakeholders were satisfied with the initiative
Average price per unit	\$ 98,142	\$ 102,359
Total price for the output	\$1,177,709	\$ 716,515

Comment on performance

During the reporting period there was a redefining of activities that constitute this output, and consequently regional planning processes were counted as part of Output 1.2—Assistance and information, this resulted in the apparent underperformance for this output.

As noted in the President's Overview (see p. 8), a major national initiative was held in July 2007 when the Tribunal, in partnership with AIATSIS, conducted a workshop in the Barossa Valley to identify ways in which native title connection reports can be prepared and assessed more efficiently. The workshop, 'Getting Outcomes Sooner', was attended by experienced native title practitioners (lawyers, anthropologists and representatives from various levels of government) from around Australia. Various suggestions were made for improving the current system:

- improving regional and operational planning (including claims prioritisation) between state and territory governments and representative bodies
- mitigating the adversarial nature of the relationships between parties
- clarifying the needs and expectations of all parties in relation to connection material as early as possible (e.g. at a plenary conference convened by the Tribunal).

Other suggestions included:

- providing simpler, cheaper access to government records and/or using limited discovery orders for easier access to relevant information
- revising government guidelines to ensure that they are flexible, clear (e.g. with checklists) and consistently applied

- incorporating the preparation and assessment of connection material as part of the mediation framework and not a precursor to it
- mediating connection and other issues in parallel rather than sequentially.

Many of these suggestions can only be given effect by stakeholders within the native title system. The Tribunal has, however, convened regional planning meetings with state and territory governments and claimants' representatives around the country and has adopted a more strategic approach to the prioritisation of claims. These meetings have been recorded under 'Output 1.2—Assistance and information', below.

In New South Wales, the Tribunal convened a series of meetings between some claimants' representatives and state government representatives to discuss the state government's credible evidence requirements for the resolution of claims. This initiative carried over from the previous reporting period.

In Western Australia, the Tribunal held a three-day workshop in August 2007 for staff from the Kimberley Land Council, where they were provided training in registration testing, ILUAs and future act processes.

The Tribunal also provided capacity-building assistance to Birriliburu claim group Members in the Central Desert area of Western Australia and worked in conjunction with the native title representative body to help establish a prescribed body corporate for the Birriliburu native title claim.

Level of client satisfaction

The rating of 99 per cent reflects high client satisfaction with the level of service provided in personal briefings and meetings.

Output 1.2—Assistance and information

Description

This output category covers a wide range of Tribunal services to assist native title claimants and other participants in native title processes.

Under the Act, the Tribunal provides various types of assistance, from help with the preparation of applications and information about native title, to the provision of maps, research reports, workshops, seminars and media information.

Performance

Performance indicators for assistance and information are:

- Quantity—the number of assistance events, products or services
- Quality—80 per cent of respondents are satisfied with Tribunal services
- Price—average price per unit and total price of output.

Performance at a glance		
Measure	Estimate	Result
Quantity	525	435
Quality	80% of respondents are satisfied with services	94% of stakeholders were satisfied with services
Average price per unit	\$ 6,224	\$ 7,687
Total price for the output	\$3,267,821	\$3,343,760

Comment on performance

There was a reduced demand for this service in the reporting period compared with the previous period. Requests for geospatial products and information remained strong around the country as the Tribunal directed more attention to reducing the number of parties to applications by identifying their interests in the land subject to claim and its underlying tenure. The Tribunal also provided research assistance to stakeholders in most regions.

Around the nation, registries held a number of regional planning meetings with stakeholders, including representatives from FaHCSIA and Attorney-General's Department, to formulate agreed regional work programs and to set priorities.

In Western Australia, the Tribunal continued to provide research and geospatial assistance as part of the mediation of native title claims in the south-west of the state. Parties were assisted in a data matching exercise to identify issues in which they were in agreement and help narrow the issues in dispute.

Also in Western Australia, the Tribunal provided assistance to a number of unrepresented native title claim groups, focusing on areas where there are overlapping claims. In some cases, the Tribunal produced reports containing summaries of ethnographic and historical literature relevant to the groups in question. In other cases, Tribunal research officers worked closely with claimants to produce genealogies based on information held by claimants and in publicly available records. The genealogies have been used to help establish the right people for the country and may help in the formulation of new claims.

In the Northern Territory, Tribunal staff provided information sessions to the Native Title Unit of the Department and Mines and Energy and gave a lecture on native title processes for law students at Charles Darwin University.

In New South Wales, the Tribunal assisted stakeholders in a range of activities throughout the year. In April 2008 it assisted in a native title education workshop for south coast communities and also provided a high level of capacity-building assistance to claim groups and people considering making claimant applications.

Tribunal representatives attended workshops in Port Macquarie and Coolool organised by FaHCSIA for field officers from native title representative bodies. They gave

presentations and participated in panel discussions on evidence, the law, anthropology and native title as well as on authorisation.

Additionally, the Tribunal provided information and assistance to applicants and their representatives in understanding the conditions of the registration test in New South Wales, Queensland and Western Australia.

In Victoria, Tribunal staff provided research and information to government and traditional owner representatives who are developing a Victorian Native Title Framework.

In May 2008, the Tribunal conducted a workshop for stakeholders in South Australia on the impact of ss. 47, 47A and 47B of the Act on native title determinations. There are several consent determinations being negotiated in South Australia that involve pastoral leases held by Members of the native title claim group and this workshop helped parties to understand better whether and how native title rights and interests might be affected.

In Western Australia, Tribunal staff travelled through the Pilbara in December 2007 and met chief executive officers from the shires of Karratha, Tom Price, Newman and Meekatharra, as well as managers from the Indigenous Coordination Centre, Aboriginal corporations and the Yamatji Land and Sea Council. The trip enabled the Tribunal to have a better understanding of the issues facing stakeholders and to develop individual plans to address their needs. These needs included assistance and training in ILUAs and future acts and the provision of detailed maps. It also highlighted the need for more regular meetings and communication.

Throughout the reporting period the Tribunal continued to produce newsletters and other products to help keep stakeholders informed of the latest developments in native title. *Talking Native Title* was produced quarterly and contained general news on native title. Three editions of *Native Title Hot Spots* were produced to provide information on legal developments such as judicial decisions and Tribunal determinations. Three editions were also produced of the *Indigenous Fishing Bulletin* to provide updates on significant issues relating to indigenous fishing interests. In addition to these, a new booklet was published to help Indigenous people understand the requirements of the registration test and, as mentioned in the President's Overview, a DVD, *15 years of native title*, was produced to provide an overview of the history of native title in Australia.

Level of client satisfaction

The Tribunal's overall satisfaction rating for information and services was 94 per cent. This category covers a broad range of services including of maps, information and research (96 per cent) and personal contacts (89 per cent).

Output group 2—Agreement-making

Output 2.1—Indigenous land use agreements

Description

This output category covers finalised indigenous land use agreements (ILUA) negotiations and milestone agreements leading to a final agreement, where the Tribunal provided negotiation assistance.

ILUAs are agreements reached between people who hold, or claim to hold, native title in an area and people who have, or wish to gain, an interest in that area. There are three types of ILUAs: area agreements, body corporate agreements and alternative procedure agreements.

The ILUA scheme facilitates agreement-making by allowing a flexible and broad scope for negotiations about native title and related issues, including future acts. ILUAs are often negotiated to resolve issues during the mediation of claimant applications.

People who wish to make an ILUA may ask the Tribunal for assistance in facilitating the agreement-making.

Performance

The performance indicators for ILUAs are:

- Quantity—number of 2.1a), 2.1b) and 2.1c) agreements
- Quality—clients' perception of the quality of the agreement-making process
- Resource usage—average price per unit and total price for the output.

Performance at a glance				
Measure	Estimate		Result	
Quantity	2.1a)	40	2.1a)	21
	2.1b)	52	2.1b)	106
	2.1c)	250	2.1c)	119
Total	342		246	
Quality*	Clients' perception of the quality of the agreement-making process		See Table 12, p. 100	
Average price per unit				
2.1a)	\$	44,179	\$	53,062
2.1b)	\$	18,924	\$	6,110
2.1c)	\$	9,154	\$	14,025
Total price for the output	\$5,039,723		\$3,430,834	

* Note: Clients' perception of quality was measured against agreement-making processes.

Table 3 Quantity of ILUAs achieved by state and territory									
Type of agreement	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
2.1a Fully concluded ILUA and use and access agreement negotiations	-	-	1	15	5	-	-	-	21
2.1b Milestone agreements in ILUA negotiation outside NTDA ^s *	-	-	-	-	105	-	-	1	106
2.1c Milestone agreements in ILUA negotiation within NTDA ^s *	-	6	3	36	74	-	-	-	119
Total	-	6	4	51	184	-	-	1	246

* Native title determination applications

Comment on performance

2.1a) Fully concluded ILUA and use and access agreement negotiations

During the reporting period, the Tribunal concluded negotiations for 21 ILUAs. While in line with last year's performance, this is less than was anticipated. Notably, ILUA negotiations in South Australia have been delayed due to funding constraints experienced by all major stakeholders.

Sixteen of the concluded ILUAs were conducted within the context of native title determination application mediation.

The majority of concluded ILUA negotiations were in Queensland, where the determination of claimant applications continues to be accompanied by between two and five ILUAs. For example, four ILUAs were related to the Girramay matter and two to the Ngadjon-Jii matter, determined in December 2007.

Significant achievements in South Australia include the finalisation of the Witjira National Park ILUA—to accompany an expected September 2008 consent determination—and the Yandruwandha/Yawarrawarrka conjunctive petroleum ILUA.

In Victoria, a proposal to resolve the Latji Latji claim by way of an ILUA had to be postponed to allow for issues to be resolved by way of research and mediation.

2.1b) Milestones in ILUA negotiation outside the mediation of native title determination applications

One hundred and six milestones were achieved under this limb of the output in this reporting period, representing a significant increase over last year's performance (25). Of these, 105 were achieved in South Australia. Eighty-four of the milestones were the result of ILUA negotiations with the Yandruwandha/Yawarrawarrka native title claim group, and they address a large number of sectoral interests dealt within a process

separate to mediation. The other milestone was achieved in the negotiation of the Bunuba ILUA in the Kimberley region of Western Australia.

2.1c) Milestones in ILUA negotiation inside the mediation of native title determination applications

During the reporting period 119 ILUA milestones were achieved as part of mediating claimant applications, approximately half of what had been estimated. The estimates were based on a continued high level of activity in South Australia, where the Statewide ILUA Strategy uses ILUAs to resolve issues within claimant application negotiations. While markedly fewer than the previous reporting period (259), performance is consistent with the 2005–06 reporting period, in which 129 were recorded under this output.

Although less than expected, the majority of milestones were achieved in South Australia (74). Of these, 35 were negotiated as part of the Antakirinja Matu-Yankunytjatjara claimant application mediation and addressed issues related to the co-management of the Breakaways Reserve conservation park.

In Queensland, 25 of the 36 milestones achieved were negotiated as part of the mediation of the Kuuku Ya'u claimant application.

Milestones were also recorded in New South Wales and the Northern Territory.

Level of client satisfaction

The Tribunal's overall satisfaction rating for its agreement-making service was 89 per cent. For further detail see Table 12 Satisfaction with overall agreement-making processes, p. 100.

Output 2.2—Native title agreements and related agreements

Description

This output category includes a range of agreements related to native title applications (claimant, non-claimant, compensation and revised applications) where the Tribunal has provided mediation assistance to the parties.

The range of agreements includes:

- full consent determinations that provide for the recognition of native title or for alternative resolutions of claimant applications, as well as other agreements that fully resolve native title determination applications
- agreements between parties that set the groundwork for more substantive outcomes in the future and may lead to the resolution of native title determination applications—these may be agreements on issues, process or frameworks

- agreements for compensation for the loss or impairment of native title and agreements that allow for, or regulate access by, native title holders to certain areas of land.

Performance

The performance indicators for native title agreements and related agreements are:

- Quantity—number of 2.2a), 2.2b) and 2.2c) agreements
- Quality—clients' perception of the quality of the agreement-making process
- Resource usage—average price per unit and total price for the output.

Performance at a glance				
Measure	Estimate		Result	
Quantity	2.2a)	24	2.2a)	17
	2.2b)	131	2.2b)	166
	2.2c)	138	2.2c)	334
Total	293		517	
Quality	Clients' perception of the agreement-making process		See Table 12, p. 100	
Average price per unit				
2.2a)	\$	65,823	\$	91,648
2.2b)	\$	43,638	\$	33,375
2.2c)	\$	22,865	\$	12,002
Total price for the output	\$10,451,808		\$11,107,059	

Comment on performance

In the reporting period fewer consent determinations of native title were made than were estimated. However, there were significantly more agreements to establish a framework or process for mediation to progress, and more agreements to deal with specific issues. Around the country, strategies have been put in place to review, and reduce where necessary, the number of parties to native title claims. This strategy should help in the resolution of claims in future years, as only those parties whose interests might be affected by a native title determination will be involved in the mediation of the claims.

The South Australian Registry recorded more agreements than anticipated through a successful approach to resolving overlapping claims. There is now only one contested overlap in South Australia which is currently in mediation.

Table 4 Number of agreements by state and territory

Type of agreement	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
2.2a Agreements that fully resolve NTDAs*	-	3	3	5	1	-	-	5	17
2.2b Agreements on issues, leading towards the resolution of native title determination applications	-	9	2	69	34	-	2	50	166
2.2c Process/framework agreements	-	19	4	140	30	-	18	123	334
Total	-	31	9	214	65	-	20	178	517

* Native title determination applications

2.2a) Consent determination and any other agreement which fully resolves the native title determination application

The estimated figure of 24 agreements to fully resolve native title determination applications was not achieved for a range of reasons. Despite significant research assistance and intensive mediation in five overlapping claims in the Goldfields region of Western Australia, the issues proved intractable and mediation has now ceased. In Queensland, five consent determinations which were expected in this reporting period will be achieved early in the next reporting period. Similarly, in Western Australia unforeseen delays in the preparation and assessment of connection reports, by claimants' representatives and the state government respectively, has led to delays in the resolution of claims in the Kimberley, Pilbara and Geraldton regions.

As foreshadowed in last year's annual report, three agreements were finalised by consent determination over land around Tennant Creek in the Northern Territory. In New South Wales, the agreement recognising the native title rights and interests of the Githabul People was finalised when the Court made a consent determination in November 2007 that native title exists over the entire area.

In Queensland, the native title rights of the Ngadjon-Jii People were recognised over national parks and reserves 47 km south of Cairns, including exclusive rights to an island in the Russell River. Agreements were reached with the Queensland Government, Cairns City Council, Eacham Shire Council and Ergon Energy, which have interests in the claimed area. During negotiations, the Ngadjon-Jii People and the state government reached an ILUA that establishes how the native title rights and interests will be carried out on the ground.

Case study

Reaching native title agreement over outback town

The first native title determination in the Northern Territory to be fully reached through a negotiated agreement rather than litigation was finalised on 3 September 2007.

In the grounds of the Nyinkka Nyunyu Arts and Cultural Centre, Justice John Mansfield recognised the Patta Warumungu people's native title rights over areas of land in the town of Tennant Creek.

The native title holders and the Northern Territory Government worked towards reaching agreement on more than just the usual native title issues by including wider town issues in discussions.

A comprehensive agreement that involved a consent determination and an ILUA were developed.

Reaching an agreement-in-principle in November 2006 brought the resolution of native title land issues over the town closer to finalisation. This agreement between the Patta Warumungu People and the Northern Territory Government paved the way for the consent determination and ILUA.

Native title issues for towns have been difficult to resolve across the country, but in this case the parties were able to come to agreement on such things as how the past extinguishment and present surrender of native title rights is to be compensated and the commencement of negotiations in good faith toward the creation of a park over the Devil's Pebbles, a sacred site 18 km north of Tennant Creek.

As part of the agreement, native title has been surrendered in parts of the town to provide for future residential and commercial development.

As native title holders, the Patta Warumungu people have the right to live, travel over and access the land, hunt, gather and take natural resources and conduct ceremonies and other traditional activities.



Justice John Mansfield and Tribunal President Graeme Neate following the Federal Court hearing that recognised native title over the town of Tennant Creek.

Also in Queensland, the exclusive native title rights of the Strathgordon Mob were recognised through agreement over a pastoral lease, 415 km north-west of Cairns. Negotiations between the Strathgordon Mob, Queensland Government, Poonko Strathgordon Aboriginal Corporation, Cook Shire Council and Queensland Lapidary and Allied Craft Clubs Association over the native title claim led to agreement about the groups' respective rights and interests in the claimed area. The Strathgordon Mob also reached two ILUAs with some of the parties that set out how their rights and interests will be exercised.

In Western Australia, the second part of the Ngaanyatjarra Lands native title claim was resolved in June 2008 after agreement was reached between the claimants, the Western Australian Government and the Shire of Laverton. The agreement recognises the Ngaanyatjarra People's native title rights over 1,429 sq km of reserves and unallocated land. It follows a consent determination made in 2005 which recognised their native title rights over most of their traditional lands. The Ngaanyatjarra People are now native title holders of 169,184 sq km of land and waters, the largest area in Australia where native title has been found to exist.

Accompanying the determination of the Ngaanyatjarra claim was the withdrawal, and therefore full resolution, of the overlapping Tjirrkarli Kanpi native title claim.

Also in Western Australia, the Birriliburu People's native title determination application was resolved by agreement when the Federal Court made a consent determination in June 2008 at Good Camp Rockhole on the Canning Stock Route.

In New South Wales, the Tribunal mediated a future act agreement which resolved the Barkandji #1 application. The agreement allowed the compulsory acquisition of a parcel of land by Wentworth Shire Council and resulted in the withdrawal of the native title claim.

As anticipated, no native title matters were fully resolved by agreement in Victoria during the reporting period. However, intensive mediation activity was occurring in the north-west of the State and this should lead to various matters being resolved within the next few years.

Case study

Native title recognised south of Cairns

Eight years after lodging their claim, the Ngadjon-Jii People gathered before the Federal Court in Malanda, Far North Queensland, to hear Justice Jeffrey Spender recognise their native title rights and interests over 1287 ha of national parks and reserves.

The consent determination was made after the Ngadjon-Jii People and the State of Queensland, Eacham Shire Council, Cairns City Council and Ergon Energy reached agreement about their respective rights and interests. They also reached an ILUA about how their rights will co-exist on the ground.

The Federal Court recognised the Ngadjon-Jii People's right to exclusively possess, occupy and use a 2.4 ha island in the middle of the Russell River. The group's non-exclusive rights were recognised over the remainder of the determination area in parts of the Wooroonooran National Park, Topaz Road National Park, Malanda Falls Conservation Park and two quarry reserves.

These areas where the group's non-exclusive rights have been recognised will continue to be shared by all those with an interest in the area, including the public, who will still be able to access the Wooroonooran National Park, the Topaz Road National Park and the Malanda Conservation Park for recreation purposes. The public can also access and enjoy the waterways, beds, banks and foreshores of the Russell River.

During negotiations the parties agreed to recognise the Ngadjon-Jii People as the native title holders of the area. The parties also acknowledged that the Ngadjon-Jii People have a longstanding strong connection to the determination area under their traditional laws and customs.

This consent determination finalises the native title claim the Ngadjon-Jii People lodged in the Federal Court over this area on 14 October 1999.



Members of the Ngadjon-Jii People (from left): Ernie Raymont, Cameron Gosam, Robert Canendo, Debbie Gertz and Yvonne Canendo.

2.2b) Milestones on issues, leading towards the resolution of native title determination applications

Nationally, the number of agreements reached on specific issues remained strong as the Tribunal continued working with native title claimants to resolve overlapping native claims.

In South Australia, a number of milestones were reached as claimants resolved overlaps and the Tribunal worked closely with pastoralists, government and claimants' representatives to resolve access issues on pastoral leases. Other milestones achieved in South Australia are a reflection of improved planning and better integration of native title processes.

In some Western Australian matters, parties requested mediation assistance by the Tribunal to resolve specific issues, even though the Tribunal has not had overall carriage of the mediation.

In New South Wales, a significant agreement was reached which resolves an intra-Indigenous dispute relating to the Gundungurra Tribal Council Aboriginal Corporation. This agreement will enable future progress to be made on the resolution of the application.

Issues are being resolved at a steady rate for Queensland matters, in particular on claims that are nearing resolution, such as the Kuku Ya'u claim, the Combined Dulabad Malanabarra/Yidinji claim, the Wuthathi claim and the Mamu and Djiru claims.

In the Northern Territory, the number of agreements reached was lower than expected in this reporting period. Resolution of issues affecting some claims was delayed while governments, at both Territory and Federal level, developed policy on tenure and town planning and infrastructure ownership options that might apply to the longer term future of Northern Territory towns. In addition, the Federal election limited the ability of the Commonwealth to participate during caretaker and handover periods, so that the number of issues that could be resolved within anticipated timeframes proved unrealistic.

2.2c) Process/framework milestones

Nationally, there were many more process/framework milestones than had been anticipated.

In Western Australia, many of the process milestones incorporated the use of Tribunal research assistance. These milestones reflect the way parties agreed to use the Tribunal's research services to settle overlapping issues so that substantive work can begin on resolving claims.

The Tribunal worked intensively with claimants in the north-west of Victoria, and parties in those matters reached agreement on a number of things, including strategies

Case study

Githabul People's native title recognised

After a 12-year pursuit of native title, the Githabul People's aspirations were realised on 29 November 2007 when the Federal Court recognised their native title rights in northern New South Wales.

At an outdoor hearing in the heart of Githabul country, Justice Catherine Branson made a consent determination recognising their rights and interests over 1120 sq km in nine national parks and 13 state forests, just south of the Queensland border.

This determination finalised the Githabul People's native title claim in NSW, which was first lodged in 1995. It was the first consent determination in NSW for 10 years and the result of negotiations between the Githabul People, the State of NSW and many other parties.

The outcome followed the registration of the largest ILUA in New South Wales between the Githabul People and the State.

Many benefits are expected to flow to Githabul People, including involvement in the management of the national parks and reserves, consultation in state forests, protection of culturally significant areas, employment and the transfer of 102 ha of Crown land in freehold.

Tribunal Deputy President John Sosso, who assisted the parties through mediation, said the Githabul People and the state conducted open and practical negotiations which provided a template for future successful native title agreements not only in New South Wales but elsewhere in Australia.

The Githabul People have joined the growing number of native title holders in Australia who have achieved successful native title outcomes through negotiating agreements with other groups with interests in the claimed area.



The Githabul People were recognised as native title holders over nine national parks and 13 state forests. NSW National Parks and Wildlife staff attended the determination (from left): Charlie Ord, Peter Robinson, Donna Doolan, Andy Moy, Micah Williams, Keith Close and Richard Heywood.

for resolving overlapping claims and mediation programs to progress negotiations between claimants and the Victorian Government.

A series of meetings with claimants' representatives in Queensland led to the development of work plans that identify the steps to be followed to resolve claims and establish timeframes for each of these stages.

Level of client satisfaction

The Tribunal's overall satisfaction rating for its agreement-making service was 89 per cent. For further detail see Table 12 Satisfaction with overall agreement-making processes, p. 100.

Output 2.3—Future act agreements

Description

This output category includes agreements that allow a future act (such as the granting of an exploration or mining tenement) to proceed where Tribunal Members or staff have assisted with mediation, as well as milestones reached during the mediation of a future act application and leading to the final agreement.

The Tribunal only mediates when it is requested to do so by any one of the negotiation parties, or where the President has directed that a conference be held to resolve issues related to an inquiry conducted by the Tribunal.

The two main provisions in the Act under which the Tribunal may provide mediation assistance in future act matters are:

- s. 31, which affects parties in cases where the right to negotiate applies
- s. 150, which allows the parties to request, or the President of the Tribunal to direct, that a conference be conducted to help resolve outstanding issues relevant to future act inquiries already before the Tribunal, i.e. either an expedited procedure application or a future act determination application.

Performance

Performance indicators for future act agreements are:

- Quantity—number of 2.3(a) and 2.3(b) agreements
- Quality—clients' perception of the quality of the agreement-making process
- Resource usage—average price per unit and total price for the output.

Performance at a glance				
Measure	Estimate		Result	
Quantity	2.3a)	53	2.3a)	72
	2.3b)	35	2.3b)	42
Total	88		114	
Quality	Clients' perception of the agreement-making process		See Table 12, p. 100	
Average price per unit				
2.3a)	\$	35,823	\$	17,852
2.3b)	\$	23,572	\$	15,081
Total price for the output	\$ 2,723,618		\$ 1,918,729	

Table 5 Future act agreements by state and territory									
Type of agreement	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
2.3a) Agreements that fully resolve future act applications	-	-	-	-	-	-	1	71	72
2.3b) Milestones in future act mediations	-	-	14	-	-	-	1	27	42
Total	-	-	14	-	-	-	2	98	114

Comment on performance

2.3a) Agreements that fully resolve future acts

While performance has remained steady throughout the year, Table 5 shows that the Tribunal exceeded its estimates.

The Western Australian Government's continuing policy to request mediation assistance to help clear the backlog of tenements led to a higher than expected number of applications finalised through agreement.

There has been little future act mediation activity in Victoria since 2005, primarily due to the widespread use of pro-forma ILUA and s. 31 agreements to resolve future act matters. However, one s. 31 agreement was lodged following mediation by the Tribunal in circumstances where the parties opted to use the Tribunal's right to negotiate process.

At the beginning of the reporting period, the Northern Territory Government indicated that it would refer matters which had been within its own right to negotiate for the past two to three years to the Tribunal for mediation assistance. Work towards developing template agreements has been complicated and time consuming. The delay in resolving future act matters in mediation means that outcomes will not be recorded until the next reporting period.

The trend of reaching agreement without Tribunal involvement in Queensland continued throughout this reporting period. An announcement by the Minister for, as it was then, Families, Community Service and Indigenous Affairs of the amalgamation/reconfiguration of some native title representative bodies from 1 July 2008, led to a slow-down in the work and outputs because resources of these representative bodies were directed toward implementing the new administrative arrangements.

2.3b) Milestones in future act mediations

Nationally, the Tribunal achieved its estimated milestones for this reporting period.

The Northern Territory significantly exceeded estimates due to the Northern Territory Government's new approach of requesting mediation assistance to clear its right to negotiate backlog of matters. Mediation requests were made in a first batch of matters where it appeared negotiations were inactive or were not progressing matters to resolution. All of the mediations involved the Northern Land Council.

In Western Australia, the estimated outputs for this reporting period were met.

Level of client satisfaction

The Tribunal's overall satisfaction rating for its agreement-making service was 89 per cent. For further detail see Table 12 Satisfaction with overall agreement-making processes, p. 100.

Output group 3—Decisions

Output 3.1—Registration of native title claimant applications

Description

This output category relates to the Native Title Registrar's decisions whether to register a claimant application on the Register of Native Title Claims.

Indigenous Australians who are seeking a determination that native title exists over an area of land or waters make a claimant application to the Federal Court. The application is then referred to the Registrar, who must decide whether the application meets the requirements for registration. Registration gives claimants certain procedural rights under the Act, including the right to negotiate with respect to certain future acts.

In April 2007, amendments were made to the registration provisions in the Act by the Amendment Act. Further changes were made by the Technical Amendments Act.

Previously, the Registrar had to apply a series of merit and procedural conditions (known as the 'registration test') to all new and amended claimant applications to decide whether they met the registration requirements. Following the September 2007 changes to the Act, certain amended claims can be registered without the registration test being applied, for example, where the only effect of the amendment is to reduce the area claimed, remove a right or interest from those claimed in the application, or to alter the address for service of the applicant.

If a claim is not accepted for registration, the Court may dismiss the application if it is satisfied that all avenues of review have been exhausted and the application has not been, or is not likely to be, amended in a way that would lead to it being accepted for registration, and there is no other reason not to dismiss it.

If the Registrar makes a decision that an application does not meet the registration test requirements, an applicant may seek a review of the Registrar's decision. This review may be sought in the Federal Court or, following the Technical Amendments Act, by requesting a Member of the Tribunal to reconsider whether the claim satisfies all the registration test conditions.

Performance

Performance indicators for registration of native title claimant applications are:

- Quantity—the number of decisions completed in the reporting period
- Quality—70 per cent of decisions are completed within six months of receipt of the original or amended application submitted for registration
- Price—average price per unit and total price of output.

Performance at a glance		
Measure	Estimate	Result
Quantity	130	104
Quality	70% of decisions completed within 6 months of receipt of the original or amended application submitted for registration	92% of decisions completed within 6 months of receipt of the original or amended application submitted for registration
Average price per unit	\$ 40,476	\$ 36,141
Total price for the output	\$5,261,906	\$3,758,660

Note: Ninety-one decisions were made under the 2007 Transitional Provisions (or Technical Amendments) and were therefore not included in the performance assessment.

Comment on performance

As a direct consequence of the amendments to the Act, the Tribunal had anticipated a high workload for the reporting period. The anticipated outcome of 130 decisions was not achieved. This was due to 15 claims that were identified for testing under the amendments being finalised (by consent determination or otherwise) before the registration test was applied. A further eight claims, initially identified for testing under the April 2007 amendments, were deferred for testing under the September 2007 amendments, which encompassed combined applications. In addition, a smaller number of new claims were made in the ordinary course of business.

One hundred and four decisions were made, an outcome that was almost double that of the previous reporting period (56).

The impact of the new requirement to test certain applications is evident in the output numbers, as only 13 of the 104 claims tested in the reporting period were decisions made in the ordinary course of business. The remainder were tested under the April 2007 amendments (85) or the September 2007 amendments (6).

Of the 104 decisions made, six amended claims were accepted for registration without the registration test being applied under s. 190A(6A), 17 satisfied all the conditions of the registration test and 81 did not satisfy one or more of the conditions and so were not registered on (or were removed from) the Register of Native Title Claims.

The high failure rate reflects the large number of claims that had to be re-tested under the transitional provisions of the amendments made to the Act. The majority of the claims had previously failed the registration test, were not on the Register, and were not amended following the commencement of the transitional provisions. The registration test status quo was maintained for many claims (i.e. they were not on the Register when the decision was made, and so the native title claim group did not lose procedural rights).

Parties may apply to the Federal Court for a review of a Registrar's decision under the Act or under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth).

During the reporting period, the Federal Court reviewed six decisions:

- *Gudjala People #2 v Native Title Registrar*
- *Wiri People v Native Title Registrar*
- *Glasshouse Mountains Gubbi Gubbi People v Registrar Native Title Tribunal*
- *Hazelbane v Doepel*
- *Hunter (Wiri People) v Native Title Registrar*
- *Thomas (Mantjintjarra Ngalia #2) v Native Title Registrar*.

The Registrar's decisions were set aside in *Thomas (Mantjintjarra Ngalia #2) v NTR* and *Hazelbane v Doepel*, requiring the registration test to be reapplied to these claims. The Court dismissed the four remaining applications for review, see 'Appendix II Significant decisions', p. 113 for details.

As at 30 June 2008, there had been no request for a claim to be reconsidered by a Member of the Tribunal.

Table 6 Number of registration test decisions by state and territory

State	Accepted	Accepted —s. 190A(6A)*	Not accepted	Total
ACT	-	-	1	1
NSW	2	-	9	11
NT	2	-	20	22
Qld	10	4	18	32
SA	-	2	-	2
Tas	-	-	-	-
Vic	-	-	5	5
WA	3	-	28	31
Total	17	6	81	104

* This new category was introduced following the Technical Amendments Act. Previously, the table showed the number of abbreviated decisions made in the reporting period. From April 2007, it is the policy of the Registrar to provide a full statement of reasons whenever the registration test is applied to a claim.

Timeliness of decisions

The six-month performance timeframe relates only to the 13 decisions made in the ordinary course of business. The 70 per cent performance target was exceeded (92 per cent). Where statutory timeframes required the test to be applied in a shorter timeframe (i.e. in response to a future act notice), that shorter timeframe was met.

Output 3.2—Registration of indigenous land use agreements

Description

This output category covers the Registrar's decisions whether to register ILUAs on the Register of Indigenous Land Use Agreements.

Parties to ILUAs apply to the Registrar to register their agreement on the Register of Indigenous Land Use Agreements. Under the Act, each registered ILUA has the effect as if it were a contract among the parties (if it does not already have that effect) and binds all persons who hold native title for the area to the terms of the agreement, whether or not they are parties to the agreement.

To process an ILUA application, the Registrar must:

- check for compliance against the registration requirements of the Act and regulations
- notify organisations and individuals with an interest in the area and, except in the case of body corporate agreements, notify the public
- determine any objections or other potential bars to the registration of the ILUA.

If requested, the Tribunal can assist parties to negotiate withdrawal of an objection to an area agreement or an alternative procedure agreement. In some circumstances, the Tribunal can inquire into an objection to the registration of an alternative procedure agreement.

Performance

Performance indicators for registration of ILUAs are:

- Quantity—the number of decisions completed in the reporting period
- Quality—90 per cent of decisions are completed within six months of receipt of the application submitted for registration, where there is no objection or other bar to registration
- Price—average price per unit and total price of output.

Case study

Tribunal clears registration testing hurdle

At the start of the reporting period, the Tribunal knew it faced a considerable challenge to fulfill its registration test functions, following the amendments to the Act in 2007.

The amendments required the Registrar to use best endeavours to apply, or re-apply, the registration test to certain claims by the end of one year from commencement of the relevant amendment. As a result 128 claims were identified for testing. Of these, 110 claims were to be tested by 15 April 2008, with 18 more to be tested by 1 September 2008.

To meet this challenge the Tribunal ensured that it had:

- *written to all affected stakeholders*
- *recruited and trained sufficient staff to act as delegates*
- *created a new role for a Senior Delegate (Communications) to assist applicants and their representatives to understand the conditions of the registration test*
- *undertaken a review of registration practice, policy and procedures for currency, efficiency and effectiveness, and made the necessary amendments*
- *tools and practices to improve the overall quality of registration test decisions and to encourage greater consistency between delegates' registration test decisions, including:*
 - *clear guidelines for delegates*
 - *independent copy-editing of reasons*
 - *appointment of senior delegates to support these initiatives.*

These initiatives were fundamental to the Tribunal achieving significant qualitative and quantitative outcomes.

The qualitative outcomes included new and revised public information, such as the booklet Native title claimant applications: a guide to understanding the requirements of the registration test. Improvements to practice translated into efficient decision-making, which contributed to the high number of decisions being made within the statutory timeframe as well as reduced costs (see table page 57).

The Registrar reported to the Attorney-General that as at Tuesday 15 April 2008, 102 of the 110 applications identified for testing, or 93 per cent, had been tested or finalised. This achievement exceeded the Registrar's original expectations that 80 per cent of applications would have been tested or otherwise finalised. The Attorney-General acknowledged this achievement, stating that 'the rate of finalisation of the 110 applications identified by the Amendment Act indicates that continuing improvements to the resolution of native title claims is being made'

As at 30 June 2008, three more claims had been tested under the April 2007 amendments, while registration testing of the remaining claims was postponed pending court proceedings or resolution of the claim by agreement.

Registration testing under the September 2007 amendments was on target. As at 30 June 2008, 50 per cent of the 18 claims identified for testing had been tested or otherwise finalised.



Performance at a glance		
Measure	Estimate	Result
Quantity	45	58
Quality	90% of decisions completed within 6 months of receipt of the application submitted for registration, where there is no objection or other bar to registration	80% of decisions completed within 6 months of receipt of the application submitted for registration, where there is no objection or other bar to registration
Average price per unit	\$ 53,865	\$ 41,886
Total price for the output	\$2,423,922	\$2,429,382

Note: Twenty-three applications received an objection/bar to registration and were therefore not included in the performance assessment.

Table 7 ILUAs lodged or registered by state and territory									
	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
ILUAs lodged	-	1	5	35	8	-	2	3	54
ILUAs registered	-	4	6	33	7	-	4	3	57

Note: One ILUA application was not accepted for registration and was therefore not registered

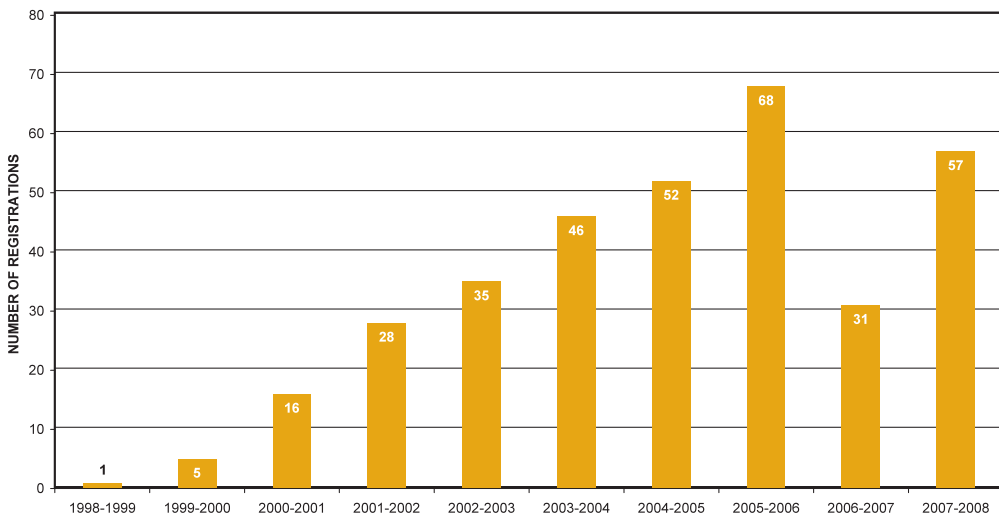
Comment on performance

On 19 October 2007, the 300th ILUA was registered on the Register of Indigenous Land Use Agreements.

Fifty-seven ILUAs were registered during the reporting period, exceeding the projected figure of 45. The most significant activity was in Queensland, where 33 ILUAs were registered. This includes 15 Eastern Kuku Yalanji ILUAs, which have doubled the national park estate from Mossman to Black Mountain, south of Cooktown, and resulted in a greater role for the Kuku Yalanji People in the management of national parks and some reserves through the granting of tenures as Aboriginal freehold.

Five of the registered ILUAs were body corporate agreements and 52 were area agreements. To date, the Tribunal has not received any applications to register an alternative procedure agreement.

Figure 5 Number of ILUA registrations per reporting period



The Federal Court's decision in *Kemp v Native Title Registrar* was handed down in the previous reporting period and the Saltwater People ILUA was referred back to the Registrar to be considered for registration. The decision not to accept the ILUA for registration was made in the current reporting period.

An application for review of the Registrar's decision to register the Traveston Crossing Dam ILUA was filed in the Federal Court. The Court had not heard the application in the current reporting period.

Timeliness of decisions

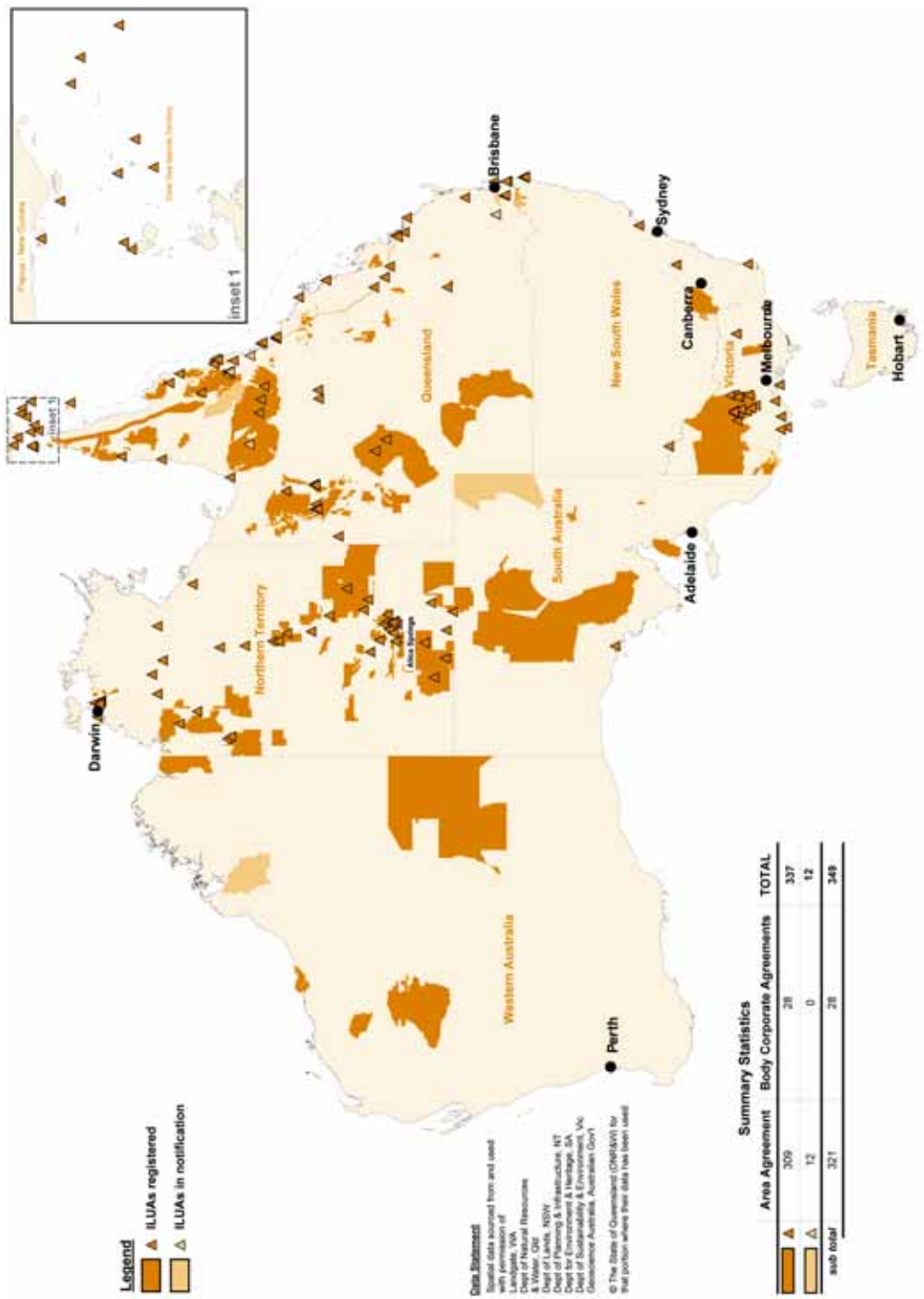
During the reporting period, an objection or adverse information was received in respect of 23 of the 58 ILUAs which were tested for registration. In Western Australia, the Tribunal is providing assistance to negotiate the withdrawal of an objection to the Nyikina Mangala ILUA.

Of the remaining 35 applications, 80 per cent of decisions were made within six months of the application being lodged. All bar two decisions were made within seven months of the application being lodged. Measures put in place to improve testing timeframes include:

- raising awareness of testing timeframes with stakeholders
- actively managing timelines so that defective applications are rectified early in the compliance stage
- revising and improving internal processes and procedures to ensure that applications are managed efficiently and the risk of administrative errors is minimised.

As a matter of policy, ILUAs in relation to which objections are received are not included in performance figures.

Figure 6 Map of indigenous land use agreements at 30 June 2008



Output 3.3—Future act determinations and decisions whether negotiations were undertaken in good faith

Description

This output category includes determinations made by the Tribunal that a future act may or may not be done and, if the future act may be done, whether it is to be done subject to conditions or not. It also includes decisions as to whether negotiations to reach agreement about future act determination applications have occurred in good faith.

Any party to the future act application may apply to the Tribunal for a determination, provided at least six months have passed since the notification day contained in the s. 29 notice and there have been negotiations in good faith during that period. If a party contests that negotiations in good faith have occurred, then the Tribunal must hold a preliminary inquiry to establish whether the negotiations have happened in good faith, in which case it has jurisdiction to proceed with the substantive inquiry.

Performance

Performance indicators for future act determinations and decisions as to whether negotiations were undertaken in good faith are:

- Quantity—number of decisions
- Quality—80 per cent finalised within six months of the application being made
- Resource usage—average price per unit and total price for the output.

Performance at a glance		
Measure	Estimate	Result
Quantity	53	84
Quality*	80% of future act determination applications finalised within 6 months of the application being made	99% of future act determination applications finalised within 6 months of the application being made
Average price per unit	\$ 18,590	\$ 6,651
Total price for the output	\$985,247	\$558,724

* Two decisions related to whether negotiation in good faith requirements were satisfied and were therefore not included in the performance assessment.

Comment on performance

Nationally, of the 82 determinations, 81 were made by consent. The strong performance in Western Australia can again be related to the productive working relationships maintained by parties during this reporting period. Western Australia exceeded its estimates slightly this reporting period because parties continue to utilise Tribunal consent determination processes, especially where logistical problems prevent agreements being signed-off, or where some named applicants refuse to sign a State Deed. In Western Australia, 72 were made by consent.

Table 8 Future act determination application outcomes by tenement

Tenement outcome	Qld	Vic	WA	Total
Application withdrawn*	1	-	14	15
Consent determination—future act can be done	0	7	72	79
Consent determination—future act can be done subject to conditions	2	-	-	2
Determination—future act can be done	-	-	1	1
Total	3	7	87	97

* Not counted for output reporting purposes

In both Queensland and Victoria, all future act determination application determinations in the reporting period were by consent. Of interest is the fact that the two future act determination applications (covering seven tenements) in Victoria were the first to be received in five years.

Output 3.4—Finalised objections to expedited procedure

This output category concerns the processing and finalisation by the Tribunal of objections to the inclusion of the expedited procedure statement.

The expedited procedure is a fast-tracking process for the grant of certain ‘minimal impact’ tenements and licences which, under s. 237 of the Act, are considered not likely to:

- interfere directly with the native title holders’ community or social activities, or
- interfere with areas or sites of particular significance, or
- involve major disturbance to any land or waters concerned, or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.

The expedited procedure is triggered when a government party (in a public notice) asserts that the expedited procedure applies to a tenement application and, therefore, the right to negotiate does not apply. The Act includes a mechanism for registered native title parties to lodge an objection to this assertion.

The expedited procedure is used in Western Australia, the Northern Territory and Queensland. Other states either use their own alternative state provisions to process tenements considered to have minimal interference or impact, or opt not to use the expedited procedure provisions.

Performance

The performance indicators for objections to the expedited procedure are:

- Quantity—number of objections resolved
- Quality—80 per cent resolved other than by agreement finalised within nine months of the s. 29 closing date, 70 per cent resolved by agreements finalised within nine months of acceptance
- Resource usage—average price per unit and total price for the output.

Performance at a glance		
Measure	Estimate	Result
Quantity	875	1,275*
Quality	80% of objections resolved other than by agreement finalised within 9 months of the s. 29 closing date	90% of objections resolved other than by agreement finalised within 9 months of the s. 29 closing date
	70% of objections resolved by agreement finalised within 9 months of acceptance	86% of objections resolved by agreement finalised within 9 months of acceptance
Average price per unit	\$ 2,159	\$ 2,249
Total price for the output	\$1,889,246	\$2,867,338

* Eighty-seven objections were resolved by 'other' processes and were therefore not included in the performance assessment. 'Other' processes include non-acceptance of the objection application, withdrawal of the objection application prior to acceptance and withdrawal of the objection application due to external factors.

Comment on performance

While all states/territories use the right to negotiate provisions under the Commonwealth scheme where appropriate, only Western Australia, Queensland and the Northern Territory use the expedited procedure process.

Table 9 Objection application outcomes by tenement

Tenement outcome	NT	Qld	WA	Total
Determination—expedited procedure applies	-	-	17	17
Determination—expedited procedure does not apply	-	-	6	6
Dismissed—s. 148(a) no jurisdiction*	-	2	27	29
Dismissed—s. 148(a) tenement withdrawn*	-	8	70	78
Dismissed—s. 148(b)	-	-	222	222
Expedited procedure statement withdrawn	-	18	10	28
Expedited procedure statement withdrawn—s. 31 agreement lodged	-	103	-	103
Objection not accepted	-	-	10	10
Objection withdrawn—agreement	3	27	702	732
Objection withdrawn—external factors	-	8	4	12
Objection withdrawn—no agreement	-	14	66	80
Objection withdrawn prior to acceptance	-	-	65	65
Tenement withdrawn*	-	4	1	5
Tenement withdrawn prior to objection acceptance*	-	3	4	7
Total	3	159	852	1,014

* Not counted for output reporting purposes.

The higher than expected outcome reflects increased activity in both Queensland and Western Australia. Although the recorded outputs significantly exceeded expected figures, the Northern Territory did not meet its estimated output due to a fall in the number of objections being lodged by the representative bodies.

In Western Australia, the ongoing high level of objection applications is attributable to the continuing rejection by claimants in most regions of the previously accepted to Regional Standard Heritage Agreement approach. It is anticipated that this trend will continue until stakeholders agree about amendments to the current Heritage Agreements following completion of the reviews of them conducted in 2006. The Geraldton and Goldfields regions continue to be the regions that lodge the highest number of objections, although the Pilbara and Central Desert areas have shown a slight increase.

In Queensland, there was a sharp increase in the number of future act notices published during this reporting period.

Notwithstanding advice by the Queensland Government that there is significant administrative work involved in providing copies of the agreements to the parties and the Tribunal (particularly due to the fact that agreements are signed in counterpart), finalisation of objection applications in Queensland exceeded the estimated outputs during the reporting period.

Management



Tribunal Executive

Role and responsibilities

The President and Registrar are the Tribunal's primary decision-makers in the governance of the Tribunal. Under the Act, the President is responsible for managing the administrative affairs of the Tribunal, assisted by the Registrar. The Registrar has responsibility for the day-to-day operations of the Tribunal, in close consultation with the President. The Registrar may delegate all or any of his or her powers under the Act to Tribunal employees.

The Registrar and the directors of the two divisions, Service Delivery, and Corporate Services and Public Affairs (see Figure 3, p. 43), comprise the Executive Team. A description of the qualifications and background of the Tribunal's Executive Team Members is available on the Tribunal's website.

The Executive Team meets fortnightly to consider operational and strategic/governance issues and remains the main forum at which the directors assist the Registrar on a range of issues affecting the Tribunal. The Chief Financial Officer attends the Executive Team meeting to provide financial and strategic assistance to the Registrar and directors.

Corporate governance

The Tribunal's strategic framework is embodied in its *Strategic Plan 2006–2008*, which enables all staff to have a shared understanding of:

- the Tribunal's purpose
- the Tribunal's values and behaviours
- key result areas
- key areas of improvement.

For more information, see 'Corporate and operational planning and performance monitoring', p. 87.

The Tribunal's corporate governance arrangements assist the Tribunal to meet its key purpose, which is to work with people to resolve native title issues over land and waters.

The President and Registrar have overall responsibility for making decisions affecting the Tribunal. In this, they are assisted by the Tribunal's Project Office and supported by a number of strategy groups and committees, as detailed in this chapter. A key outcome for the reporting period was the establishment of the Resources Coordination Group.

The governance arrangements for managing risk include controls established under the financial management framework, including the Chief Executive's Instructions and supporting guidelines, business continuity planning and reporting on legislative compliance.



The Executive Team (from left): Acting Director Corporate Services and Public Affairs Tim Evans, Acting Native Title Registrar Franklin Gaffney and Director Service Delivery Hugh Chevis.

Members' meetings

In 2007–08 the President and Members held meetings in Perth during October 2007 and in Sydney during March 2008. A range of issues were discussed at the meetings, with a particular focus on the Tribunal's strategic direction and current operating environment. Other issues included:

- practice development facilitated by Professor Tania Sourdin
- implementation of National Case Flow Management Scheme
- mediation accreditation and improvements to the Tribunal's mediation practice
- reconsideration by Members of registration test decisions
- updates from various Tribunal strategy groups.

The Perth meeting included a joint session with the Tribunal's relevant senior managers to discuss key issues of practice and implementation of the National Case Flow Management Scheme.

Strategic Planning Advisory Group

The Strategic Planning Advisory Group is a key forum for corporate governance of the Tribunal under the authority of the President and Registrar. It comprises President Graeme Neate, Deputy Presidents Christopher Sumner and John Sosso, ILUA Member Coordinator Ruth Wade, Chair of the Research Strategy Group Daniel O'Dea, Agreement-making Liaison Group Member Dr Gaye Sculthorpe, the Registrar and the divisional directors.

The group integrates management and administration with the strategic direction of the organisation, as described in the Tribunal's *Strategic Plan 2006–2008*. It met six times during the reporting period to advise on high-level budget priorities for 2007–08:

- to consider the implications of the change of Australian Government and make recommendations regarding the necessary approaches and briefings to ministers with a responsibility for native title and/or indigenous affairs
- to monitor the Tribunal's performance, including the Tribunal's Business Transformation Plan to effect the necessary responses to both internal and external drivers for change
- to make recommendations to the President and Registrar to facilitate Tribunal projects.

External Relations Working Group

The External Relations Working Group is responsible for managing and maintaining an overview of national stakeholder communication issues, including government relations, identifying and developing responses to strategic issues relevant to the Tribunal and developing relationships with stakeholders at a high level.

Chaired by the President, the group comprises Deputy President Christopher Sumner, Members John Catlin, Robert Faulkner and Neville MacPherson, the Registrar and the Manager, Workforce Planning and Communication Management.

The group met four times in the reporting period. Issues considered by the group during the reporting period included:

- the development of a national report and national statistical package on the native title system to update stakeholders about the results being delivered under the native title system
- working with the new Australian Government, including background briefing for relevant ministers
- engaging with the National Native Title Council, representative bodies and service providers
- the third round of research about the satisfaction of the Tribunal's clients with the services and assistance they have received from the Tribunal.

Agreement-making Liaison Group

The Agreement-making Liaison Group deals with practice and policy issues around Tribunal-assisted agreement-making processes.

The group is chaired by the President and comprises Members Alistair (Bardy) McFarlane, Daniel O'Dea and Dr Gaye Sculthorpe, the Director of Service Delivery and the Western Australian state manager. It meets quarterly.

The group produces periodic overviews of agreement-making practice covering claimant and non-claimant applications, ILUAs and future acts. The reports identify emerging issues and trends, and stakeholder issues and capacity-building opportunities. They also include agreement-making activity reports, analysis of Federal Court activity and statistical reporting on projected and actual output performance. The reports are for use internally by strategy groups with a new executive summary report developed for wider internal publication within the Tribunal. During the reporting period the group produced three national reports.

The group's training subcommittee, led by Member Sculthorpe and assisted by Professor Tania Sourdin, developed a process and plan for implementation of the national accreditation standard for mediators. The proposals were endorsed by Tribunal Members in March 2008. Initial expressions of interest for accreditation were sought from Members and staff.

During the reporting period the group continued to monitor impacts on agreement-making practice in relation to implementation of the Amendment Act and Technical Amendments Act.

National Future Act Liaison Group

The group maintains an overview of the national future act activity on a region-by-region basis. It is chaired by Deputy President Christopher Sumner and comprises Deputy President John Sosso and future act Members Alistair (Bardy) McFarlane, Neville MacPherson, John Catlin and Daniel O'Dea as well as the Registrar, the Director Service Delivery, Manager Geospatial Services and other senior managers.

The group meets every three months. During the reporting period, the group:

- implemented a process for electronic lodgement of Form 4 Objection Applications in Western Australia
- undertook a mediations and hearings telephone system review, which resulted in an upgraded system that improved the quality of access and communication.

Indigenous Land Use Agreement Strategy Group

The purpose of the ILUA Strategy Group is to ensure that ILUAs are seen as useful options for agreement-making in the native title system. The group provides strategic

advice to the President and Registrar with a view to improving organisational performance and the quality of service to external stakeholders in relation to ILUA negotiation.

The group is chaired by ILUA Member Coordinator Ruth Wade, and comprises the Registrar, the Director Service Delivery and other senior managers, including a senior delegate of the Registrar and representatives from Legal Services and Geospatial Services.

During this reporting period, the group oversaw updates to Tribunal practice and procedures as a result of the 2007 amendments to the Act, which included:

- new provisions relating to ILUA assistance and prohibitions on the use of information provided by parties for the purposes of obtaining assistance to negotiate an ILUA or withdraw the objection to an ILUA
- changes to the public notification of body corporate agreements
- the impact of the reconsideration of claims on the registration of ILUAs
- changes to the management of the Register of Indigenous Land Use Agreements.

In addition, the group:

- updated the Tribunal's communication documents to reflect the amendments, including the 'Steps to an ILUA'
- reviewed the public notices for certified and uncertified area agreements
- oversaw an internal review of notification practices to improve them
- provided technical advice to the Attorney-General's Department regarding the impact of frivolous and vexatious objections to ILUAs on the native title system
- managed an audit of ILUA outputs
- responded to a review of the Agreement-making Research Project
- monitored organisational performance against projections and recommended changes to practice to improve the timeliness of registration decisions.

The group meets at least twice yearly, and met three times in the reporting period.

Research Strategy Group

The Research Strategy Group was chaired by Member Daniel O'Dea and consisted of five Tribunal Members, the Director Service Delivery, the managers of the Research Unit, Legal Services and Library Services, and a State Manager.

It was responsible for developing and overseeing national policies and strategies for Tribunal research activities, approving and evaluating a range of research proposals and their outputs, monitoring operational research performance and ensuring research reports are cost-effective, practicable and of a high quality.

The group provided a bridge between the Research section and Tribunal Members through regular reporting on research activities and the dissemination of the results of research projects. It met twice during the reporting period.

Following a review of governance structures the group was replaced by a new Resources Coordination Group.

Resources Coordination Group

The Resources Coordination Group was formally established on 27 June 2008. It is chaired by Member Daniel O'Dea and consists of Tribunal Member Neville MacPherson, the Director Service Delivery, the Director Corporate Services and Public Affairs, a state manager and the managers of the Geospatial, Legal and Research sections.

The group is an advisory body to make recommendations to the Registrar about the allocation of specialist resources for substantial projects across all aspects of the Tribunal's business, including:

- projects related to resolution of claimant applications
- projects with broad regional implications
- specific issue projects with strategic impact (including projects related to future acts and ILUAs).

The group will provide for better coordination of key internal resources in managing claimant applications and will be better aligned to implement the National Case Flow Management Scheme objectives.

The group will hold its first meeting in the next reporting period.

Senior managers' meetings

A number of regular forums assist in the planning for, and implementation of, new and ongoing business. During the reporting period:

- the national operations group met fortnightly to plan for and oversee service delivery through the Tribunal's regional registries. It comprised state and territory managers and senior Principal Registry staff, such as the Director Service Delivery, and other senior staff according to the issues at the time
- Corporate Services and Public Affairs senior managers met regularly with the director of the division to coordinate divisional projects, work plans and communication strategies.

Senior managers met twice by video or teleconference and twice in a face-to-face forum. Both meetings were held in Perth, the first in conjunction with the Tribunal's Members meeting to consider the implementation of responses to legislative changes and new practices. The second meeting, scheduled to coincide with the AIATSIS annual native title conference, dealt with development and planning activities, and reports on recent initiatives.

Corporate and operational planning and performance monitoring

As the key governance and operational document for the Tribunal, the *Strategic Plan 2006–2008* provides the framework for the continuing strategic management of the Tribunal. It allows the Tribunal to shape its organisational future and respond to the continually changing environment and to deliver outcomes to clients.

The plan contains four key result areas:

- clients and stakeholders
- services
- people
- business performance.

Objectives, strategies and measures (including links to the Tribunal's Portfolio Budget Statement) are listed under each of those key result areas. Section and registry operational plans are developed each year based on the key result areas above and take into account issues in the external and internal operating environment, external client and stakeholder feedback and the future direction of the Tribunal. The key result areas were also incorporated in staff performance management plans for 2007–08.

Following its conclusion at the end of 2008, a new strategic plan for 2009–2011 will be developed in the next reporting period.

Financial management

The Tribunal uses the controls established under its financial management framework, including the Chief Executive's Instructions and supporting guidelines, to apply financial management. Performance against the Tribunal's purchasing policies is on p. 105. Details about the Tribunal's finances are set out at 'Tribunal finances', p. 107.

Risk management

The Risk Management and Audit Committee comprises the Director Corporate Services and Public Affairs, nominated senior managers from each division, Member Neville MacPherson and the Tribunal's Chief Financial Officer. If required, the committee can access independent external advice to assist with its work.

The committee met regularly during the reporting period and implemented the Tribunal's risk management policy, risk management framework, risk management plan and risk management templates. As part of the implementation process, a dedicated page on the Tribunal's intranet was created to house all risk management material, and targeted training was delivered in each registry to foster a culture of risk management and to provide employees with the skills to identify and assess risk.

The Tribunal participated in Comcover's annual Risk Management Benchmarking Program, which measures the effectiveness of our risk management framework, practices and systems. The Tribunal's results saw a further improvement in its risk management status (to comprehensive), together with an increase in the discount for the 2008–09 premiums.

Other key matters finalised related to business continuity and fraud control. The Tribunal completed its fraud control plan during the reporting period.

Figure 7 Certification of Tribunal fraud control arrangements

I, Franklin Gaffney, certify that I am satisfied that the Tribunal has in place appropriate fraud control mechanisms that meet the Tribunal's needs and that comply with the Commonwealth Fraud Control Guidelines applying in 2007–08.



Franklin Gaffney

Acting Registrar

19 September 2008

Strategic information and technology management

The Registrar has a statutory requirement to maintain a number of registers which hold records of native title claimant and non-claimant applications, determinations and certain agreements made under the Act. These are the Register of Native Title Claims, National Native Title Register and Register of Indigenous Land Use Agreements.

Following an external review of the Tribunal's information and knowledge management requirements, work commenced on a consolidated information management environment. The Tribunal aims to achieve an information technology service which provides unified application and register information, with consolidated search and reporting facilities. An information technology governance framework was established and included a governing committee to monitor and provide business input into information technology projects.

During the reporting period, to improve both the speed and reliability of its information technology, the Tribunal began an upgrade to the network speed in all registries with the aim of building a high-availability environment to ensure service continuity. Plans were commenced to improve the management and transaction costs of electronic documents and records.

Work was undertaken to improve alignment with government and industry information standards, specifically ACSI33, AS20000, AS17799 and AS15489.

Management of human resources

During 2007–08, the Tribunal completed its first Employee Handbook, implemented a range of strategies to address results from the 2007 employee survey and continued to develop innovative ways to recruit and retain staff.

The completion of the Employee Handbook was the culmination of a 12-month consultation process to review employment-related policies and procedures. The process involved all employees, local area consultative committees, recognised unions and management. The handbook is available to all employees through the Tribunal's intranet.

Employee survey

The Tribunal undertakes employee surveys, with the assistance of an external provider, to assess staff satisfaction and determine people-management priorities. The first employee survey was undertaken in 2006 and provided a benchmark against the results of the 2007 survey.

The 2007 employee survey was conducted between June and July 2007 and 174 employees participated (representing 72 per cent of employees).

The survey results showed that employees were generally positive about:

- aspects of the work they perform
- the work/life balance at the Tribunal
- the client and stakeholder focus of the Tribunal.

The main areas for improvement were in relation to learning and development opportunities, and communication and consultation.

In response to the employee survey, the Tribunal's executive facilitated sessions with all registries of the Tribunal to discuss the survey results and seek further feedback about key areas for improvement.

Strategies for improvement

Based on the analysis of the 2006 and 2007 surveys, the Tribunal identified the following key areas to engage employees at the Tribunal:

- aligning employees with the Tribunal's values and strategic direction
- state manager/section manager performance
- communication and consultation
- current job satisfaction
- rewarding and recognising high achieving employees.

A range of measures has been implemented to address these areas:

- a Registrar's e-news, published bi-monthly to highlight significant matters of interest and provide updates on key projects
- an ongoing exercise, commenced in February 2008, to identify Tribunal-wide training needs
- specific targeted training (e.g. leadership training for senior managers)
- recognising long serving employees (see case study p. 94)
- the reintroduction of regional reporting by state managers at Senior Managers' meetings.

The measures implemented will be evaluated as part of the outcome of the 2008 employee survey which was undertaken from May to June 2008. The response rate to that survey was 77 per cent and the Tribunal will report on the results in the next reporting period.

Workforce planning

As in the previous reporting period, strong economic conditions have influenced the departure of some employees, particularly in Western Australia and Queensland.

The Tribunal experienced significant challenges in meeting its workforce needs, partly because of the competitive employee market, but also because of the intersections between native title and the mining sector and some of the specialist areas of skills and knowledge.

As part of its workforce planning, which has become an integral part of operational planning, the Tribunal continued to develop strategies to meet the ongoing challenge of recruiting appropriately skilled and qualified staff, and retaining the skills and knowledge already within its workforce.

Drawing on the employee survey, one of the ways to do this was to promote the terms and conditions of employment, particularly the work/life balance, flexible working hours and diversity within the workforce.

The Tribunal also has continued to implement and develop more innovative ways to attract applicants and streamline recruitment processes, by simplifying application processes and shortening the time taken to finalise recruitment exercises. Towards the end of the reporting period, the Tribunal had established a key performance indicator, which is to make offers of appointment in all advertised vacancies within thirty days from when the vacancy is first advertised.

Our workforce profile

At 30 June 2008, the Tribunal had 12 Holders of Public Office (President, Registrar and Members) and 245 people employed under the *Public Service Act 1999* (Cwlth) (PSA)—

the same level as at the end of the previous reporting period, see Table 16 Employees by classification, location and gender as at 30 June 2008, p. 111.

However, this staffing level was not sustained throughout the reporting period, as 75 employees left the Tribunal (39 ongoing, 36 non-ongoing), representing a 30 per cent turnover. This was a further increase from the previous reporting period, in which 22 per cent, or 54 employees, left the Tribunal.

Table 10 Employees by equal employment opportunity group participation and type of employment		
Employees	At 30 June 2007	At 30 June 2008
Female	172	173
Indigenous	27	29
Linguistically diverse background	16	11
People with a disability	5	5
Ongoing	210	216
Part-time	39	32

Indigenous employees

In the Australian Public Service Commissioner's *State of the Service Report 2006–07*, the Tribunal was noted as being one of four Australian Government agencies with the highest proportion of ongoing Indigenous employees (more than 10 per cent).

At 30 June 2008, the Tribunal's percentage of Indigenous employees was 11.84 per cent of ongoing employees, an increase of 0.94 per cent from the previous reporting period.

The Tribunal has been committed to the maintenance and continued development of an Indigenous Advisory Group since 2003. Open to all Indigenous employees, the group elects a steering committee each year to progress matters identified by the broader group and represent Indigenous employees in a range of forums. The Registrar regularly meets with the steering committee and the full group.

During the reporting period, a key focus for the group continued to be how to recruit, retain and develop Indigenous employees. The Tribunal has an Indigenous Recruitment and Development Plan that the group monitors and reviews. The Tribunal also sent two Indigenous employees to attend the inaugural national conference of Indigenous employees in the Australian Public Service. The conference gave the delegates a forum to consider the state of Indigenous employment in the Australian Public Service and identify areas for future action.

The group also coordinates activities for National Aboriginal and Islander Observance Committee (NAIDOC) week and other community events.

Table 11 Indigenous employees by division and location as at 30 June 2008

Classification	Location/registry							
	Principal	WA	NSW	Qld	Vic	SA	NT	Total
Traineeship	-	-	-	1	-	-	-	1
Cadet	-	-	-	-	-	-	-	-
APS level 1	-	-	-	-	-	1	-	1
APS level 2	3	1	1	2	1	-	1	9
APS level 3	1	1	3	-	-	-	-	5
APS level 4	1	1	-	3	1	-	-	6
APS level 5	1	-	-	-	-	-	-	1
APS level 6	-	1	-	1	-	-	1	3
Legal 1	-	-	-	-	-	-	-	-
Legal 2	-	-	-	-	-	-	-	-
Media 1	-	-	-	-	-	-	-	-
Media 2	-	-	-	-	-	-	-	-
Library 1	-	-	-	-	-	-	-	-
Library 2	-	-	-	-	-	-	-	-
Executive level 1	-	1	-	1	-	-	-	2
Executive level 2	-	-	-	1	-	-	-	1
Senior executive	-	-	-	-	-	-	-	-
Total employees	6	5	4	9	2	1	2	29

Collective agreement, common law agreement and Australian Workplace Agreements

The terms and conditions for employees are governed by the Tribunal's collective agreement or individual workplace agreements.

The collective agreement's nominal expiry date is 22 December 2009. Negotiations for a subsequent collective agreement will begin during the next reporting period.

Of the 245 employees, 228 were covered by the collective agreement, one on a common law agreement and 16 were on Australian Workplace Agreements. Two of the employees on Australian Workplace Agreements are Senior Executive Service (SES) Band 1, whose salaries are negotiated with the Registrar.

The remaining 14 employees are non-SES, five are Executive Level 2, four are Executive Level 1 or equivalent, three are APS Level 6, one is APS Level 4 and one is APS Level 3.

Performance-based pay

As part of the collective agreement settlement, the Tribunal successfully negotiated a performance-based pay collective agreement. Endorsed by unions and employees, the agreement put at risk 0.5 per cent of the annual salary increase against reductions in unscheduled leave. By rewarding employees, for delivering on agreed objectives and improving attendance, the Registrar has fostered a culture of greater attendance.

To manage the cultural shift associated with the introduction of performance-based pay, the Executive releases updated unscheduled leave figures on a quarterly basis and requires senior managers to discuss their team's performance with team members. To assist managers to convey the Tribunal's expectations regarding attendance at work, they have been provided with relevant Australian Public Service Commission information packs and training to foster a culture of attendance. This process ensures that anonymity is preserved and that individual 'hot spots' can be managed locally.

The combination of Executive support, managerial training and employee awareness has seen an improvement in attendance levels across the Tribunal. If attendance rates can be improved by 1.5 days over the life of the collective agreement, the Tribunal will achieve productivity savings in the vicinity of \$1.5 million.

Performance bonus scheme

To accompany its collective agreement settlement, the Tribunal has also instigated a discretionary performance-based bonus scheme which is available to senior managers. Participation in the discretionary performance-based bonus scheme for senior managers agreeing to, and attaining satisfactory performance against, agreed key performance indicators. This scheme was introduced during the reporting period and accordingly no payments have been made during the reporting period.

Non-salary benefits

Through the Tribunal's collective agreement, employees can apply for a number of non-salary benefits. These benefits include studies assistance (see 'Studies assistance', p. 95), an employee assistance program and vocational guidance.

Career and development

Learning and development

The focus for learning and development for Tribunal employees during the reporting period continued to be on enhancing the leadership skills of managers, meeting compliance requirements for occupational health and safety, and technical training in relation to the 2007 amendments to the Act.

During the reporting period the Tribunal invited all staff to participate in a self-rating training needs analysis. Eighty per cent of employees took the opportunity to rate their skills over a number of workplace skill areas. This provided valuable feedback to the Tribunal's People Services unit and the results of the survey will be incorporated into the Tribunal's corporate training calendar for 2008–09.

During the reporting period, the Tribunal convened a National Case Management Conference in May 2008. This biennial event brings together Tribunal Members and relevant employees from across Australia to workshop and share knowledge about native title and agreement-making. Following on from the Claims Resolution Review carried out in 2006, the focus of the conference was on how to bring about the faster resolution of native title claims.

The Tribunal does not currently evaluate effectiveness of its learning and development activities. It is anticipated that this will be developed in the next reporting period, as an outcome of the training needs analysis, and in response to workforce planning and the employee survey.

Acknowledging employees

Each year the Tribunal acknowledges the work of its employees through its Rewards and Recognition program.

In 2007, for the first time, the Tribunal recognised its long serving employees. The Tribunal has been operating since 1994 and was able to acknowledge more than forty employees (or 25 per cent of its workforce) who had reached the milestone of 10 years' or more service to the Tribunal.

A series of presentation ceremonies was held in each of the registries and formed a highlight of the reporting year. Each employee was presented with a piece of Aboriginal bone art as a 'thank you' for longevity in service.



President Graeme Neate presents Western Australia State Manager Lillian Maher with her award in recognition of her more than 14 years of service.

Studies assistance

The Tribunal's studies assistance program aims to support employees in gaining tertiary or further educational qualifications by providing access to study leave and financial assistance. This further education can help employees to acquire the broader conceptual, research, analytical and communication skills, which in turn facilitate the Tribunal's ability to meet its outputs and strategic plan. During the reporting period the Tribunal assisted a total of 27 employees (11 per cent) with 32 applications.

Indigenous study awards, traineeships and cadetships

The Tribunal offered one award under the Indigenous Employee Undergraduate Study Award during the reporting period. The undergraduate award gives Indigenous employees the opportunity to study full-time at Australian universities or other tertiary institutions in an area relevant to a career in the Tribunal or the Australian Public Service. Three trainees were engaged over the reporting period, one in Brisbane and two in Sydney.

Performance against disability strategy

The Tribunal ensures that all employment policies and procedures comply with the *Disability Discrimination Act 1992* (Cwlth), and continued to update its disability strategies during the reporting period.

Occupational health and safety performance

The occupational health and safety coordinator and representatives provided regular reports to the Tribunal's Consultative Forum and National Health and Safety Management committee.

During the reporting period, there were no accidents notified under s. 68 of the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cwlth) and no performance improvement notices were provided to the Tribunal.

Initiatives taken during the year to ensure the health, safety and welfare at work of employees include:

- preventative medical assistance (e.g. workstation assessments, eye management)
- Employee Assistance Program (independent, confidential and professional counselling service)
- vaccination program
- fitness for continued duty examinations as required (e.g. the return to work of ill or injured employees)
- a range of health initiatives to assist employees in maintaining a healthy lifestyle and a safe work environment.

Accountability



Ethical standards and accountability

The Tribunal fosters a culture that recognises the importance of maintaining high ethical standards. Information on ethical standards in the APS Code of Conduct continues to be provided to employees through an induction program, the provision of ongoing information sessions and a range of supporting guidelines available on the Tribunal's intranet. The induction program summarises employees' responsibilities as public servants and includes references to ethical guidelines such as whistleblowing procedures and procedures for determining alleged breaches of the Australian Public Service (APS) Code of Conduct.

The St James Ethics Centre, an independent, not-for-profit organisation, offers interested people the opportunity to apply for a place in its fully-funded Short Course for Good Leadership. The Tribunal, as part of its ongoing commitment to ethical leadership and decision-making, is fully supportive of employees who wish to apply for a place on this course.

Specific expectations on levels of accountability and compliance with the ethical standards are detailed through examples of performance indicators in the Tribunal's Capability Framework and measured through the performance management program.

During the reporting period, one internal complaint of alleged breaches of the APS Code of Conduct was finalised. It was determined that there was a minor breach of the Code of Conduct and appropriate sanctions were applied.

Members of the Tribunal are subject to various statutory provisions relating to behaviour and capacity. As Tribunal Members are not members of the APS, they are not directly governed by the APS Code of Conduct, although they may be subject to it if they are involved in the supervision of staff.

Tribunal Members have voluntarily adopted a code of conduct, procedures for dealing with alleged breaches of the Members' voluntary code of conduct and an extended conflict of interest policy. During the reporting period there were no complaints under either document.

Ecologically sustainable development and environmental performance

The Tribunal improved its environmental performance during the reporting period in accordance with the Australian Government Energy Efficiency in Government Operations Policy and s. 516A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth).

During the second half of the reporting period, the Energy Management Group established in 2002 was replaced by a national Environmental Management Group. The group comprises representatives from each registry and a management representative. It reports quarterly to the Executive Team Meeting.

The Tribunal has taken steps to minimise its impact on the environment, including:

- installation of water-saving devices, recycling bins or recycling systems and reduction of lighting where possible
- installation of multi-functional devices rather than printers and default double-sided printing
- installation of solar blinds in the Principal Registry
- sourcing of second-hand/recycled office furnishings/equipment.

In Western Australia, in response to the state's disruption to gas supply (Varanus Island gas explosion on 3 June 2008) the Principal and Western Australia state registries further reduced their power consumption by reducing use of, or switching off, non-essential computer and other electrical equipment, modifying air-conditioning (Principal Registry only) and reducing and removing unnecessary lighting.

A key focus of the Environmental Management Group over the next six months will be to develop an environmental management system.

External scrutiny

Judicial decisions

There was one High Court judgment on native title during the reporting period and about 50 written Federal Court judgments, some of which involved decisions of the Registrar for more information see p. 48 and p.69. See also the President's Overview, 'Judgments and litigation', p. 3, and 'Appendix II Significant decisions', p. 113.

Freedom of Information

During the reporting period, no formal requests were made under the *Freedom of Information Act 1982* (Cwlth) for access to documents. Further information is provided in 'Appendix III Freedom of Information', p. 146.

Other scrutiny

Human Rights and Equal Opportunity Commission

Under s. 209 of the Act, the Aboriginal and Torres Strait Islander Social Justice Commissioner is required to report annually on the operation of the Act and its effect on the exercise and enjoyment of human rights by Aboriginal peoples and Torres Strait Islanders.

The Commissioner's *Native Title Report 2007* was tabled in Parliament on 31 March 2008.

Although the report stated that the native title system had been successfully used in many parts of the country and acknowledged a range of benefits and achievements, in the Commissioner's assessment, the native title system is too complex, legalistic and bureaucratic.

The report contained 25 recommendations. One recommendation was to 'unscramble the existing legislative gridlock in native title' and another proposed a national summit on the native title system.

Other

There were no reports into the Tribunal's operations by the Australian National Audit Office, Administrative Appeals Tribunal, Commonwealth Ombudsman or Privacy Commissioner during the reporting period.

Accountability to clients

Client satisfaction

The Tribunal commissioned research into the satisfaction of its clients and stakeholders, which took place in February and March 2008. This followed research completed in 2003 and 2005 and targeted research on agreement-making conducted in 2006.

The Tribunal's overall satisfaction rating was 94 per cent (above the target satisfaction of 80 per cent), equating to an average of 7.15 (out of a maximum of 10), improved from 6.77 in 2005. Only six per cent of 213 clients surveyed were dissatisfied (rating below five). In the 2003 research, the satisfaction level was 84 per cent and in 2005 it improved to 90 per cent.

Other major findings include the following:

- Positive aspects of the Tribunal have not changed much since 2003, though some have strengthened, with staff continuing to be favourably rated and

more satisfaction with speed and mediation, plus improved communication, administration and systems.

- The main improvements noted were with useful information, interested and helpful staff, staff knowledge and professionalism, responsiveness, speed, politeness, ease of contact and accurate advice, good mediation, efficiency and organisation.
- Dissatisfaction based on outcomes fell from 11 per cent in 2005 to 8 per cent in 2008 and dissatisfaction with processes fell from 13 per cent to 9 per cent.
- Overall, Indigenous organisations gave lower than average ratings, though the average was 6.39, being consistent with 2005. Government agencies gave the highest overall ratings, with an average of 7.55, and lawyers were also above average, with 7.36.

Clients and stakeholders identified four areas for potential improvement that were not mentioned in 2005:

- better mediation and more consultation
- fairer, more impartial advice
- better mapping and research
- more advice on or assistance with registration changes.

The results have been used to report against the qualitative measures set out in the Tribunal's output and performance framework. Table 12 below provides the results for the quality measure for Output group 2—Agreement-making.

Table 12 Satisfaction with overall agreement-making processes

Criteria	Exceeds	Meets	Below	DK/NA*
Cost effectiveness of the process	15%	42%	38%	6%
Fairness of the process to all parties	13%	56%	29%	2%
Efficiency of the process	8%	51%	40%	2%
Efforts to learn about agreement making	11%	45%	19%	25%
Extent staff make you feel empowered	8%	59%	16%	16%
Your ability to deal with future agreements or disputes	11%	68%	8%	15%
Extent the agreement led to a settled outcome	12%	57%	16%	14%
Extent the outcome is likely to be stable and durable over time	8%	63%	13%	16%
Extent to which the processes help build relationships between the parties	19%	57%	21%	3%

*Don't know/not applicable

The results of the research will be used to inform the Tribunal's continuous improvement program and will be used to develop qualitative measures for ongoing measurement.

Client Service Charter

The Tribunal maintains a Client Service Charter to ensure that service standards meet client needs. No complaints that required action under the charter were received during the reporting period.

Social justice and equity in service delivery

The work of the Tribunal has an impact on matters of social justice. As explained in this annual report and in the *Strategic Plan 2006–2008*, the primary purpose of the Tribunal is to work with people to resolve native title issues over land and waters. The Tribunal must try to carry out its functions in a fair, just, economical, informal and prompt manner and may take into account the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.

It is critical for all parties to native title proceedings to understand the processes involved in reaching agreements and otherwise resolving native title issues under the Act. To promote understanding, the Tribunal provides detailed information and assistance to clients and stakeholders on a day-to-day basis. For further information see ‘Output group 1—Stakeholder and community relations’, p. 49.

The Tribunal also recognises that benefits to Indigenous Australians often arise from negotiated agreements about native title and related matters. For further information see ‘Output group 2—Agreement-making’, p. 54.

The *Strategic Plan 2006–2008* outlines in detail the current operating environment for the resolution of native title issues, areas for improvement in our service delivery and the key result areas. It is available from the Tribunal’s website, www.nntt.gov.au or from any office of the Tribunal.

Online services

The Tribunal launched a new website during the reporting period to better meet the information needs of stakeholders and clients, including improved navigation, design and content management. The previous site was six years old and, over time, research showed it was not meeting the needs of the Tribunal’s diverse audiences.

The refreshed website provides improved access to the Tribunal’s geospatial products, publications, newsletters and media releases, statistical information, national and state overviews and applications, determinations and ILUAs. The site continues to meet Australian Government online standards.

Native TitleVision (NTV), the Tribunal's free online visualisation, mapping and query tool, continues to be well supported by stakeholders. In the past year there was a 25 per cent increase in the number of organisations registering to use NTV, with registrations totalling over 240. It is used to provide supporting information in mediations and as background to decision-making by other stakeholders. It provides a geospatial view of the Tribunal's registers and databases, overlays of administrative regions, non-freehold and mining tenure and topographic features.

Multimedia presentations

To simplify native title for stakeholders, multimedia presentations were introduced to the website. Short multimedia clips, targeted at a general audience, explain some of the key concepts in native title. The five topics covered are history, exactly what is native title, three approaches to negotiating native title, who manages the native title process and key terms.

History: View and listen to a brief overview of the history leading up to the High Court of Australia's 1992 Mabo decision.



Three approaches to negotiating native title: Take a visual administrative journey and see a native title holder speak about each approach.



Exactly what is native title: See native title holders speak about what their particular native title rights and interests mean to them.



Performance against purchasing policies

Procurement

The Tribunal's procurement policies and practices reflect the principles set out in the Commonwealth Procurement Guidelines. The Tribunal publishes an annual procurement plan on AusTender by 1 July each year to draw the early attention of businesses to potential procurement opportunities.

The Tribunal policy and procedures on procurement are communicated through the Chief Executive Instructions to assist employees in complying with the requirements of the *Financial Management and Accountability Act 1997* (Cwlth) and the accompanying regulations, and Commonwealth Procurement Guidelines.

As part of the Tribunal's procurement policy it published details of:

- publicly available business opportunities with a value of \$10,000 or more on AusTender

- actual contracts or standing offers awarded with a value of \$10,000 or more on AusTender
- actual contracts or standing offers with a value of \$100,000 or more on our website as required by Senate Order 192.

Contracts

In accordance with the Senate Order dated 21 June 2001, the Tribunal has continued to list all contracts in excess of \$100,000 on its website. This list identifies whether these contracts contain confidentiality clauses in line with the Senate Order directions.

Consultancies

Consultants continue to provide services where specialised or professional skills are not available in the Tribunal or where there is an identified need for independent research or assessment.

The Tribunal engages consultants based on value for money, open and effective competition, ethics and fair dealing and accountability.

The Act provides for consultancies in two circumstance: s. 131A specifies that the President may engage consultants for any assistance, mediation or review that the Tribunal provides under the Act (no consultancies were entered into under s. 131A); and s. 132 provides that the Registrar may engage consultants with suitable qualifications to provide expert advice and services, including research activities.

During the reporting period, four new consultancy contracts were entered into involving a total actual expenditure of \$132,857. In addition, three ongoing consultancy contracts were active during the 2007–08 year, involving total actual expenditure of \$179,956. More detailed information on consultancy contracts let during the year to a value of \$10,000 or more is available in 'Appendix V Consultants', p. 152.

As a result of implementing the new IT Enterprise Architecture strategy, the Tribunal recruited high calibre employees in place of external consultants, thus the decrease in reported expenditure from last year. For actual expenditure on consultancies during the reporting period, see Table 13 below.

Table 13 Expenditure on consultancies by division	
Division	Expenditure
Corporate Services and Public Affairs	\$296,505
Service Delivery	\$ 16,308
Total	\$312,813

Finances



How the Tribunal is funded

The Tribunal forms part of the ‘justice system’ group within the Attorney-General’s portfolio and it receives one source of funding from Parliament: departmental appropriation.

The Tribunal uses resources to produce goods and services (outputs) at a quantity, quality and price endorsed by government. The Tribunal’s outputs for 2007–08 are detailed in Table 14 Total resources for outcome, p. 106.

Measuring performance

The Tribunal publishes detailed financial forecasts each year as part of the Budget Papers.

The estimation model

The Tribunal’s budget planning is consistent with the statutory requirements:

- in March/April of each year the Portfolio Budget Statement (PBS) is prepared for the following financial year
- in July, the output prices are reviewed based on actual salary and administrative cost data for the just completed financial year. These figures are used in the annual report for that year
- in October/November of each year, the PBS output data for the current financial year is reviewed. This process may include revising PBS and revising the estimated numbers of outputs. Any changes are reported to Parliament through the additional estimates process.

The Tribunal accepts that the price and output estimates that are generated from this model will not lead to true benchmarking, particularly as it does not rely on analysis of the underlying causes of price changes. Given the nature of the Tribunal’s work, benchmarking is very difficult.

The estimation process in 2007–08

The Tribunal followed the process outlined above during this reporting period.

Table 14 identifies the price of each output group and outputs during the reporting period against the full-year budget and quantifies any variation.

Key results in 2007–08

Key results for Tribunal departmental resources included:

- Operating surplus: the Tribunal had an operating surplus of \$2.95 million, in large part due to reductions in suppliers’ expenditure and depreciation.
- An increase in equity: net equity increased by \$3.08 million to a total of \$13.24 million due to accumulated surplus.

The Tribunal received an unqualified audit report on the 2007–08 financial statements from the Australian National Audit Office.

Table 14 Total resources for outcome

	(1) Full-year budget (a)	(2) Actual (b)	Variation (column 2 minus column 1)	Budget 2008–09
	2007–08 \$'000	2007–08 \$'000	\$'000	\$'000
Output group 1: Stakeholder and community relations				
Output 1.1 : Projects and initiatives	1,168	716	-452	862
Output 1.2 : Assistance and information	3,243	3,344	101	3,921
Subtotal output group 1	4,411	4,060	-351	4,783
Output group 2 : Agreement-making				
Output 2.1 : Indigenous land use agreements	5,001	3,431	-1,570	5,048
Output 2.2 : Native title agreements	10,371	11,107	736	11,658
Output 2.3 : Future act agreements	2,703	1,919	-784	1,946
Subtotal output group 2	18,075	16,457	-1,618	18,652
Output group 3 : Decisions				
Output 3.1 : Claim registration	5,221	3,759	-1,462	2,723
Output 3.2 : Registration of indigenous land use agreements	2,405	2,429	24	2,083
Output 3.3 : Future act determinations	978	559	-419	599
Output 3.4 : Finalised objections	1,875	2,867	992	3,316
Subtotal output group 3	10,479	9,614	-865	8,721
Total for outcome (total price of outputs and administered expenses)	32,965	30,131	-2,834	32,156
Less revenue from other sources available to be used ^(c)	200	243	43	200
Net cost to government (appropriation)	32,765	29,888	-2,877	31,956

	2007–08	2008–09
Average staffing level	223	224

^(a) the budget for 2007–08 is the budget published in the Tribunal's 2007–08 Portfolio Budget Statements, adjusted for the increased efficiency dividend

^(b) actual expenses shown are the total expenses recorded against each output in the financial statements

^(c) revenue from other sources available to be used is miscellaneous revenue from the sale of goods and services, and interest income.

Tribunal finances

At the beginning of 2007–08, the Tribunal expected to receive and spend \$33.22 million. This sum included lapsing program funding of \$8.25 million. The lapsing funding is part of a four-year cycle of funding which commenced in 2004–05 through to 2008–09. The proposed level of funding for the four-year cycle from 2009–10 was addressed as part of a review of funding the native title system.

The Tribunal did not receive any additional funding through Additional Estimates and Supplementary Additional Estimates processes. However, it did have to meet the increased efficiency dividend levied by the Australian Government in early 2008. This reduced expected government revenue to \$32.97 million.

The Tribunal's expenditure for the 2007–08 reporting period was \$30.13 million, and consequently the Tribunal finished the year with an operating surplus of \$3.077 million. The reduction in suppliers' expenditure is due to a moratorium on technology costs and savings in travel and claim management expenditure.

Significant shifts in the Tribunal's income, expenses and balance sheets in this reporting period were:

- although expenses rose in comparison to 2006–07, total expenditure was below budget, and costs of employees remained the Tribunal's largest single expense (\$19.73 million)
- liabilities rose slightly due to a modest increase in employee provisions, the largest growth being in payments for office rents and outgoings
- the increase in net assets is largely attributable to an increase in financial assets (\$3.22 million) due to undrawn appropriation receipts.

Details of trends in Tribunal finances are provided in Table 15 Comparison of income, expenses assets and liabilities, p. 108.

Table 15 Comparison of income, expenses assets and liabilities

Trends in departmental finances		(1) 2006–07	(2) 2007–08	(2)–(1) Change from last year
		\$m	\$m	\$m
Revenue from Government		32.67	32.97	.30
Other revenues		.06	.24	.18
Total income		32.73	33.21	.48
Employee expenses		18.92	19.73	.81
Supplier expenses		8.57	9.96	1.39
Other expenses		.73	.44	-.29
Total expenses		28.22	30.13	1.91
Operating result		4.51	3.08	-1.43
Financial assets	A	13.37	16.59	3.22
Non-financial assets	B	1.96	2.00	.04
Liabilities	C	5.17	5.35	.18
Net assets = A +B-C		10.16	13.24	3.08

Understanding the Tribunal's financial statements

The content and format of the financial statements is prescribed by the Minister for Finance and Administration under the *Financial Management and Accountability Act 1997* (Cwlth). The statements include:

- an income statement, which shows Tribunal income and expenses on an accrual basis
- a balance sheet, which details Tribunal assets and liabilities, as well as the amount of Australian Government's equity at year-end
- a statement of cash flows, which shows where the cash used during the year came from and how it was used
- a statement of changes in equity: this shows how the Australian Government equity held by the Tribunal has changed due to changes in asset valuation, accumulated surpluses and capital transactions.

More information is provided in the accompanying schedules and explanatory notes, while information on related topics is available elsewhere in this report, as follows:

- executive remuneration policies (see 'Collective agreement, common law agreement and Australian Workplace Agreements', p. 92)
- procurement policies and practices (see 'Performance against purchasing policies', p. 102)
- consultancies (see 'Consultancies', p. 103)
- payments for market research and advertising (see 'Appendix IV Use of advertising and market research', p. 151).

Full detail are available in 'Appendix VI Audit report and notes to the financial statements', p. 154.

Appendices



Appendix I Human resources

Average number of employees for 2007–08 was 247.5. This is not a full-time equivalent figure and does not include Holders of Public Office (President, Members or Registrar).

Table 16 Employees by classification, location and gender as at 30 June 2008

Classification	Salary range	Male								Female							
		Location/registry								Location/registry							
		Principal	WA	NSW	Qld	Vic	SA	NT	Total	Principal	WA	NSW	Qld	Vic	SA	NT	Total
Traineeship	10,375–27,667	-	-	-	1	-	-	-	1	-	-	-	-	-	-	-	-
Cadet	11,971–36,755	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
APS Level 1	20,751–38,225	-	-	-	-	-	-	-	-	-	-	-	-	-	1	-	1
APS Level 2	39,139–43,402	2	2	-	2	1	1	-	8	11	16	1	10	1	1	1	41
APS Level 3	44,582–48,117	3	-	-	-	-	-	-	3	12	4	4	2	-	-	1	23
APS Level 4	49,689–53,949	2	1	1	1	-	-	-	5	8	11	1	12	2	2	1	37
APS Level 5	55,422–58,765	9	-	-	-	-	-	-	9	3	-	-	1	-	1	-	5
APS Level 6	59,858–68,760	11	4	3	2	2	1	1	24	10	7	5	7	2	2	1	34
Legal 1	45,935–91,789	-	-	-	1	-	-	-	1	5	-	-	-	-	-	-	5
Legal 2	101,928–106,343	1	-	-	-	-	-	-	1	-	-	-	-	-	-	-	-
Media 1	62,350–70,850	-	-	-	-	-	-	-	-	1	-	-	1	-	-	-	2
Media 2	80,719–91,789	-	-	-	-	-	-	-	-	1	-	-	-	-	-	-	1
Library 1	41,739–58,557	-	-	-	-	-	-	-	-	2	-	-	-	-	-	-	2
Library 2	59,858–66,894	-	-	-	-	-	-	-	-	-	-	-	1	-	-	-	1
Exec level 1	76,736–82,858	4	1	1	3	-	-	-	9	8	4	4	2	1	-	-	19
Exec level 2	88,503–103,691	6	-	1	1	1	-	1	10	-	1	-	-	1	-	-	2
SES 1	133,813	-	1	-	-	-	-	-	1	-	-	-	-	-	-	-	-
Total employees	245	38	9	6	11	4	2	2	72	8	43	15	36	7	7	4	173

Table 17 Holders of public office of the National Native Title Tribunal as at 30 June 2008

Name	Title	Appointed	Term	Location
Graeme Neate	President	1 Mar 1999 ¹ 1 Mar 2004 1 Mar 2007	Five years Reappointed for a further three years Reappointed for a further five years	Brisbane
Christopher Sumner	Full-time Deputy President	18 Apr 2000 ² 18 Apr 2003 12 April 2007	Three years Reappointed for a further four years Reappointed for a further five years	Adelaide
John Sosso	Full-time Deputy President	28 Feb 2000 ³ 28 Feb 2003 28 Feb 2007	Three years Reappointed for a further four years Appointed as a Deputy President for five years	Brisbane
Alistair (Bardy) McFarlane	Full-time Member	20 Mar 2000 20 Mar 2003 20 Mar 2007	Three years Reappointed for a further four years Reappointed for a further five years	Adelaide
John Catlin	Full-time Member	6 Oct 2003 6 Oct 2006	Three years Reappointed for a further five years	Perth
Graham Fletcher	Full-time Member	20 Mar 2000 20 Mar 2003 20 Mar 2007	Three years Reappointed for a further four years Reappointed for a further five years	Cairns
Daniel O'Dea	Full-time Member	9 Dec 2002 9 Dec 2005 9 Dec 2007	Three years Reappointed for a further two years Reappointed for a further five years	Perth
Gaye Sculthorpe	Full-time Member	2 Feb 2000 ⁴ 2 Feb 2003 2 Feb 2004 2 Feb 2008	Three years Reappointed for a further three years Reappointed as full-time for four years Reappointed for a further six months	Melbourne
Robert Faulkner	Part-time Member	2 Aug 2004	Five years	Sydney
Neville MacPherson	Part-time Member	1 Sep 2003 ⁵ 1 Sep 2006	Three years Reappointed for a further five years	Melbourne
Ruth Wade	Part-time Member	2 Feb 2000 2 Feb 2003 2 Feb 2006 2 Feb 2008	Three years Reappointed for three years Reappointed for a further two years Reappointed for a further six months	Brisbane
Franklin Gaffney	Acting Native Title Registrar	26 Nov 2007	Appointed pending appointment of Native Title Registrar	Perth

1 Reappointed from part-time Member to President

2 Reappointed from full-time Member to Deputy President

3 Reappointed from full-time Member to Deputy President

4 Reappointed from part-time Member to full-time Member

5 Reappointed from full-time Member to part-time Member

Appendix II Significant decisions

During the reporting period, the following High Court and Federal Court decisions were the most significant in terms of their impact on the operation of the Tribunal. For further native title decisions please refer to the *Native Title Hot Spots* archive on the Tribunal's website.

In this Appendix references to sections are to sections of the *Native Title Act 1993* (Cwlth)(the Act) unless stated otherwise.

High Court

Griffiths v Minister for Lands, Planning and Environment (2008) 82 ALJR 899, (2008) 246 ALR 218, [2008] HCA 20, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Keifel JJ, 15 May 2008

This was an appeal over the Northern Territory Court of Appeal's decision in *Minister for Lands, Planning and Environment v Griffiths & Ors* (2004) 14 NTLR 188; [2004] NTCA 5. It concerned the compulsory acquisition of native title rights and interests in relation to land in the town of Timber Creek in the north-west of the Northern Territory. The town largely comprises unalienated 'Crown land' within the meaning of that term in the Crown Lands Act (NT). The appeal was conducted on the basis that native title existed in relation to the relevant land or waters.

To bring about the acquisition, the Minister relied upon s. 43(1) of the Lands Acquisition Act (NT) (the LAA) which empowers the Minister, subject to that statute, to acquire compulsorily land 'for any purpose whatsoever'. The purpose of the compulsory acquisition was to free the land of native title (if any) and to grant to third parties Crown leases for various uses.

The appellants argued that:

- notwithstanding the phrase 'any purpose whatsoever' with regard to acquisition of land under s. 43(1)(b) of the LAA, that section does not confer power upon the Minister to acquire land from one person solely to enable it to be sold or leased by the Territory for private use to another person
- subsection 24MD(2) of the Act permitted extinguishment of native title by compulsory acquisition under the LAA only when non-native title rights and interests also subsisted in the area of land or waters to which the acquisition relates.

In relation to the first point, the amendment of the LAA to allow the compulsory acquisition of land 'for any purpose whatsoever' was seen by a majority of the High Court as a removal from the Territory legislature of any ground for the limitation of the statutory power. It was unnecessary in this case to consider whether there are any limits to the scope of that power as it clearly extends, at least, to include acquisition of land for the 'purpose of enabling the exercise of powers conferred upon the executive

by another statute of the Territory'. In this case, the grant of interests was to third parties. Kirby and Kiefel JJ disagreed with the majority on this point.

In relation to the second point, s. 24MD(2)(b) of the Act requires that the 'whole, or equivalent part, of *all* non-native title rights and interests, in relation to the land or waters to which the native title rights and interests that are compulsorily acquired relate, is also acquired (whether compulsorily or by surrender, cancellation or resumption or otherwise) in connection with the compulsory acquisition of the native title rights and interests'. (Emphasis added.)

The appellants submitted that this requirement can only be satisfied where there are some non-native title rights and interests in the land, and they also are acquired. The Court rejected this argument and held that 'all' in s. 24MD(2)(b) may be read as 'any'.

The appeal was dismissed.

Federal Court decisions

During the reporting period several decisions of the Full Court of the Federal Court were handed down. They are significant because they illustrate interpretation and application of the principles laid down by the High Court, particularly in *Western Australia v Ward* (2002) 213 CLR 1, *Commonwealth of Australia v Yarmirr* (2001–2002) 208 CLR 1 and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (Yorta Yorta).

Also summarised are a number of decisions of the Federal Court which directly relate to the functions of the Registrar and the Tribunal.

Full Court appeals

Jango v Northern Territory of Australia (2007) 159 FCR 531; (2007) 240 ALR 432; [2007] FCAFC 101, French, Finn and Mansfield JJ, 6 July 2007

This case dealt with an appeal to a Full Court of the Federal Court against the dismissal of an application for a determination of compensation made under s. 61(1) of the Act. The main issues were whether the trial judge either:

- misread the compensation claim group's case
- should have made a decision in their favour outside of the nature of their case as formally stated.

The compensation application was brought on behalf of a group of Yankunytjatjara and Pitjantjatjara People, whose native title rights and interests were said to have been extinguished in land around the town of Yulara in the Northern Territory. Their claim to hold native title at the time of the alleged extinguishment was based on the traditional laws and traditional customs of the Western Desert Bloc, i.e. the members

of the compensation claim group claimed native title as people of the eastern Western Desert.

Questions relating to both the existence (and extinguishment) of native title and any subsequent liability to provide compensation were heard as preliminary issues. The determination of quantum was ‘deferred pending resolution’ of the preliminary issues. His Honour Justice Ronald Sackville (the trial judge) ‘delivered ... careful, lengthy and comprehensive’ reasons for dismissing the compensation application.

In summary, the trial judge dismissed the application on the basis that:

- it had not been shown that the compensation claim group had, at time when the alleged extinguishing events took place, any native title rights and interests in the compensation claim area
- the evidence as presented did not prove the case for the existence of native title as put in the application and points of claim—see *Jango v Northern Territory* (2006) 152 FCR 150; [2006] FCA 318.

Their Honours observed that:

The Court cannot, in hearing a native title determination application or a compensation application, conduct a roving inquiry into whether anybody, and if so who, held any and if so what native title rights and interests in the land and waters under consideration. Such an inquiry is an administrative rather than [a] judicial function. Indeed, recent amendments to the NTA allow such inquiries to be carried out under certain circumstances by the National Native Title Tribunal—at [84].

On appeal, it was said that the finding that the case failed, because the evidence did not support a ‘dichotomy’ between (or ‘combination’ of) the pleaded ‘conditions’ and ‘additional factors’, reflected a fundamental misreading of the pleaded case which, it was said, made plain that native title rights and interests were held if a person satisfied ‘at least one’ of the pleaded conditions.

Their Honours dismissed this contention saying, among other things, that:

- the trial judge did not misread or misunderstand the case
- there was no doubt that both the application and the points of claim identified conditions, at least one of which was necessary (and any of which was sufficient) to identify a person as holding native title rights and interests
- the ‘additional factors’ were not propounded as criteria for the identification of a person as a holder of native title rights and interests but were formulated as relevant to the nature and extent of the rights and interests attributable to particular persons and their seniority and authority relevant to others
- in this case, the ‘dichotomy’ was found in both the application and the points of claim

- although the claimants' closing written submissions departed from that dichotomy, in closing oral argument, counsel for the claim group came back to the case set out in both the originating process (i.e. the application) and the points of claim.

The appellants argued that the primary judge, having made findings as to the manner in which native title rights are acquired under the traditional laws and customs of the Western Desert bloc, should have proceeded to give effect to those findings in relation to all or some of the members of the compensation claim group, even where doing so meant departing from the case put to the Court.

This was rejected, with their Honours reiterating that the Act:

does not mandate the approach proposed by the appellants. It would have been inconsistent with the case presented by the appellants and which the respondents were prepared to meet ... His Honour was entirely correct in making his decision within the framework of the case presented by the appellants. In so doing it must be emphasised that he recognised that an unduly rigid view should not be taken of the pleadings—at [92].

Their Honours also recognised the more fundamental difficulty facing the trial judge, which was that the evidence before him reflected 'such a variety of opinions, practices and assertions' that it could not be taken as establishing that the applicants observed and acknowledged at the relevant time laws and customs of the Western Desert cultural bloc as pleaded in the points of claim.

For the reasons given, the compensation claim group's appeal was dismissed.

Western Australia v Sebastian [2008] FCAFC 65 (Full Court), Branson, North and Mansfield JJ, 2 May 2008

In three cases, *Rubibi Community (No 5) v Western Australia* [2005] FCA 1025, *Rubibi Community v Western Australia* (No. 6) [2006] FCA 82 and *Rubibi Community v Western Australia* (No 7) [2006] FCA 459, his Honour Justice Ronald Merkel, among other things, held that:

- there were communal native title rights and interests possessed by members of the Yawuru community in relation to an area of land and waters around Broome, Western Australia
- the rights and interests were not the group native title rights and interests claimed to be possessed by members of the Walman Yawuru clan
- the evidence supported the inference that the Yawuru community was entitled to exclusive possession and occupation of the Yawuru claim area (excluding the intertidal zone) where there has been no extinguishment
- the Djungan People were a subgroup of the Yawuru community and therefore the determination of native title should extend over both the northern and southern parts of the Yawuru claim area.

In his final judgment in relation to the claim, Merkel J published reasons for judgment determining, among other things, the areas within the Yawuru claim area where the native title rights and interests of the Yawuru community had been wholly or partially extinguished. The State of Western Australia and the Walman Yawuru claimants appealed against the decision and Yawuru claimants cross-appealed. The Commonwealth and the Western Australian Fishing Industry Council also made submissions in relation to aspects of the appeals and the cross-appeal.

Broadly speaking, the appeal proceedings concerned:

- whether the northern part of the claim area was traditionally held by what was said to be a different group, the Djugan People
- whether the Walman Yawuru clan held native title as a group separate from the Yawuru community
- the basis on which his Honour found that there was continuing observance of the traditional rules governing the descent of rights
- certain extinguishment issues including the validity of certain reserves and whether s. 47B applied to areas within the Broome town site so that any extinguishment over those areas had to be disregarded.

In relation to the first point, the Full Court rejected the State's contention that the Djugan were a group separate from the Yawuru People. The trial judge did find that Djugan and Yawuru formed one 'native title holding community ... now and at sovereignty' and that the Djugan were a subgroup of the Yawuru. The evidence supporting this finding established, despite cultural differences, that there were extensive traditional connections and commonalities between the Djugan and the Yawuru.

The Full Court held, in relation to the second point, that Merkel J had applied the legal test required by the *Yorta Yorta* case and correctly determined that native title was held on a communal basis by the Yawuru community under their traditional laws and customs. It rejected the position of Walman Yawuru claimants that the group held native title rights and interests separately from the Yawuru community in respect of the area over which the group has a special attachment. Indeed, the Court upheld Merkel J's finding that the only rights and interests that the Walman Yawuru possess in relation to the claim area are rights or interests held in any capacity they may have as members of the Yawuru community.

In relation to the third point, the Court found no error in his Honour's findings that there had been continuity in observance of the rules governing the descent of rights in the Yawuru community. Merkel J considered whether the existence of an ambilineal or a cognatic descent system reflected a change from the traditional laws and customs at sovereignty such that the rights and interests now asserted are no longer possessed under the laws and customs observed by the Yawuru group at sovereignty. His Honour decided it did not reflect such a change. He said that a 'change from a community

similar to a patrilineal clan-based community at or before sovereignty to a cognatic or ambilineal based community is a change of a kind that was contemplated under the ‘contingency provisions’ of those traditional laws and customs’.

In relation to the last point, the Court held that Merkel J erred in concluding that:

- Reserve 631 was validly created
- native title was wholly extinguished over the Broome Cemetery reserve
- the Yawuru claimants did not, for the purposes of s. 47B of the Act, occupy the areas at Kennedy Hill at the time their claimant application was made.

All the other challenges to his Honour’s findings on the extinguishment issues failed.

In relation to s. 47B (which allows for certain extinguishment of native title to be disregarded) the State argued that it did not apply to any area within the town site of Broome because it was subject to a proclamation ‘under which the whole or a part of the land or waters in the area is to be used for public purposes, or for a particular purpose’ within the meaning of s. 47B(1)(b)(ii). The Full Court rejected this argument and indicated that the approach in *Northern Territory of Australia v Alyawarr, Kayteye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 should be accepted as correct unless and until the High Court establishes that it is erroneous.

Bodney v Bennell (2008) 167 FCR 84, [2008] FCAFC 63, Finn, Sundberg and Mansfield JJ, 23 April 2008

This case concerns four appeals against the judgment of his Honour Justice Murray Wilcox in *Bennell v Western Australia* (2006) 153 FCR 120, [2006] FCA 1243 (Bennell).

The main issue before the Full Court was whether the trial judge correctly applied ss. 223(1)(a) and 223(1)(b) of the Act. In joint reasons for judgment, the Full Court found, among other things, that the trial judge had incorrectly applied those provisions and so the Full Court set aside the relevant orders made at first instance. The separate question dealt with in *Bennell* was then remitted to the docket judge to determine the future progress of the matter.

In *Bennell*, pursuant to Order 29, rule 2 of the Federal Court Rules, Wilcox J dealt with three separate questions in a separate proceeding (Part A, which is part of the area covered by the Single Noongar claim). Six claimant applications in the south-west of Western Australia were involved. In paraphrase (and putting questions of extinguishment to one side), the separate questions were:

- whether native title existed in the area covered by the separate proceedings (which encompassed parts of the Perth metropolitan area and some surrounding non-urban areas)
- if so, whether native title to Part A was held by the Noongar People as a single communal title

- what were the nature and extent of the native title rights and interests in relation to Part A?

Wilcox J answered the first two questions in the affirmative. In relation to the third question his Honour found that certain native title rights and interests exist but left open the question of whether they were held to the exclusion of all others. His Honour also dismissed the five overlapping applications, all made by Christopher (Corrie) Bodney.

The State of Western Australia and the Commonwealth of Australia sought leave to appeal against the judgment in Bennell. The Western Australian Fishing Industry Council (WAFIC) sought leave on limited grounds. Mr Bodney sought leave to appeal against the dismissal of his applications and the decision in favour of the Noongar People. The Court granted leave to all four appellants.

The major issues the State and Commonwealth raised in their grounds of appeal were whether:

- there had been continuity in the acknowledgment of the traditional laws and observance of the traditional customs of the single Noongar society from sovereignty until recent times, as required under s. 223(1)(a) of the Act
- Wilcox J was wrong in his approach to the issue of connection between the Noongar People and the area covered by Part A under s. 223(1)(b) of the Act.

In dealing with these grounds of appeal, their Honours assumed, without deciding, that there existed at sovereignty a single Noongar society in the area covered by the Single Noongar claim (as Wilcox J had found).

The Court was of the view that:

Because it is the normative system that is the source of the rights and interests, it is necessary in order to prove native title that the normative system has had a continuous existence and vitality since sovereignty ... It is therefore necessary for native title claimants to show that the normative system that existed at sovereignty is substantially the same as the one that exists today. If it is not, then any rights and interests are not “possessed under the traditional laws acknowledged and traditional customs observed”—at [47].

Among other things, the Court was critical of the fact that Wilcox J made no express findings and (on many topics) ‘no concluded or even tentative view’ in relation to proof of continuity of acknowledgment and observance of marriage laws and customs, noting that:

- Wilcox J had glossed over evidence that showed there was ‘a large degree of inconsistency between the [Aboriginal] witnesses as to the extent to which cousins could marry’ and ‘the rules are not followed today’

- the fact that the traditional punishment of spearing those who transgressed marriage rules was not still practised was a ‘significant change’.

On laws and customs relating to burial practices, the Court noted that Wilcox J had found that there were ‘significant discrepancies’ in the evidence.

The Court accepted that the correct way to approach the issue of continuity was:

- to ask whether acknowledgement of traditional laws and observance of traditional customs had continued substantially uninterrupted since sovereignty
- to answer that question by ascertaining whether, for each generation of the relevant society since sovereignty, those laws and customs both constituted a normative system giving rise to rights and interests in land and, in fact, regulated and defined the rights and interests which those people had and could exercise in relation to the land and waters.

Their Honours found that Wilcox J ‘did not pose the continuity question in the form propounded’ by the High Court in *Yorta Yorta*:

Instead of enquiring whether the laws and customs have continued to be acknowledged and observed substantially uninterrupted by each generation since sovereignty, he asked whether the community that existed at sovereignty continued to exist over subsequent years with its members continuing to acknowledge and observe at least some of the traditional 1829 laws and customs relating to land—at [73].

It was found that Wilcox J’s failure to address continued acknowledgment and observance of traditional law and custom between sovereignty and the present was ‘underlined, and perhaps explained’ by his ‘disregard’ of opinions expressed by the anthropologists who gave evidence in *Bennell* based on the writings of nineteenth and twentieth century anthropologists and observers. The Court was careful to note that:

We use the word “disregard” because, while his Honour said he obtained no benefit or little assistance from this material, he did not positively disallow it, so that it was not part of the evidence before him. It is nevertheless clear that his Honour said he would not take it into account and that he did not do so—at [84].

Therefore, it was found, among other things, that:

- Wilcox J committed a ‘serious error’ by failing to have regard, or attach weight, to expert anthropological evidence on the observance of the laws and customs in the period between sovereignty and the present
- these errors led the primary judge to deprive himself of the very evidence he should have used to determine (as he was required to do, following *Yorta Yorta*) whether, for each generation since sovereignty, acknowledgment and observance of the Noongar laws and customs had continued substantially uninterrupted.

At several points, Wilcox J referred to changes in law and custom being ‘inevitable’ or ‘readily understandable’ because those changes were forced on Aboriginal people

by white settlement. The Court pointed out that it was clear from Yorta Yorta that the reasons for such ‘important’ changes are irrelevant.

The Court held that the Commonwealth succeeded in proving the ‘continuity’ errors it alleged on its appeal, and that the State succeeded on the ground that Wilcox J applied the wrong test in determining whether the claimants had continued to acknowledge and observe traditional laws and customs from sovereignty to the present.

The Court found that Wilcox J was also wrong to ‘simply subsume the connection issue in relation to [the Perth metropolitan area] within a finding of connection to the whole [Single Noongar] claim area’; i.e. there should have been an inquiry into the connection, by traditional laws and customs, of the claimants to Part A.

Finally, their Honours noted (among other things) that:

- the connection inquiry can have a ‘particular topographic focus’, e.g. in cases where the question was whether claimants had lost, or maintained, their connection with particular parts of the claim area
- the topographic focus of connection was critical to this appeal, given that the separate question related only to Part A, i.e. the Perth metropolitan area
- where what was in issue was whether connection had been maintained to a particular part of a claim area, it was critical that the traditional laws and customs be examined ‘as they relate to that area’ and that the evidence demonstrated that connection to that area had, ‘in reality’, been substantially maintained since the time of sovereignty.

Wilcox J adopted a quite different course in establishing connection to Part A; i.e. he simply asserted that he was satisfied that the applicants had succeeded in demonstrating the necessary connection between themselves and most of the Single Noongar claim area and so decided the claimants had established a connection with Part A.

Wilcox J found that, while there was no evidence to demonstrate an irrefutable line of descent from a Noongar person living in Part A at sovereignty to any particular member of the claimant group (i.e. the claim group as a whole), it seemed ‘most unlikely’ that the present wider Noongar community contained no descendant of any of them. The Full Court found that:

- even if this so-called statistical probability was accepted, it would not provide any evidence of the descendant’s present connection to Part A
- Wilcox J inferred a connection from the descendant’s membership of the Single Noongar community, irrespective of whether that unknown person (or persons) claimed rights and interests in Part A or, indeed, presently observed and acknowledged that community’s laws and customs, a methodology that suffered from the same vice as was noted earlier

- as the rights and interests in question related only to Part A, and as the acquisition of rights over land and interests in that area was tied, by the community's laws and customs, to descent rules, proof of continuing connection to that area would have to track the continuing operation and vitality of those descent rules as they related to that area.

In conclusion, in relation to s. 223(1)(b), the Court found that:

- Wilcox J misapplied s. 223(1)(b) of the Act
- in so doing, he failed to answer a question necessary to be answered in deciding the separate question and, therefore, on this ground alone, the appeals of the State and the Commonwealth succeeded—at [190].

Griffiths v Northern Territory (2007) 165 FCR 391, (2007) 243 ALR 7; [2007] FCAFC 178, French, Branson and Sundberg JJ, 22 November 2007

This was an appeal from the judgment at first instance of his Honour Justice Mark Weinberg in *Griffiths v Northern Territory* (2006) 165 FCR 300, [2006] FCA 903, with the determination recognising the existence of native title subsequently made in *Griffiths v Northern Territory* (No. 2) [2006] FCA 1155. The area covered by the determination included certain lots in the town of Timber Creek in the Northern Territory. The whole of the determination area had previously been subject to a number of pastoral leases.

The issues before the Full Court of the Federal Court in these appeal proceedings were whether:

- the finding at first instance that the Ngaliwurru and Nungali Peoples' native title did not amount to a right to possession, occupation, use and enjoyment to the exclusion of all others (exclusive possession) was correct
- a shift under law and custom from patrilineal to cognatic descent meant that the laws and customs of the Ngaliwurru and Nungali Peoples were not traditional, in the sense that word is used in the Act
- section 47B of the Act applied to an area proclaimed pursuant to s. 111 of the Crown Lands Ordinance 1931–1972 (Cwlth) to be a town site.

The Full Court:

- upheld the appeal by the native title holders on the first issue and varied the determination of native title accordingly
- dismissed the cross-appeal by the Northern Territory, which raised the last two issues noted above.

The case is significant because (among other things) the Court explains what is, and (more importantly, perhaps) what is not, required for proof of 'exclusive' native title.

Weinberg J found that those who constituted the native title claim group (comprised of the Ngaliwurru and Nungali Peoples descended from six apical Ngaliwurri persons) had established they held native title rights and interests in relation to the claim area but that those native title rights and interests did not include the right to exclusive possession of the area. The applicants appealed against that aspect of the judgment. The Territory cross-appealed, raising the two issues noted above.

On the first point, the appellants submitted that Weinberg J was wrong to approach the question of exclusivity by asking whether the rights and interests held by the native title holders under their traditional laws and customs:

- were ‘akin to rights that are usufructuary in nature’
- rose ‘significantly above the level of usufructuary rights’.

After reviewing the findings of the trial judge on the exclusivity issue, the Court held that:

- the characterisation of native title as ‘usufructuary’ did not preclude the inclusion of a native title right of possession, occupation and use arising under traditional law and traditional custom
- if native title rights are usufructuary (because they involve, at common law, the right to use the sovereign’s land), then the usufruct may incorporate rights to exclude others from the land, albeit that the sovereign may, by lawful exercise of power, extinguish such rights
- therefore, the question as to whether the evidence of native title rights rose above usufructuary rights posed by Weinberg J was unnecessary and had the potential to lead into error.

The second limb of the appellants’ argument was that Weinberg J erred in fact, having regard to the evidence which his Honour had accepted. It was found that ‘the evidence of the Aboriginal witnesses, being uncontradicted, together with the relevant elements of the anthropological report ... required the conclusion that the appellants’ possession, use and occupation of their country was exclusive’.

Their Honours were of the view, among other things, that:

- it is not a necessary condition of the exclusivity that the native title holders should, in their testimony, frame their claim as some sort of analogue of a proprietary right
- it is not necessary that the native title claim group should assert a right to bar entry to their country on the basis that it is ‘their country’
- if control of access to country flows from spiritual necessity, because of the harm that the country will inflict upon unauthorised entry, that control can nevertheless support a characterisation of native title as exclusive, with the Court noting that relationship to country is essentially a ‘spiritual affair’

- if, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry, and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have what the common law will recognise as an exclusive right of possession, use and occupation
- the status of the native title holders as gatekeepers in this case was reiterated in the evidence of most of the Indigenous witnesses and by the anthropological report which was ultimately accepted at first instance
- it is not necessary to exclusivity that the native title holders require permission for entry onto their country on every occasion that a stranger enters, provided that the stranger has been properly introduced to the country by them in the first place
- exclusivity is not negated by a general practice of permitting access to properly introduced outsiders.

Therefore, it was held that the effect of the uncontested evidence of Indigenous witnesses and the opinion evidence of experts lead to the conclusion that the appellants as a community had exclusive possession, use and occupation of the application area. The appeal therefore succeeded on the question of exclusivity.

On the second point, the Full Court noted that despite a change in descent principles, Weinberg J accepted expert opinion that the normative system underpinning the acquisition of rights to land had not changed and, accordingly, was not satisfied that an increased reliance on matrilineal descent had so affected the relevant laws and customs that they could no longer be regarded as traditional.

Taking into account the evidence before the trial judge, the Court held that no error was identified that affected his Honour's consideration of whether the claimants no longer acknowledge and observe traditional laws and customs giving rise to rights and interests in land because they presently gain rights to country in part by descent through either the matrilineal or patrilineal line.

The final issue related to the application of s. 47B of the Act in respect of the town site of Timber Creek. It was proclaimed pursuant to s. 111 of the Crown Lands Ordinance 1931–1972 (Cwlth) (ordinance), which empowered the Governor-General, by proclamation, to constitute and define the boundaries of new towns in the Northern Territory. Where s. 47B applies, certain extinguishment is to be disregarded for all the purposes under the Act.

The whole of the claim area was previously subject to pastoral leases. Accordingly, unless s. 47B applied, any extinguishment caused by the grant of those pastoral leases could not be disregarded. Section 47B does not apply if the relevant area is covered by, among other things, a proclamation made or conferred by the Crown in any capacity under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose—see s. 47B(1)(b)(ii).

At first instance, Weinberg J rejected the Northern Territory's submission that the area in question was covered by a proclamation under which the land was to be used for public purposes or for a particular purpose within the exception to s. 47B(1)(b)(ii). His Honour considered that he was bound by the Full Court decision in *Northern Territory of Australia v Alyawarr, Kayteye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 (Alyawarr) on this point.

The Northern Territory submitted that the facts in this case were distinguishable from those in Alyawarr. The Full Court held that Alyawarr could not be distinguished from the present case and it was obliged to follow it unless persuaded that it was plainly wrong. In any event, although the Territory initially invited the Court not to follow Alyawarr, it became apparent that it merely wished to preserve its ability to argue before the High Court that it was wrongly decided.

Following the decision of the Full Court, the Northern Territory sought leave to appeal the decision to the High Court. The application for special leave to appeal was rejected by their Honours Justices Kenneth Hayne and Susan Crennan because there were 'insufficient prospects of success of an appeal'—*Northern Territory v Griffiths* [2008] HCATrans 123.

Commonwealth v Clifton (2007) 164 FCR 355; (2007) 245 ALR 1; [2007] FCAFC 190, Branson, Sundberg and Dowsett JJ, 6 December 2007

Mr Mark McKenzie sought a determination of native title on his and the Kuyani People's behalf, notwithstanding that they had no claimant application on foot, in circumstances where he was a respondent party to an application for a determination of native title made by a group to which he did not belong. This is an appeal from the interlocutory judgment of his Honour Justice Paul Finn in *Kokatha People v South Australia* [2007] FCA 1057 where he held that a determination of native title could not be made in these circumstances.

The Commonwealth obtained leave to appeal against that judgment to a Full Court of the Federal Court.

The issue was whether the Federal Court could make a determination of native title in favour of a person:

- who did not have a claimant application made under the Act on foot in relation to the area in question
- who was a respondent to a claimant application brought on behalf of another group over that area.

The Commonwealth submitted (among other things) that:

- the content of a 'determination of native title' is controlled by s. 225, which directs the Court to consider the content of all native title and non-native title rights and interests in the area in question and the relationship between them

- the possibility that the Court might be able to make a determination of native title that did not conform with a group identified in an application should not be excluded peremptorily or on procedural grounds
- if, on the evidence, the Court was satisfied that native title rights and interests were held by a person who, or group that, was not an applicant, a determination to that effect was not proscribed by the Act.

The Full Court dismissed the appeal, finding that a person or persons who want a determination of native title to be made in their favour must have a claimant application on foot.

In the Court's view (among other things):

- section 213 of the Act, which is 'critical' to a determination of the extent of the Court's jurisdiction under the Act, demonstrates an intention to limit both the general jurisdiction conferred by the *Judiciary Act 1903* (Cwlth) and the jurisdiction conferred by s. 81 of the Act
- the requirement in s. 213(1) that a native title determination must be made in accordance with the procedures in the Act made it necessary to identify the procedures that govern the making of such a determination
- it may also make it necessary to determine which of those procedures the legislature intended to be critical to a valid exercise of the jurisdiction of the Court.

The Court found that the Act provides no procedures other than those in Division 1 of Part 3 of the Act whereby a person or group could obtain a determination of native title. In its view:

[I]t is unlikely almost to the point of being fanciful that the legislature intended that standing to institute a proceeding claiming a determination of native title should be strictly limited to persons authorised by the relevant native title claim group but that standing effectively to counter-claim for identical relief should be unlimited by any requirement for authorisation. This unlikelihood is the more apparent when one considers the numerous obligations placed on the Native Title Registrar to give notice of a native title determination application. Assuming the submissions of the Commonwealth and Mr McKenzie to be correct, other parties to the proceeding could advance comparable claims without any requirement arising for these statutory requirements and obligations to be met—at [52].

The Court held that:

- subsection 213(1) disclosed a legislative intent that a determination of native title should only be made in accordance with the procedures set out in the Act
- since the 1998 amendments (http://www.austlii.edu.au/au/legis/cth/consol_act/ntaa1998227/), those procedures required, at a minimum, that a s. 13(1) application must be made under Part 3 of the Act by a person or persons authorised by a native title claim group in the manner required by s. 61(1)

- where more than one native title claim group sought a determination of native title, each group must authorise a person or persons to make an application as mentioned in s. 13(1) under Part 3
- where more than one native title determination application is made over an area, s. 67 requires that they be dealt with in the one proceeding (at least to the extent of any overlap)
- consequently, a determination of native title in respect of any one or more of the claim groups would be able to be made in accordance with the procedures of the Act
- alternatively, if after the Native Title Registrar has given notice under s. 66, only one application is filed in respect of the area, the Court would be entitled to be satisfied that no other group or groups asserted a claim to hold native title to the area.

Parker v Western Australia (2008) 167 FCR 340, (2008) 245 ALR 436; [2008] FCAFC 23, Moore, Branson and Tamberlin JJ, 7 March 2008

This decision deals with an appeal to the Full Court of Federal Court against the judgment in *Parker v Western Australia* [2007] FCA 1027 (Parker, see below). The main issue was whether the primary judge was right to find that the National Native Title Tribunal's determination that the expedited procedure was attracted to the grant of an exploration licence over a site of particular significance was not affected by any error of law.

Maitland Parker, on behalf of the Martu Idja Banyjima People (the MIB People), appealed against the judgment in Parker in which his Honour Justice Anthony Siopis upheld the Tribunal's decision in respect of s. 237(b) of the Acts i.e. that the grant of a particular exploration licence under the *Mining Act 1978* (WA) was not likely to interfere with a site of particular significance called the Barimunya site. There was no dispute that the Barimunya site was of particular significance to the MIB People in accordance with their traditional laws and customs, as the Tribunal had found.

The first issue raised on appeal was whether the primary judge made an error of law in holding that the Tribunal had made a finding as to whether or not there was a real risk of interference with the Barimunya site, pursuant to s. 237(b). This, in turn, raised two points, according to his Honour Justice Brian Tamberlin:

- whether the Tribunal failed to consider the particular significance of the Barimunya site and what might comprise interference with it in accordance with the MIB People's traditional laws and customs
- assuming the Tribunal did take into account the particular significance of that site, whether its determination was so unreasonable as to warrant the conclusion that the determination should be set aside.

The second issue was whether the primary judge should have found the Tribunal had failed to fulfil its obligation under s. 162(2) of the Act to state in its reasons the findings of fact upon which its determination was based.

In separate judgments, the Full Court concluded that the appeal should be dismissed with costs.

His Honour Justice Michael Moore held (among other things) that:

- the Tribunal was obliged to set out any findings of fact it made which led to its determination of the matters covered by the inquiry (in this instance, whether or not the expedited procedure was attracted to the future act in question)
- the Tribunal's ultimate finding had to be whether the act 'was not likely to interfere' in one of the ways identified in s. 237 and it was difficult to characterise that as a 'finding of fact' because it involved (among other things) 'determining what is likely to occur in the future' which is 'a matter of speculative though informed appraisal and not fact finding'
- a finding for the purposes of s. 237(b) that there was not a real risk of interference is not a finding of fact and is not a matter to which the obligation created by s. 162(2) applies
- the inference drawn by the primary judge that the Tribunal made a finding about what would constitute interference with the Barimunya site was an inference that was available from the material before the Tribunal and from its reasons, although the Tribunal should have stated its finding on the point
- as the inference drawn was available there was no error of law in the primary judge's conclusion that the Tribunal did make a finding as to what might comprise interference with the Barimunya site in accordance with the MIB People's traditional laws and customs.

Her Honour Justice Catherine Branson found (among other things) that:

- it is for the Tribunal to determine the weight to be given to matters such as the regime found in the *Aboriginal Heritage Act 1972* (WA) in making necessary findings of fact
- the Tribunal recorded its finding that the Barimunya site was a site of particular significance to the native title party before identifying nine factors it took into account in finding that that is was unlikely that there would be interference with that site
- the factors identified by the Tribunal supported the inference that it did not overlook confidential evidence that presumably made it plain that merely walking on the site could constitute interference with it
- by identifying the uncontested evidence upon which it found that the site was of particular significance to the native title party, the Tribunal enabled the parties and the Court to know the factual basis of its finding
- it was to be inferred that the Tribunal was satisfied that the nine factors identified in its reasons 'rendered it unlikely that the grant of the exploration licence would result in any person walking on the Barimunya site without being accompanied by an elder'.

His Honour Justice Brian Tamberlin held (among other things) that:

- as the significance of the Barimunya site was not contested, the Tribunal did not consider there was a need to furnish further details of the site
- having taken this 'correct and comprehensive approach, the Tribunal cannot be said to have failed to deal properly with this matter' and the proposition that the finding of the Tribunal was 'so unreasonable as to amount to an error of law' was 'untenable' because the determination made by the Tribunal was 'clearly open to it'
- the relevant express finding of fact on which the Tribunal based its ultimate determination that the expedited procedure was attracted to the grant of the exploration licence was that it was 'unlikely that there would be interference with the Barimunya site'
- it was clear that the Tribunal made this finding of fact having regard to the detailed evidence given by the native title party, which explained the sensitivity of the Barimunya site and outlined the range of activities which were considered likely to interfere with the site
- as a result, the primary judge made no error in concluding that the Tribunal had properly made a finding as to whether there was a real risk of interference with the Barimunya site, as required by s. 237(b)
- while the Tribunal did not spell out some evidence in detail because of its 'highly confidential nature', its reasons for decision sufficiently demonstrated that the evidence was taken into account and so the 'essential' findings of fact were 'sufficiently stated' for the purposes of s. 62(2).

Orders were made to dismiss the appeal and the appellant was ordered to pay the respondents' costs.

Decisions at first instance

Gudjala People #2 v Native Title Registrar [2007] FCA 1167, Dowsett J, 7 August 2007

This case was about an application for review of a decision by a delegate of the Registrar not to accept a claimant application for registration on the Register of Native Title Claims. The application for review was made under s. 190D(2) of the Act.

The main issues before the Federal Court were:

- whether a delegate of the Native Title Registrar had misled the applicant, denied the applicant procedural fairness or taken into account irrelevant material in making the registration test decision
- whether the description of the native title claim group found in the application satisfied s. 190B(3)
- whether the application satisfied ss. 190B(5) to 190B(7).

The decision is important because it is the first case in which the Court has considered in detail what is required to provide a sufficient factual basis for the purposes of s. 190B(5). The relevance of the judgment of the High Court in *Yorta Yorta* to various conditions of the registration test was also considered for the first time.

The Native Title Registrar must accept for registration the claim made in a claimant application if it satisfies all of the conditions found in ss. 190B and 190C. In any other case, the Registrar must not accept the claim for registration—see s. 190A(6).

The claimant application under consideration in this case was made on behalf of the Gudjala People in April 2006 (Gudjala People #2). In November 2006, a delegate of the Native Title Registrar decided it must not be accepted for registration because it did not meet the conditions found in ss. 190B(3), 190B(5), 190B(6) and 190B(7). Subsequently, the applicant filed a claim registration review application pursuant to ss. 69(1) and 190D(2) (as it was then).

An earlier, related claimant application, known as the Gudjala ‘core country’ claim, was filed in 2005. The only significant difference between the two claims was that Gudjala People #2 covered some specific parcels that were, for reasons that are presently irrelevant, excluded from the core country claim. In March 2005, the core country claim was accepted for registration by the same delegate who considered, and rejected, Gudjala People #2.

The applicant submitted that:

- the applicant was misled by the delegate’s previous decision and in any case the delegate was *functus officio* on making the first decision in respect of the second decision and it was not open to him to, in effect, reverse his own earlier decision
- the applicant was deprived of procedural fairness in the decision-making process
- the delegate took into account irrelevant material and failed to take into account relevant material
- the material available to the delegate did not justify the application failing the test
- the decision involved an error of law.

A claim registration review conducted pursuant to s. 190D(2) is not restricted to consideration and determination of a question of law but extends to determination of issues of fact and it is not restricted to the material before the Registrar—see the Full Court decision in *Western Australia v Strickland* (2000) 99 FCR 33; [2000] FCA 652. Thus, given the nature of the review, the Court must form its own view of the adequacy of the information provided by the applicant against the conditions of the registration test.

In relation to the first point on whether a delegate is bound by his or her previous decisions, His Honour found that the arguments were ‘misconceived’ because:

- the delegate could not have considered the application ‘at all’ if *functus officio*
- in fact, ‘there was a statutory duty to do so’ and the applicant’s submissions failed to take account of that duty
- the delegate ‘was obliged to act in accordance with law, not in accordance with his own previous decision’ and there could be ‘no question’ of the delegate being bound to follow his own earlier decision if he considered that it incorrectly applied the Act
- in any case, the question was whether or not the delegate was correct in his view of Gudjala People #2.

The allegation of a denial of procedural fairness took two forms:

- an allegation that errors in the decision denied the applicant an opportunity to have the application assessed according to the appropriate criteria
- the fact that the core country claim satisfied the same delegate with respect to the same group, for the same country, with the same traditional laws and customs and represented by the same individuals ‘contributed’ to the unfairness of the decision not to register Gudjala People #2 ‘without reference to a cogent or relevant reason for a changed opinion and on erroneous bases’.

Dowsett J dismissed the first allegation because it confused procedural fairness with errors in the decision-making process, when errors alone will not usually amount to a denial of procedural fairness.

The second argument led the Court to consider the duty conferred upon the delegate. The Act requires, pursuant to s. 190A(5A) that:

Before the Registrar [or delegate] has decided whether or not to accept the claim for registration, he or she may notify the applicant that the application may be amended under the Federal Court Rules.

His Honour found there was ‘nothing’ in the second allegation because (among other things):

- nothing in the Act suggested that the delegate was to receive submissions about any proposed decision and, if anything, s. 190A(5A) suggested the contrary
- no special requirements of procedural fairness arose simply because the same delegate considered both applications
- the applicant was obliged to satisfy the delegate that the requirements of the test were met and could not rely upon ‘past practices’
- the applicant was given a preliminary assessment that warned of possible inadequacies in relation to all of the conditions of the test it ultimately failed to meet, with the exception of s. 190B(6), and could ‘hardly complain that other identified inadequacies led to a failure to satisfy the requirements of’ s. 190B(6)

- it was made clear in the preliminary assessment that it was for the applicant to get independent legal advice and provide sufficient information to pass the test
- exercising the discretion available under s. 190A(5A) to advise of possible ‘shortcomings’ and give the applicant an opportunity to amend before the registration test decision was made was desirable but ‘not necessary’.

The allegation that the delegate took into account irrelevant material by having regard to documents relating to other applications was dismissed largely because the delegate did not treat that material as ‘generally relevant to his task’ and made ‘very limited’ use of it. In any case the delegate ‘may have regard to such other information as he or she considers appropriate’ (s. 190A(3)). Dowsett J commented, however, that ‘it would be ... undesirable that the ... delegate take into account information derived from other applications without affording the applicant an opportunity to comment upon it’.

His Honour then went on to consider whether the material provided by the applicant was sufficient to meet the requirements of the relevant conditions of the registration test.

Paragraph 190B(3)(b) requires that the Registrar must be satisfied that the persons in the native title claim group are described in the application sufficiently clearly so that it can be ascertained whether any particular person is in that group. This part of the test responds to a similar requirement found in s. 61(4).

The native title claim group description was awkwardly drafted in two paragraphs. The delegate considered that the paragraph identifying the claim group by reference to named apical ancestors would, of itself, be sufficient to satisfy s. 190B(3). However, the additional paragraph, which asserted membership was in accordance with traditional laws and customs etc., suggested to the delegate that membership of the claim group was not solely dependent upon descent from the named ancestors but the relevant laws and customs were not identified. This led the delegate to decide the description in the application was not sufficiently clear for the purposes of s. 190B(3)(b).

His Honour held that there was no error involved in the delegate accepting that the application complied with s. 61(4) for the purposes of ‘procedural’ condition found in s. 190C(2) but deciding that it did not meet the ‘merit’ condition found in s. 190B(3) because the Act draws a distinction between ss. 190B(3) and 190C(2) as they apply to s. 61(4).

Given the nature of the review, however, it was also necessary for the Court to form its own view as to whether there was compliance with s. 190B(3)(b). While this was a question that was ‘not without difficulty’ in this case, it was found that the ‘better’ view was that the application satisfied that condition of the test. The canons of statutory construction required the two parts of the claim group description to be read as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open. His Honour found that the description could be read in that way.

Subsection 190B(5) requires the Registrar to be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

- that the native title claim group have, and the predecessors of those persons had, an association with the area
- that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
- that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The Court noted that the reference in s. 190B(5) to the factual basis upon which it is asserted that the claimed native title rights and interests exist was:

[C]learly a reference to the existence of rights vested in the claim group. Thus it was necessary that the delegate be satisfied that there was an alleged factual basis sufficient to support the assertion that the claim group was entitled to the claimed native title rights and interests. In other words, it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)—at [39].

The factual basis provided must support the assertion ‘that the native title claim group have, and the predecessors of those persons had, an association with the area’ (s. 190B(5)(a)).

The affidavit evidence of the two claimants identified their relationship to the apical ancestors and set out the association each claimant had with the claim area and the association of their parents and grandparents. His Honour was somewhat critical of the anthropologist’s report in relation to this issue, noting, among other things, that in much of the report it was unclear whether the writer was expressing opinions or stating facts.

It was found that the application did not demonstrate the required association because:

- while the affidavit evidence of the two claimants may have demonstrated that they, and their families, presently have an association with the claim area, and that their predecessors have had such association since European settlement, it did not demonstrate that the claim group as a whole presently has such association
- while this did not mean all members must have such association at all times, there must be evidence that there is an association between the whole claim group and the area claimed

- similarly, there must be evidence of such an association between the predecessors of the whole group and the area over the period since sovereignty
- the affidavit evidence did not ‘go so far’ and the anthropologist’s report provided opinions and conclusions rather than any alleged factual basis for such opinions and conclusions or for the claim.

The second part of s. 190B(5) requires that the factual basis is sufficient to support the assertion ‘that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests’.

It was found that, in order to satisfy s. 190B(5)(b):

- the factual basis must be capable of demonstrating that there are traditional laws acknowledged and traditional customs observed by the native title claim group and giving rise to the group’s claim to native title rights and interests
- in accordance with *Yorta Yorta*, the requirement in s. 190B(5)(b) that the laws and customs be ‘traditional’ means that ‘they must have their source in a pre-sovereignty society and have been observed since that time by a continuing society’
- the task at s. 190B(5)(b) is to identify the existence, at least at the time of European occupation, of ‘a society of people, living according to identifiable laws and customs, having a normative content’
- such laws and customs must ‘establish normal standards of conduct or, perhaps, be prescriptive of such standards’
- there can be no relevant traditional laws and customs unless there was, at sovereignty, a society ‘defined by recognition of laws and customs from which such traditional laws and customs are derived’
- the ‘starting point’ for s. 190B(5)(b) must be identification of an Indigenous society at the time of sovereignty or, at least, at the time of European occupation (1850 to 1860 in this case)
- while the apical ancestors used to define the claim group need not be shown to be, in and of themselves, such a society, at some point the applicant must ‘explain the link between the claim group and the claim area’, which would ‘certainly involve the identification of some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage’.

After reviewing the material His Honour found that s. 190B(5)(b) was not satisfied because:

On the material presently available, I find no factual basis supportive of an inference that there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs.

While it was not necessary to do so, his Honour did go on to say that there was also ‘scant’ evidence concerning the ‘broader question’ of whether there were ‘traditional’ laws and customs currently acknowledged and observed by the claim group. That evidence consisted of what was said in the affidavits of two claimants and the anthropologist’s report.

The Court concluded that the ‘real deficiencies’ in the application were ‘twofold’:

- it failed to explain how, by reference to traditional law and customs presently acknowledged and observed, the claim group was limited to descendants of the identified apical ancestors
- no basis was given to support an inference that there was, at and prior to 1850–1860, a society which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group.

The third part of s. 190B(5) requires that there is a sufficient factual basis to support the assertion that ‘the native title claim group have continued to hold the native title in accordance with those traditional laws and customs’.

Dowsett J found that the application did not satisfy s. 190B(5)(c) because it:

[I]mplies a continuity of such tenure going back to sovereignty, or at least European occupation as a basis for inferring the position prior to that date and at the time of sovereignty. The difficulty is the inability to demonstrate the existence, at that time, of a society observing laws and customs from which current traditional laws and customs were derived. This difficulty led the delegate to conclude that this requirement has not been satisfied. I agree—at [82].

In relation to ss. 190B(6) and 190B(7), His Honour found that the requirements were not met for essentially the same reasons the requirements of s. 190B(5) were not met. Thus, the application for review was dismissed because the Court found that the conditions in ss. 190B(5) to 190B(7) were not met.

The applicant has appealed from this decision. The appeal has been heard by a Full Court of the Federal Court and its judgment is reserved.

Wiri People v Native Title Registrar [2008] FCA 574, Collier J, 29 April 2008

In this review of a registration test decision, the main issue before the Federal Court was whether the claimant application (referred to here as *Wiri People #2* application) met the authorisation condition found in s. 190C(4)(b) of the Act.

The Native Title Registrar's delegate found that the Wiri People #2 application did not satisfy the requirements of s. 190C(4)(b), i.e. that the applicant was authorised to make the application and deal with matter arising in relation to it by all the persons in the native title claim group, essentially because:

- the evidence relating to the proper composition of the claim group was 'conflicting and contentious'
- the delegate could not be satisfied that the group described in the application was the whole of the native title claim group.

In making this finding, the delegate referred to *Risk v National Native Title Tribunal* [2000] FCA 1589 (Risk). The applicant sought review of the delegate's decision under s. 190D of the Act.

The applicant submitted (among other things) that the delegate:

- had misconstrued risk by erroneously considering she was required to make a factual determination as to the 'correct' description of the native title claim group
- had failed to appreciate that an assessment of the composition of the claim group is a function of the duty found in s. 190C(2), not s. 190C(4)(b)
- did not limit her assessment under s. 190C(4)(b) to the description of the claim group as it appeared in the application and accompanying material
- having been satisfied that s. 190C(2) was met, should have confined her inquiries in relation to s. 190C(4)(b) to whether the claimant group, as described in the application, had authorised the making of the application.

The Registrar submitted (among other things) that:

- paragraph 190C(4)(b) required the delegate to be satisfied that the applicant was authorised to make the application by all the other persons in the 'native title claim group', which involved consideration of the composition of that group
- the delegate's role went beyond merely accepting the correctness of an applicant's assertion that the persons who, according to their traditional laws and customs, hold communal rights and interests comprising the particular native title claimed are confined to those named or described in the application.

The Court rejected the submission that the delegate had misconstrued the principles in *Risk*, essentially because:

- it was open to the delegate to take into account the existence the Wiri Core Country Claim, an overlapping and competing application, which contained a broader native title claim group description and which had been certified the CQLC
- it was clear from the delegate's reasons that she had carefully avoided both adjudicating between the two claim group descriptions and making a factual determination as to the 'correct' description.

As to the applicant's second submission, the Court found that an assessment of the composition of the claim group was a function of the delegate's duty under s. 190C(4)(b), not s. 190C(2) because, among other things:

- the applicant misrepresented the plain meaning of s. 190C(4)(b) in giving it a more restricted meaning
- the applicant's argument confused the terms of ss. 190C(2) and 190C(4)(b)—while there was an obvious intersection between those two provisions, the matters of which the delegate must be satisfied are different
- under s. 190C(2), the delegate must be satisfied that the application contains the information required by ss. 61 and 62 whereas under s. 190C(4), the delegate must be satisfied as to the identity of the claimed native title holders, including the applicant.

As to the applicant's third submission, Collier J held that:

- paragraph 190C(4)(b) does not confine the delegate to the information in the application or statements in the affidavit;
- the existence and nature of the information in the Wiri Core Country Claim was available and relevant to the delegate's consideration of whether the applicant in the Wiri People #2 application was authorised to make the application on behalf of all the other persons in the native title claim group;
- while the delegate was not required to look beyond the terms of the application for the purposes of s. 190C(2), it did not necessarily follow that the same principle applies to s. 190C(4)(b).

The applicant's fourth submission was also rejected; i.e. once the delegate was satisfied of those matters under s. 190C(2), in the case of an uncertified application, the requirements of s. 190C(4)(b) are not met simply if the delegate is satisfied that the claim group as described in the application authorised the making of the application.

Her Honour concluded that:

- the delegate had not misconstrued the decision in *Risk*
- the delegate's approach to the different requirements of ss. 190C(2) and 190C(4)(b), and her conclusion that the claim made in the application did not meet the condition found in s. 190C(4)(b) in relation to authorisation, were correct.

Collier J was of the view that the applicant had not made out any ground of review and so dismissed the application.

Hazelbane v Doepel (2008) 167 FCR 325, [2008] FCA 290, Mansfield J, 7 March 2008

This case deals with an application under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (the AD(JR) Act) for review of a decision by the Registrar to accept a claimant application for registration pursuant to s. 190A of the Act. The critical issues were whether:

- the applicant to a registered overlapping claimant application was a person aggrieved by the decision of the Registrar and, therefore, had standing to bring an application for review under s. 5 of the AD(JR) Act
- the Registrar was required to afford procedural fairness to the applicant to a registered overlapping application and, if so, whether it had been afforded
- section 53A of the *Federal Court Australia Act 1976* (Cwlth)(the FCA Act) prohibited the Registrar from considering material which was produced for the purposes of mediation in the Federal Court
- the Registrar erred in law by finding that the application met the requirements of s. 190C(4) of the Act.

It was decided that the Registrar's decision should be set aside because:

- in the particular circumstances of this case, the Registrar had failed to provide procedural fairness to the applicant on the overlapping registered application
- the Registrar's finding that the application satisfied s. 190C(4)(b) of the Act was wrong.

The decision is significant because it indicates that, absent the particular circumstances of this case, the Registrar is not required to afford procedural fairness to the applicant on an overlapping registered claim when making a registration test decision on any 'competing' overlapping claim.

The Registrar accepted an application for registration under s. 190A of the Act. It was made by a number of persons over an area of land in the town of Batchelor in the Northern Territory. The Court called those making the application the Batchelor No. 2 applicant and their application the Batchelor No. 2 application. The applicant to a previously registered claimant application (Batchelor No. 1 application) over the same area, referred to as the Town of Batchelor No. 1 applicant, sought review of the Registrar's decision to register the Batchelor No. 2 application. The Northern Land Council (NLC), the recognised representative body under the Act for the area concerned, had certified the Town of Batchelor No. 1 application pursuant to s. 203BE of the Act but had not certified the Town of Batchelor No. 2 application.

In relation to the question of standing to make the application for review, Mansfield J held that:

- the enjoyment of future act procedural rights of the applicant would be diminished because the persons who were required to afford them to the Town of Batchelor No. 1 applicant would also have afford them to the Town of Batchelor No. 2 applicant
- therefore, in a practical sense and to 'put it somewhat crudely, the potential fruits of the negotiations would probably be shared rather than doubled'
- on that basis, the Town of Batchelor No. 1 applicant's interests were adversely affected by the Registrar's decision to a greater extent than ordinary members of the public

- therefore, the Town of Batchelor No. 1 applicant had standing under s. 5 of the AD(JR) Act to make an application for review of the Registrar's decision to register the Town of Batchelor No. 2 application.

The Town of Batchelor No. 1 applicant contended that:

- the Registrar was obliged to extend procedural fairness to them
- this included affording them an opportunity to make written submissions and present material on whether that application should be accepted for registration
- the Registrar had failed to afford that opportunity.

The Court accepted that, had this opportunity been afforded, the Town of Batchelor No. 1 applicant would have (either directly or through the NLC) provided anthropological and other material to the Registrar which may have influenced the Registrar's decision.

Mansfield J considered the extent to which an entitlement to procedural fairness may have been excluded by the express terms of the Act or any necessary implication and concluded that:

- section 66 of the Act proceeds on the basis that a decision to accept a native title claim for registration under s. 190A must be made before a competing registered native title claimant in respect of the same area is notified of the competing claim
- paragraph 66(6)(a) makes it plain that, in the normal course, a competing registered native title claimant is not entitled to be given the opportunity to be heard when the Registrar is considering whether to accept a claimant application over the same area for registration.

Mansfield J, however, considered that a 'combination of particular circumstances' meant this case did not follow the 'normal course' but, rather, gave rise to a legitimate expectation on the part of the Town of Batchelor No. 1 applicant, and an obligation on the part of the Registrar, that the NLC and its solicitors would be given:

- notification that the Registrar was considering whether to accept the Town of Batchelor No. 2 application for registration;
- a time within which to make submissions and provide additional information to the Registrar.

The Court held that the Registrar's decision should be set aside because the nature of any submission and any additional information which may have been provided had an opportunity to do so been afforded might have affected that decision.

The applicant argued that the delegate should not have had regard to material that was submitted by the Town of Batchelor No.2 applicant as it was material that had been presented in the course of mediation. They relied on s. 53B of the FCA Act (although the section referred to in the judgment was s. 53A) which provides that 'Evidence of anything said, or of any admission made, at a conference conducted by a mediator in

the course of mediating anything referred under s. 53A is not admissible ... in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence’.

Mansfield J held that:

- the Town of Batchelor No. 2 applicant was entitled to provide material to the Registrar in addition to that in the Town of Batchelor No. 2 application for the purposes of satisfying the requirements of s. 190B(5) of the Act
- section 53A [*sic*] of the FCA Act did not prevent a party producing in evidence the same material as that presented at mediation (provided, of course, it is relevant)
- the Registrar simply recorded that he understood the material to have been prepared for the purposes of mediation and did not receive material as to what was said at the mediation, ‘or of anything there said’.

In relation to the authorisation condition of the registration test, paragraph 190C(4)(b) provides that the Registrar must be satisfied that those who constitute the Town of Batchelor No. 2 applicant are members of the native title claim group and are authorised to make the application and deal with matters arising in relation to it by all the persons in the native title claim group.

The Court concluded that the Registrar’s decision to overlook the shortcomings in the attachments to the Town of Batchelor No. 2 application, because they were not professionally prepared, was understandable. However, the substance of the material had to be adequate to satisfy the requirements of s. 190C(4)(b) and his Honour was of the view that the material did not have that quality. So, for that reason also, the decision of the Registrar to accept the Town of Batchelor No. 2 application for registration under s. 190A was set aside.

Glasshouse Mountains Gubbi Gubbi People v Registrar [2008] FCA 529, Spender J, 21 April 2008

This case concerned an application for review under s. 5 of the AD(JR) Act. The main issues were whether:

- Item 90 of Schedule 2 of the *Native Title Amendment Act 2007* (Cwlth) (2007 Amendment Act) required the Registrar to apply the registration test to a claimant application that had been continuously registered since it was made in 1996 and had not been subjected to the test previously
- the Registrar breached the rules of procedural fairness in refusing to extend the time for making a registration test decision
- having applied the registration test under Item 90 and decided the claim did not meet the conditions of the test, the Registrar was empowered to remove a claim from the Register of Native Title Claims (the Register) in the absence of any express power to do so.

The Registrar wrote to the applicant on 24 April 2007 advising that Item 90 of Schedule 2 to the 2007 Amendment Act (the transitional provisions) applied to the Gubbi Gubbi application and it now had to be subjected to the registration test. On 14 May 2007, a further letter was sent on the Registrar's behalf which informed the applicant that:

- the test would be applied to the claim in September 2007
- any amendments to the application should be made, and any additional materials should be provided, by 17 August 2007
- if nothing further was received, the Registrar's delegate would proceed to test the claim on the basis of the information currently available.

On 17 August 2007, the applicant sent an email stating that, while the claim group initially considered withdrawing the application, they now sought an extension of time to prepare the claim for the test. On 20 August 2007, the Registrar's delegate rejected the request for an extension of time for the making of the registration test decision but granted the applicant an extension until 24 August 2007 to provide any additional materials. The delegate pointed out there was no express statutory authority for delaying the application of the test and that requests for extensions were assessed on a case by case basis, taking into account all the relevant circumstances.

Nothing was received by 24 August 2007 and so the registration test was applied on 28 September 2007. The Registrar's delegate found that the claim made in the Gubbi Gubbi application did not meet all of the conditions of the test as required by s. 190A(6) and, as a consequence, it was removed from the Register. The applicant then sought review under the AD(JR) Act. The Commonwealth Attorney-General intervened in the proceedings pursuant to s. 18(1) of the AD(JR) Act.

His Honour accepted the Attorney-General's interpretation of the provisions, finding on the first issue that:

- the clear object of Item 90 was that certain registered claims that had not previously been examined against the criteria of the registration test must now be tested
- Item 90(2) imposed upon the Registrar a requirement to examine any claim satisfying the conditions of Item 90(1) against the requirements of ss. 190, 190A, 190B and 190C of the Act in order to decide whether that claim should be on the Register.

Spender J held (among other things) in relation to the second issue that:

- the imposition of a nominal one-year deadline within which the Registrar was to consider the relevant claims demonstrated that Item 90(2) was clearly aimed at having decisions made as quickly as the resources of the Tribunal, the applicant and relevant representative bodies would allow
- it was in the interests of all parties that the intention of the legislature to be carried out as soon as was reasonably practicable

- the nominal one-year time period was not relevant to any consideration of whether the applicant in this case had been given a reasonable opportunity to submit materials to the Registrar
- it was not unreasonable for the Registrar to place the Gubbi Gubbi application among the first to be tested
- there was no obligation on the Registrar to advise an applicant as to what amendments were required to be made to ensure compliance with the requirements of the registration test
- the applicant's failure to comply with the deadline set by the Registrar was not because that deadline was unreasonable but because they did not perform the necessary tasks in the not unreasonable time given by the Registrar.

In relation to the third issue, his Honour held that:

- the Act imposes particular duties on the Registrar to maintain the Register, keep it up to date and ensure that only claims that meet the requirements of the statute are entered on it
- the Registrar was obliged to remove a claim from the Register if, after considering it under Item 90 of Schedule 2, the Registrar decided it did not meet the registration test criteria
- although there was no express power to do so, the power existed by necessary implication.

The Federal Court concluded that none of the grounds raised had been made out and so dismissed the application. Of note is the Court's finding that the Registrar is not obliged to advise an applicant of what amendments may be required to ensure compliance with the requirements of the registration test.

Parker v Western Australia [2007] FCA 1027 Siopis J, 6 July 2007

This decision dealt with an appeal to the Federal Court under s. 169 of the Act against a decision of the Tribunal that a future act attracted the expedited procedure. The issue in this case related solely to the Tribunal's decision in respect of s. 237(b), i.e. that the future act in question was not likely to interfere with areas or sites of particular significance to the native title party. This judgment went on appeal to a Full Court of the Federal Court. Please refer above to a summary of that decision: *Parker v Western Australia* (2008) 167 FCR 340, (2008) 245 ALR 436; [2008] FCAFC 23.

The future act in question was the granting of an exploration licence in north-west Western Australia. The Martu Idja Banyjima People (the native title party) had a registered native title claim which, to some extent, overlapped the area of the proposed exploration licence.

The evidence relied upon by the native title party before the Tribunal consisted of:

- two affidavits sworn by members of the native title party, both of which annexed a witness statement setting out the reasons why the Barimunya site has special significance to the native title party
- a letter from an anthropologist dealing with the cultural heritage significance of the Barimunya site
- a copy of BHP Billiton's 'Aboriginal Heritage Induction Handbook' (BHP Billiton's handbook), which referred to the Barimunya site.

Siopis J noted that the Tribunal:

- made a direction under s. 155 of the Act that the affidavits and anthropologist's letter, as well as the statement of contentions of the native title parties, were not to be disclosed
- explained in its reasons that it only referred to those documents to the extent necessary to explain the decision and did not include material which should, according to customary laws and traditions, remain confidential.

The Court summarised the Tribunal's findings as being that:

- the Barimunya site was a site of particular significance to the native title party in accordance with the traditions of the native title claim group it represented
- it was necessary to apply a predictive assessment as to whether the proposed future act was likely to give rise to the proscribed interference, which involved taking into account the grantee party's intention in relation to the protection of Aboriginal sites
- section 17 of the *Aboriginal Heritage Act 1972* (WA) (the AHA) provided that specified conduct in respect of an Aboriginal site, such as damaging or in any way altering it, was an offence
- section 18 of the AHA provided a means to obtain an exemption from the provisions of s. 17 in prescribed circumstances
- the grantee party said that it would comply with its legal obligations under the AHA and would attempt to avoid Aboriginal sites but, in the event there was a need to disturb a site, it would make an application pursuant to s. 18 of the AHA
- the existence of the statutory protective regime found in the AHA, and the expressed intention on the part of the grantee party to operate within that regime, was not decisive of the question of whether it was not likely there would be a proscribed interference under s. 237(b) of the Act because each case must be considered on its particular facts
- that said, the Tribunal was entitled to have regard, and give considerable weight, to the government party's site protection regime under the AHA.

It was also noted that the Tribunal had regard to the following factors in deciding that interference with the Barimunya site was unlikely:

- the existence of the site was well known and it had been the subject of earlier site surveys (including some conducted for BHP Billiton)
- parts of the buffer zone (and possibly the actual site) were currently the subject of a heritage survey
- the most important part of the delineated site area was also within the area covered by the Innawonga and Bunjima Peoples' registered claim and any exploration would be the subject of a site survey conducted by them pursuant to a Regional Standard Heritage Agreement (RSHA)
- while the grantee party had made application for a mining lease, which appeared to be at least partially over the delineated site and suggested the possibility of future mining in the area, the future act with which the Tribunal was concerned was an exploration licence only
- before any decision would be made to grant the exploration licence, the views of the traditional owners, including members of the native title party and Innawonga and Bunjima claim groups, would be known
- the evidence showed that the agreement of the traditional owners with BHP Billiton, which preceded the development of the Yandi mine, recognised the significance of this area and restricted access to it by employees of BHP Billiton
- the native title party was not opposed to exploration *per se* but was not satisfied with the type and cost of a proposed site survey
- the government party's conditions on the licence would provide the option for the native title party to enter into an RSHA
- the grantee party was currently carrying out surveys with the native title party and other native title claimants, with other groups having indicated that work programs will not interfere with sites.

The native title party appealed pursuant to s. 169 of the Act on the grounds that the Tribunal failed to consider whether the grant of the exploration licence was not likely to interfere with the Barimunya site or area.

It was submitted that the Tribunal failed to consider:

- whether there was a real risk of interference with the site or area otherwise than by conduct in breach of s. 17 of the AHA and/or conduct approved under s. 18 of the AHA
- whether low-impact exploration, as defined in the RSHA, would constitute interference with the Barimunya site or area
- the particular significance of the Barimunya site or area to the native title party and what might comprise interference with that site in accordance with relevant traditional laws and customs in assessing whether or not there was a real risk of interference with that site or area.

His Honour dismissed the first ground, saying the Tribunal:

- distinguished between the protection that might be afforded to an Aboriginal site by the statutory protective regime under the AHA and the application of the predictive assessment required under s. 237(b) of the Act
- noted that neither the existence of the statutory protective regime nor the expressed intention of a grantee party to give effect to that regime was conclusive of the question under s. 237(b) as to whether the grant of the exploration licence was not likely to interfere with the Barimunya site.

Siopis J dismissed the remaining two grounds, finding that:

- in its application of the requisite predictive assessment, the Tribunal took into account that even walking on the site in the absence of appropriate senior Aboriginal People would constitute interference with the site
- even though the Tribunal did not refer to the confidential evidence, there were sufficient signs in its reasoning to show it had recognised the requisite degree of exclusion necessary to prevent 'interference' and satisfied itself that such interference was not likely.

The appeal was dismissed with costs.

Appendix III Freedom of Information

Section 8 of the *Freedom of Information Act 1982* (Cwlth) requires each Australian Government agency to publish information about the way it is organised and its functions, powers and arrangements for public participation in the work of the agency. Agencies are also required to publish the categories of documents they hold and how members of the public can gain access to them.

Inquiries regarding Freedom of Information may be made at the Principal Registry and the regional registries or offices.

Number of formal requests for information

During the reporting period the Tribunal received no formal request for access to documents under the *Freedom of Information Act*.

Organisation

The Tribunal's organisational structure as at 30 June 2008 is provided in Figure 3 National Native Title Tribunal Organisational Structure, p. 43. An outline of the responsibilities of its executive and senior management committees is provided under 'Tribunal Executive', p. 81.

Functions and powers

The broad functions of the Tribunal are discussed in the Tribunal overview section in this report, p. 39. A summary of the information related to the Tribunal's functions and powers is provided below to meet the requirements of the *Freedom of Information Act 1982* (Cwlth).

Role

The Tribunal's role is to assist people in reaching agreements about native title in a spirit of mutual recognition and respect for each other's rights and interests. The Tribunal also arbitrates in certain future act matters. The Tribunal seeks to carry out its functions in a fair, just, economical, informal and prompt way.

Authority and legislation

The functions and powers of the Tribunal are conferred by the *Native Title Act 1993* (Cwlth) under which the Tribunal was established. The *Native Title Amendment Act 2007* (Cwlth) and the *Native Title Amendment (Technical Amendments) Act 2007* (Cwlth) conferred additional functions and powers. These new powers are discussed in the President's overview, p. 1.

Native Title Registrar

Under the Act, the Native Title Registrar must assist the Tribunal's President in the management of the administrative affairs of the Tribunal. The Registrar may delegate all or any of his/her powers under the Act to Tribunal officers, and he or she may also engage consultants to perform services for the Registrar.

The Registrar has powers related to notification of native title applications and ILUAs and in making decisions regarding the registration of claimant applications and ILUAs. The Registrar maintains three statutory registers and makes decisions about the waiver of fees concerning future act applications made to the Tribunal. The Registrar may also provide non-financial assistance to people involved in native title proceedings.

National Native Title Tribunal

Mediation of native title applications by the Tribunal is under the Federal Court's supervision. All or part of an application may be referred to the Tribunal for that purpose. The Tribunal has the function to provide, if asked, assistance to parties negotiating various agreements. The Tribunal also has an arbitral role in relation to the right to negotiate future act matters.

Avenues for public participation

The Tribunal actively encourages the general public and those involved in the native title process to contribute their ideas and suggestions on how it could improve its operations. The Tribunal invites public comment from individuals and organisations through its website at www.nntt.gov.au.

It holds regular meetings with clients and stakeholders, including representative and peak bodies, state, territory and Australian Government agencies (for example, the Federal Court, and land use and mapping agencies) that deal with the Tribunal, solicitors that represent claimants and other parties.

In addition, public meetings may be held nationwide by Tribunal Members and staff.

Tribunal Members and staff often attend community festival/events, regional shows, industry conferences and trade shows, representative or peak-body conferences, forums, seminars, workshops etc. Attending these events provides important opportunities for exchanging information and gauging responses to Tribunal initiatives and the way the Tribunal operates.

The Tribunal's Client Service Charter and feedback procedures are the formal mechanisms in which the public can participate. For more information see 'Client Service Charter', p. 101.

Documents or information available for purchase or subject to a photocopy fee

The information available for purchase is: application summaries—documents relating to future act applications made to the Tribunal and all claimant applications (including those that have failed the registration test, and new or amended claimant applications that have not yet been through the registration test), non-claimant applications, and compensation applications filed with the Federal Court and referred to the Native Title Registrar.

Information from the following is available free of charge but may be subject to a photocopy fee.

- Register of Native Title Claims—a register containing information about each native title determination application that has satisfied the conditions for registration in s. 190A or was accepted under the old Act but not yet determined (s. 185 of the Act).
- National Native Title Register—a register containing information about each native title determination that has been determined by the Federal Court, High Court or other recognised body (s. 192 of the Act).
- Register of Indigenous Land Use Agreements—a register of ILUAs that have been accepted for registration (s. 199A of the Act).

Documents available free of charge

The following documents are available free of charge upon request or from the Tribunal's website:

- brochures and fact sheets
- Client Service Charter
- *Strategic Plan 2006–2008*
- ILUA information
- *Guide to future act decisions made under the Commonwealth right to negotiate scheme*
- Occasional Paper Series (including commissioned and specific issue reports)
- *Talking Native Title*, quarterly national newsletter and electronic newsletters for the states of Western Australia, South Australia and Victoria
- *Native Title Hot Spots*, regular electronic publication summarising recent cases in native title law and Tribunal future act determinations
- *About Native Title* booklet
- *Using the Registers of the National Native Title Tribunal*
- *Native title claimant applications: a guide to understanding the requirements of the registration test*
- applications affected by future act notices
- guide and application forms to instituting a future act determination and objections to an expedited procedure (under s. 75 of the Act)

- guidelines on acceptance of expedited procedure objection applications
- certain procedures of the Tribunal
- bibliographies
- Tribunal's portfolio budget statements
- future act determinations made and published by the Tribunal
- edited reasons for decisions in registration test matters.

Other information

Briefs, submissions and reports: The Tribunal prepares and holds copies of briefing papers, submissions and reports relevant to specific functions. Briefing papers and submissions include those prepared for ministers, committees and conferences. Reports are generally limited to meetings of working parties and committees. The Operations Unit also issues regular reports on activities and outputs and statistics.

Conference papers: The Tribunal library holds copies of all conference and seminar papers presented by the President, Registrar, Members or employees. Copies of conference papers can be obtained from the Tribunal and are usually available on the Tribunal's website.

Reviews and research: The Tribunal prepares and holds background research papers, prepared at the request of employees or Members, about legal, social and land-use issues related to native title applications (see 'Research Strategy Group', p. 85).

Databases: A number of databases are maintained to support the information and processing needs of the Tribunal.

Files: Paper and computer files are maintained on all Tribunal activities. A list of files created by the Tribunal relating to the policy advising functions, development of legislation, and other matters of public administration, is available on the Tribunal's website.

Finance documentation: A series of documents is maintained relating to the Tribunal's financial management, including the chart of accounts, expenditure and revenue ledgers, register of accounts and appropriation ledger.

Mailing list: The Tribunal maintains mailing lists for its own use which are used principally to disseminate information.

Maps and plans: Maps and plans held within the Tribunal include working drawings, plans and specifications for Tribunal accommodation; and maps depicting specific native title applications or applications within a defined region, either commissioned or produced by the Tribunal, or made available by state or territory government service providers for purchase. These can be viewed under freedom of information processes but are not copied if this would be in breach of copyright or data licensing agreements.

Administration: Documents relating to administration include such matters as personnel, finance, property, information technology and corporate development. There are also manuals and instructions produced to guide Tribunal officers.

Access to information

Facilities for examining accessible documents and obtaining copies are available at Tribunal registries. Documents available free of charge upon request (other than under the *Freedom of Information Act 1982* (Cwlth)) are also available from the Tribunal.

Inquiries regarding Freedom of Information may be made at the Principal Registry and the various regional registries or offices. Assistance will be given to applicants to identify the documents they seek. Inquiries concerning access to documents or other matters relating to Freedom of Information should be directed to the Freedom of Information Contact Officer, Legal Services, Principal Registry.

An application for access pursuant to the *Freedom of Information Act 1982* (Cwlth) must be in writing and should contain sufficient information to identify the relevant documents, together with the prescribed fee (\$30) to commence the process. Additional charges are payable (usually set as an hourly rate) for time spent in locating the documents requested and granting access. Charges and fees may be waived in particular circumstances.

The Tribunal must make a decision in relation to FOI requests within 30 days of the date of receiving a request. The Tribunal's obligations under the Freedom of Information Act and how to access documents under the Act are available on the Tribunal's website.

Access other than through the Freedom of Information Act

Parties to applications can obtain access to their own records. These are not available to the general public. No formal or written application is required. Inquiries should be directed to the case manager for the application. It may be necessary to obtain some documents from the Federal Court.

Appendix IV Use of advertising and market research

The Tribunal used the services of two research organisations during the reporting period. The Tribunal paid \$24,092 for the conduct of research and evaluation into staff satisfaction by ORIMA Research. The survey will be completed in the next reporting period. Mark Dignam and Associates were paid \$41,360 for the conduct of research and evaluation into client satisfaction. For more information see 'Employee survey', p. 89, and 'Client satisfaction', p. 47.

The Tribunal paid \$5,437 to Lasermail Pty Ltd, an external distribution agency, for labour costs associated with sorting, packaging and mailing of information.

The costs for advertising via a media advertising organisation are in Table 18 below.

Table 18 Expenditure on advertising (via a media advertising organisation)	
Type	Expenditure
Notification of applications as required under the Act	\$303,618
Staff recruitment	\$150,242
Other advertising (for example, tenders and consultants)	Nil
Total expenditure on advertising	\$453,860

The total amount for distribution and advertising was \$459,297.59.

Appendix V Consultants

Table 19 Consultancy services of \$10,000 or more let under s. 131A of the Act

Consultant	Description	Contract price	Selection process	Justification
		Nil		

Table 20 Consultancy services of \$10,000 or more let under s. 132 of the Act

Consultant	Description	Contract price (\$)	Other	Selection process*	Justification**
Australian Government Solicitor	Legal services	20,606	On-going	Panel	B
Fujitsu Australia	ICT strategic advice	14,807	On-going	Deed of extension	B
Holding Redlich	Legal services	51,097	New	Select tender	B
Mark Dignam and Associates	Client satisfaction survey	41,360	New	Select tender	C
Orima Research	Staff satisfaction survey	24,092	New	Select tender	C
University of Queensland	Mediator accreditation	16,308	New	Direct sourcing	C
Vivid Group	Website project	144,543	On-going	Deed of extension	B
Total		\$312,813			

* Selection process terms drawn from the Commonwealth Procurement Guidelines, 2005:

Open tender: A procurement procedure in which a request for tender is published inviting all businesses that satisfy the conditions for participation to submit tenders. Public tenders are sought from the marketplace using national and major metropolitan newspaper advertising and the Australian Government AusTender internet site.

Select tender: A procurement procedure in which the procuring agency selects which potential suppliers are invited to submit tenders. Tenders are invited from a shortlist of competent suppliers.

Direct sourcing: A form of restricted tendering, available only under certain defined circumstances, with a single potential supplier or suppliers being invited to bid because of their unique expertise and/or their special ability to supply the goods and/or services sought.

Panel: An arrangement under which a number of suppliers, usually selected through a single procurement process, may each supply property or services to an agency as specified in the panel arrangements. Tenders are sought from suppliers that have pre-qualified on the agency panels to supply to the government. This category includes standing offers and supplier panels where consultant offers to supply goods and services for a predetermined length of time, usually at a pre-arranged price.

**** Justification for decision to use consultancy:**

A: skills currently unavailable within agency

B: need for specialised or professional skills

C: need for independent research or assessment.

Appendix VI Audit report and notes to the financial statements



INDEPENDENT AUDITOR'S REPORT

To the Attorney-General

Scope

I have audited the accompanying financial statements of the National Native Title Tribunal for the year ended 30 June 2008, which comprise: a statement by the Chief Executive and Chief Finance Officer; income statement; balance sheet; statement of changes in equity; cash flow statement; schedules of commitments and administered items; and notes to the financial statements, including a summary of significant accounting policies.

The Responsibility of the Chief Executive for the Financial Statements

The National Native Title Tribunal's Chief Executive is responsible for the preparation and fair presentation of the financial statements in accordance with the Finance Minister's Orders made under the *Financial Management and Accountability Act 1997* and the Australian Accounting Standards (including the Australian Accounting Interpretations). This responsibility includes establishing and maintaining internal controls relevant to the preparation and fair presentation of the financial statements that are free from material misstatement, whether due to fraud or error; selecting and applying appropriate accounting policies; and making accounting estimates that are reasonable in the circumstances.

Auditor's Responsibility

My responsibility is to express an opinion on the financial statements based on my audit. My audit has been conducted in accordance with the Australian National Audit Office Auditing Standards, which incorporate the Australian Auditing Standards. These Auditing Standards require that I comply with relevant ethical requirements relating to audit engagements and plan and perform the audit to obtain reasonable assurance whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgement, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the National Native Title Tribunal's preparation and fair presentation of the financial statements in order to design audit procedures that are

appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the National Native Title Tribunal's internal control. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by the Chief Executive, as well as evaluating the overall presentation of the financial statements.

I believe that the audit evidence I have obtained is sufficient and appropriate to provide a basis for my audit opinion.

Independence

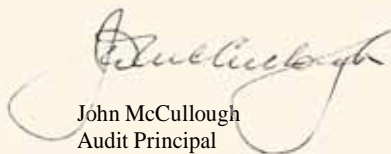
In conducting the audit, I have followed the independence requirements of the Australian National Audit Office, which incorporate the requirements of the Australian accounting profession.

Auditor's Opinion

In my opinion, the financial statements of the National Native Title Tribunal:

- (a) have been prepared in accordance with the Finance Minister's Orders made under the *Financial Management and Accountability Act 1997* including the Australian Accounting Standards; and
- (b) give a true and fair view of the matters required by the Finance Minister's Orders including the National Native Title Tribunal's financial position as at 30 June 2008 and its financial performance and its cash flows for the year then-ended.

Australian National Audit Office



John McCullough
Audit Principal
Delegate of the Auditor-General

Canberra
10 September 2008

National Native Title Tribunal

Statement by the Chief Executive and Chief Finance Officer

In our opinion, the attached financial statements for the year ended 30 June 2008 are based on properly maintained financial records and give a true and fair view of the matters required by the Finance Minister's Orders made under the *Financial Management and Accountability Act 1997, as amended.*



Franklin Gaffney
Chief Executive Officer



Hardip Bhabra
Chief Finance Officer

5 September 2008

INCOME STATEMENT for the year ended 30 June 2008

	Notes	2008 \$'000	2007 \$'000
INCOME			
Revenue			
Revenue from Government	3A	32,965	32,667
Sale of goods and rendering of services	3B	79	63
Interest	3C	163	-
Total revenue		33,2068	32,730
Gains			
Sale of assets	3D	-	2
Total gains		-	2
Total Income		33,080	32,732
EXPENSES			
Employee benefits	4A	19,731	18,916
Suppliers	4B	9,960	8,570
Depreciation and amortisation	4C	440	726
Other expenses	4D	-	9
Total Expenses		30,131	28,221
Surplus (Deficit) attributable to the Australian Government		3,077	4,511

The above statement should be read in conjunction with the accompanying notes.

BALANCE SHEET as at 30 June 2008

	Notes	2008 \$'000	2007 \$'000
ASSETS			
Financial Assets			
Cash and cash equivalents	5A	595	456
Trade and other receivables	5B	15,990	12,918
Total financial assets		16,585	13,374
Non-Financial Assets			
Land and buildings	6A	99	142
Infrastructure, plant and equipment	6B	841	548
Intangibles	6C	84	135
Other non-financial assets	6D	978	1,129
Total non-financial assets		2,002	1,955
Total Assets		18,588	15,329
LIABILITIES			
Payables			
Suppliers	7A	404	479
Other payables	7B	40	15
Total payables		444	494
Provisions			
Employee provisions	8A	4,449	4,217
Other provisions	8B	457	457
Total provisions		4,906	4,674
Total Liabilities		5,350	5,168
Net Assets		13,238	10,161
EQUITY			
Parent Entity Interest			
Contributed equity		2,415	2,415
Retained surplus (accumulated deficit)		10,823	7,746
Total Equity		13,238	10,161
Current Assets		16,585	13,374
Non-Current Assets		2,002	1,955
Current Liabilities		4,012	3,790
Non-Current Liabilities		1,338	1,378

The above statement should be read in conjunction with the accompanying notes.

Statement of changes in equity as at 30 June 2008

	Retained Earnings		Contributed Equity/Capital		Total Equity	
	2008	2007	2008	2007	2008	2007
	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000
Opening balance						
Balance carried forward from previous period	7,746	5,120	2,415	2,415	10,161	7,535
Return of funds	-	(1,921)	-	-	0	(1,921)
Adjustment for errors	-	36	-	-	0	36
Adjusted opening balance	7,746	3,235	2,415	2,415	10,161	5,650
Income and expenses						
Sub-total income and expenses recognised						
Directly in Equity	7,746	3,235	2,415	2,415	10,161	5,650
Surplus (Deficit) for the period	3,077	4,511	-	-	3,077	4,511
Total income and expenses	10,823	7,746	2,415	2,415	13,238	10,161
of which:						
attributable to the Australian Government	10,823	7,746	2,415	2,415	13,238	10,161
Closing balance at 30 June 2008	10,823	7,746	2,415	2,415	13,238	10,161
Less: minority interest	-	-	-	-	-	-
Closing balance attributable to the Australian Government	10,823	7,746	2,415	2,415	13,238	10,161

The above statement should be read in conjunction with the accompanying notes.

CASH FLOW STATEMENT for the year ended 30 June 2008

	Notes	2008 \$'000	2007 \$'000
OPERATING ACTIVITIES			
Cash received			
Goods and services		79	36
Appropriations		30,005	27,467
Interest		163	-
Net GST received		824	794
Other cash received		160	426
Total cash received		31,232	28,723
Cash used			
Employees		(19,275)	(18,243)
Suppliers		(11,180)	(10,690)
Cash transferred to OPA		-	(700)
Total cash used		(30,455)	(29,633)
Net cash flows from or (used by) operating activities	9	777	(910)
INVESTING ACTIVITIES			
Cash used			
Purchase of property, plant and equipment		(638)	(84)
Total cash used		(638)	(84)
Net cash flows from or (used by) investing activities		(638)	(84)
Net increase or (decrease) in cash held		139	(994)
Cash and cash equivalents at the beginning of the reporting period		456	1,450
Cash and cash equivalents at the end of the reporting period	5A	595	456

The above statement should be read in conjunction with the accompanying notes.

Schedule of commitments as at 30 June 2008

BY TYPE	2008 \$'000	2007 \$'000
Commitments Receivable		
GST recoverable on commitments	(910)	(556)
<i>Total Commitments Receivable</i>	(910)	(556)
Other commitments		
Operating leases	10,013	6,112
Other commitments	-	479
<i>Total other commitments</i>	10,013	6,591
Net commitments by type	9,103	6,035
BY MATURITY		
Commitments receivable		
Operating lease income		
One year or less	(310)	(556)
From one to five years	(527)	-
Over five years	(73)	-
<i>Total operating lease income</i>	(910)	(556)
Commitments payable		
Operating lease commitments		
One year or less	3,408	189
From one to five years	5,797	5,923
Over five years	808	-
<i>Total operating lease commitments</i>	10,013	6,112
Other Commitments		
One year or less	-	479
<i>Total other commitments</i>	-	479
Net Commitments by Maturity	9,103	6,035

The above statement should be read in conjunction with the accompanying notes.

Schedule of administered items

Income administered on behalf of Government for the year ended 30 June 2008

	Notes	2008 \$'000	2007 \$'000
REVENUE			
Non-taxation revenue			
Fees and fines	14A	13	5
Total non-taxation revenue		13	5
Total revenues administered on behalf of Government		13	5
Total income administered on behalf of Government		13	5

Administered Cash Flows for the period ended 30 June 2008

OPERATING ACTIVITIES

Cash received

Fees	14A	13	5
Total cash received		13	5

Cash used

Other: Return of fees		3	1
Total cash used		3	1

Net cash flows from or (used by) operating activities

10	4
----	---

Net Increase (Decrease) in Cash Held

10	4
----	---

Cash and cash equivalents at the beginning of the reporting period

-	-
---	---

Cash from Official Public Account for:

Appropriations	13	5
	13	5

Cash to Official Public Account for:

Appropriations	(13)	(5)
	(13)	(5)

Effect of exchange rate movements on cash and cash equivalents at the beginning of the reporting period

-	-
---	---

Cash and cash equivalents at the end of the reporting period

0	0
---	---

This schedule should be read in conjunction with the accompanying notes.

Notes to and forming part of the financial statements for the year ended 30 June 2008

Index of notes to the financial statements

Note 1	Summary of significant accounting policies
Note 2	Events after the balance sheet date
Note 3	Income
Note 4	Expenses
Note 5	Financial assets
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Note 7	Payables
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Note 10	Contingent liabilities and assets
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Note 17	Reporting of outcomes

Note 1 Summary of significant accounting policies

1.1 Objectives of the National Native Title Tribunal

The National Native Title Tribunal ('the Tribunal') is an Australian Public Service organisation. The objectives of the Tribunal are:

- To assist people to develop agreements that resolve native title issues.
- To have fair and efficient processes for making arbitral and registration decisions.
- To provide accurate and comprehensive information about native title matters to clients, governments and communities.
- To have a highly skilled, flexible, diverse and valued workforce.

The Tribunal is structured to meet one outcome, the resolution of native title issues over land and waters.

Tribunal activities contributing to this outcome are classified as either departmental or administered. Departmental activities involve the use of assets, liabilities, revenues and expenses controlled or incurred by the Tribunal in its own right.

Administered activities involve the management or oversight by the Tribunal, on behalf of the Government, of items controlled or incurred by the Government.

Departmental activities are identified under three Outputs.

Output 1—*Stakeholder and Community Relations*;

Output 2—*Agreement-making*; and

Output 3—*Decisions*.

Notes to and forming part of the financial statements for the year ended 30 June 2008

The continued existence of the Tribunal in its present form and with its present programs is dependent on Government policy and on continuing appropriations by Parliament for the Tribunal's administration and programs.

1.2 Basis of preparation of the financial report

The Financial Statements and notes are required by section 49 of the *Financial Management and Accountability Act 1997* and are a General Purpose Financial Report.

The Financial Statements and notes have been prepared in accordance with:

- Finance Minister's Orders (or FMOs) or reporting periods ending on or after 1 July 2007; and
- Australian Accounting Standards and Interpretations issued by the Australian Accounting Standards Board (AASB) that apply for the reporting period.

The financial report has been prepared on an accrual basis and is in accordance with the historical cost convention, except for certain assets at fair value.

Except where stated, no allowance is made for the effect of changing prices on the results or the financial position.

The Financial Report is presented in Australian dollars and values are rounded to the nearest thousand dollars unless otherwise specified. Unless an alternative treatment is specifically required by an Accounting Standard or the FMOs, assets and liabilities are recognised in the Balance Sheet when and only when it is probable that future economic benefits will flow to the Entity or a future sacrifice of economic benefits will be required and the amounts of the assets or liabilities can be reliably measured. However, assets and liabilities arising under agreements equally proportionately unperformed are not recognised unless required by an Accounting Standard. Liabilities and assets that are unrealised are reported in the Schedule of Commitments. The Tribunal had no Contingencies as at the end of the reporting period.

Unless alternative treatment is specifically required by an accounting standard, revenues and expenses are recognised in the Income Statement when and only when the flow, consumption or loss of economic benefits has occurred and can be reliably measured.

Administered revenues, expenses, assets and liabilities and cash flows reported in the Schedule of Administered Items and related notes are accounted for on the same basis and using the same policies as for departmental items, except where otherwise stated at Note 1.19.

1.3 Significant accounting judgements and estimates

No accounting assumptions or estimates have been identified that have a significant risk of causing a material adjustment to carrying amounts of assets and liabilities within the next accounting period.

1.4 Statement of compliance

Adoption of new Australian Accounting Standard requirements

No accounting standard has been adopted earlier than the application date as stated in the standard. The following new standards are applicable to the current reporting period:

Financial instrument disclosure

AASB 7 *Financial Instruments: Disclosures* is effective for reporting periods beginning on or after 1 January 2007 (the 2007-08 financial year) and amends the disclosure requirements for financial instruments. In general AASB 7 requires greater disclosure than that previously required.

Associated with the introduction of AASB 7 a number of accounting standards were amended to reference the new standard or remove the present disclosure requirements through 2005-10 Amendments to Australian Accounting Standards [AASB 132, AASB 101, AASB 114, AASB 117, AASB 133, AASB 139, AASB 1, AASB 4, AASB 1023 & AASB 1038]. These changes have no financial impact but will affect the disclosure presented in future financial reports.

The following new standards, amendments to standards or interpretations for the current financial year have no material financial impact on the Tribunal.

- 2007-4 *Amendments to Australian Accounting Standards arising from ED 151 and Other Amendments and Erratum: Proportionate Consolidation*
- 2007-7 *Amendments to Australian Accounting Standards*
- UIG Interpretation 11 AASB 2—*Group and Treasury Share Transactions* and 2007-1 *Amendments to Australian Accounting Standards arising from AASB Interpretation 11*

The following standards and interpretations have been issued but are not applicable to the operations of the Tribunal.

AASB 1049 Whole of Government and General Government Sector Financial Reporting

AASB 1049 specifies the reporting requirements for the General Government Sector. The FMOs do not apply to this reporting or the consolidated financial statements of the Australian Government.

Future Australian Accounting Standard requirements

The following new standards, amendments to standards or interpretations have been issued by the Australian Accounting Standards Board but are effective for future reporting periods. It is estimated that the impact of adopting these pronouncements when effective will have no material financial impact on future reporting periods.

- AASB Interpretation 12 *Service Concession Arrangements* and 2007-2 *Amendments to Australian Accounting Standards arising from AASB Interpretation 12*
- AASB 8 *Operating Segments* and 2007-3 *Amendments to Australian Accounting Standards arising from AASB 8*
- 2007-6 *Amendments to Australian Accounting Standards arising from AASB 123*
- AASB Interpretation 13 *Customer Loyalty Programmes*
- AASB Interpretation 14 AASB 119—*The Limit on a Defined Benefit Asset, Minimum Funding Requirements and their Interaction*

Notes to and forming part of the financial statements for the year ended 30 June 2008

1.5 Revenue

Revenue from Government

Amounts appropriated for departmental output appropriations for the year (adjusted for any formal additions and reductions) are recognised as revenue when the agency gains control of the appropriation, except for certain amounts that relate to activities that are reciprocal in nature, in which case revenue is recognised only when it has been earned.

Appropriations receivable are recognised at their nominal amounts.

Other types of revenue

Revenue from the sale of goods is recognised when:

- The risks and rewards of ownership have been transferred to the buyer;
- The seller retains no managerial involvement nor effective control over the goods;
- The revenue and transaction costs incurred can be reliably measured; and
- It is probable that the economic benefits associated with the transaction will flow to the entity.

Revenue from rendering of services is recognised by reference to the stage of completion of contracts at the reporting date. The revenue is recognised when:

- The amount of revenue, stage of completion and transaction costs incurred can be reliably measured; and
- The probable economic benefits with the transaction will flow to the entity.

The stage of completion of contracts at the reporting date is determined by reference to the proportion that costs incurred to date bear to the estimated total costs of the transaction.

Receivables for goods and services, which have 30 day terms, are recognised at the nominal amounts due less any provision for bad and doubtful debts. Collectability of debts is reviewed at balance date. Provisions are made when collectability of the debt is no longer probable.

Interest revenue is recognised using the effective interest method as set out in AASB 139 *Financial Instruments: Recognition and Measurement*.

1.6 Gains

Other resources received free of charge

Resources received free of charge are recognised as gains when and only when a fair value can be reliably determined and the services would have been purchased if they had not been donated. Use of those resources is recognised as an expense.

Contributions of assets at no cost of acquisition or for nominal consideration are recognised as gains at their fair value when the asset qualifies for recognition, unless received from another Government Agency or Authority as a consequence of a restructuring of administrative arrangements (Refer to Note 1.7).

Resources received free of charge are recorded as either revenue or gains depending on their nature.

Sale of assets

Gains from disposal of non-current assets is recognised when control of the asset has passed to the buyer.

1.7 Transactions with the Government as owner*Other distributions to owners*

The FMOs require that distributions to owners be debited to contributed equity unless in the nature of a dividend.

1.8 Employee benefits

Liabilities for services rendered by employees are recognised at the reporting date to the extent that they have not been settled.

Liabilities for 'short-term employee benefits' (as defined in AASB 119) and termination benefits due within twelve months of balance date are measured at their nominal amounts.

The nominal amount is calculated with regard to the rates expected to be paid on settlement of the liability.

All other employee benefit liabilities are measured at the present value of the estimated future cash outflows to be made in respect of services provided by employees up to the reporting date.

Leave

The liability for employee benefits includes provision for annual leave and long service leave. No provision has been made for sick leave as all sick leave is non-vesting and the average sick leave taken in future years by employees of the Tribunal is estimated to be less than the annual entitlement for sick leave.

The leave liabilities are calculated on the basis of employees' remuneration, including the Tribunal's employer superannuation contribution rates to the extent that the leave is likely to be taken during service rather than paid out on termination.

The liability for long service leave has been determined by reference to the work of an actuary as at 30 June 2008. The estimate of the present value of the liability takes into account attrition rates and pay increases through promotion and inflation.

Separation and redundancy

No provision has been made for separation and redundancy payments as the Tribunal has not identified any positions as excess to the requirements within the next 12 months.

Superannuation

The majority of employees of the Tribunal are members of the Commonwealth Superannuation Scheme (CSS), the Public Sector Superannuation Scheme (PSS) or the PSS accumulation plan (PSSap). A small number of employees are members of AGEST and SunSuper.

The CSS and PSS are defined benefit schemes for the Australian Government. The PSSap is a defined contribution scheme.

Notes to and forming part of the financial statements for the year ended 30 June 2008

The liability for defined benefits is recognised in the financial statements of the Australian Government and is settled by the Australian Government in due course. This liability is reported by the Department of Finance and Administration as an administered item.

The Tribunal makes employer contributions to the employee superannuation scheme at rates determined by an actuary to be sufficient to meet the current cost to the Government of the superannuation entitlements of the Tribunal's employees. The Tribunal accounts for the contributions as if they were contributions to defined contribution plans.

Contributions to AGEST and SunSuper comply with the requirements of Superannuation Guarantee legislation.

From 1 July 2005, new employees are eligible to join the PSSap scheme.

The liability for superannuation recognised as at 30 June 2008 represents outstanding contributions for the final fortnight of the year as well as superannuation liabilities applicable to the total leave provisions.

1.9 Leases

A distinction is made between finance leases and operating leases. Finance leases effectively transfer from the lessor to the lessee substantially all the risks and rewards incidental to ownership of leased non-current assets. An operating lease is a lease that is not a finance lease. In operating leases, the lessor effectively retains substantially all such risks and benefits.

Operating lease payments are expensed on a straight line basis which is representative of the pattern of benefits derived from the leased assets.

The Tribunal had no finance leases in existence at 30 June 2008.

1.10 Cash

Cash and cash equivalents includes notes and coins held and any deposits in bank accounts with an original maturity of three months or less that are readily convertible to known amounts of cash and subject to insignificant risk of changes in value. Cash is recognised at its nominal amount.

1.11 Financial assets

Trade and other receivables

Trade and other receivables that have fixed or determinable payments that are not quoted in an active market are classified as 'loans and receivables' and are included in current assets.

Impairment of financial assets

Financial assets are assessed for impairment at each balance date.

Financial assets held at amortised cost

If there is objective evidence that an impairment loss has been incurred for receivables, the amount of the loss is measured as the difference between the asset's carrying amount and the present value of estimated future cash flows discounted at the asset's original effective interest rate. The carrying amount is reduced by way of an allowance account. The loss is recognised in the Income Statement.

The effective interest rate is the rate that exactly discounts estimated future cash receipts through the expected life of the financial asset, or, where appropriate, a shorter period.

1.12 Financial liabilities

Supplier and other payables

Supplier and other payables are recognised at amortised cost. Liabilities are recognised to the extent that the goods or services have been received (and irrespective of having been invoiced).

1.13 Contingent liabilities and contingent assets

Contingent Liabilities and Contingent Assets are not recognised in the Balance Sheet but are reported in the relevant schedules and notes. They may arise from uncertainty as to the existence of a liability or asset or represent an asset or liability in respect of which the amount cannot be reliably measured. Contingent assets are disclosed when settlement is probable but not virtually certain and contingent liabilities are disclosed when settlement is greater than remote.

1.14 Financial guarantee contracts

Financial guarantee contracts are accounted for in accordance with AASB139. They are not treated as a contingent liability, as they are regarded as financial instruments outside the scope of AASB137.

1.15 Acquisition of assets

Assets are recorded at cost on acquisition except as stated below. The cost of acquisition includes the fair value of assets transferred in exchange and liabilities undertaken. Financial assets are initially measured at their fair value plus transaction costs where appropriate.

Assets acquired at no cost, or for nominal consideration, are initially recognised as assets and revenues at their fair value at the date of acquisition, unless acquired as a consequence of restructuring of administrative arrangements. In the latter case, assets are initially recognised as contributions by owners at the amounts at which they were recognised in the transferor Agency's accounts immediately prior to the restructuring.

1.16 Property, plant and equipment

Asset recognition threshold

Purchases of property, plant and equipment are recognised initially at cost in the Balance Sheet, except for purchases costing less than \$2,000, which are expensed in the year of acquisition (other than where they form part of a group of similar items which are significant in total).

The initial cost of an asset includes an estimate of the cost of dismantling and removing the item and restoring the site on which it is located. This is particularly relevant to 'makegood' provisions in property leases taken up by the Tribunal where there exists an obligation to restore the property to its original condition. These costs are included in the value of the Tribunal's leasehold improvements with a corresponding provision for the 'makegood' recognised.

Notes to and forming part of the financial statements for the year ended 30 June 2008

Revaluations

Fair values for each class of asset are determined as shown below:

Asset class	Fair value measured at:
Leasehold improvements	Depreciated replacement cost
Infrastructure, plant and equipment	Market selling price

Following initial recognition at cost, property plant and equipment are carried at fair value less accumulated depreciation and accumulated impairment losses. Valuations are conducted with sufficient frequency to ensure that the carrying amounts of assets do not differ materially from the assets' fair values as at the reporting date. The regularity of independent valuations depends upon the volatility of movements in market values for the relevant assets. The Tribunal did not undertake any asset revaluations during the financial year.

Revaluation adjustments are made on a class basis. Any revaluation increment is credited to equity under the heading of asset revaluation reserve except to the extent that it reverses a previous revaluation decrement of the same asset class that was previously recognised through operating result. Revaluation decrements for a class of assets are recognised directly through operating result except to the extent that they reverse a previous revaluation increment for that class.

Any accumulated depreciation as at the revaluation date is eliminated against the gross carrying amount of the asset and the asset restated to the revalued amount.

Depreciation

Depreciable property plant and equipment assets are written-off to their estimated residual values over their estimated useful lives to the Tribunal using, in all cases, the straight-line method of depreciation.

Depreciation rates (useful lives), residual values and methods are reviewed at each reporting date and necessary adjustments are recognised in the current, or current and future reporting periods, as appropriate.

Depreciation rates applying to each class of depreciable asset are based on the following useful lives:

	2008	2007
Leasehold improvements	Lease term	Lease term
Plant and equipment	3 to 10 years	3 to 10 years

Impairment

All assets were assessed for impairment at 30 June 2008. Where indications of impairment exist, the asset's recoverable amount is estimated and an impairment adjustment made if the asset's recoverable amount is less than its carrying amount.

The recoverable amount of an asset is the higher of its fair value less costs to sell and its value in use. Value in use is the present value of the future cash flows expected to be derived from the asset. Where the future economic benefit of an asset is not primarily dependent on the

asset's ability to generate future cash flows, and the asset would be replaced if the Tribunal were deprived of the asset, its value in use is taken to be its depreciated replacement cost.

1.17 Intangibles

The Tribunal's intangibles comprise internally developed software for internal use. These assets are carried at cost less accumulated amortisation and accumulated impairment losses.

Software is amortised on a straight-line basis over its anticipated useful life. The useful lives of the Tribunal's software is 5 years (2006-07: 5 years).

All software assets were assessed for indications of impairment as at 30 June 2008.

1.18 Taxation/competitive neutrality

The Tribunal is exempt from all forms of taxation except fringe benefits tax (FBT) and the goods and services tax (GST).

Revenues, expenses and assets are recognised net of GST:

- except where the amount of GST incurred is not recoverable from the Australian Taxation Office; and
- except for receivables and payables.

1.19 Reporting of administered activities

Administered revenues, expenses, assets, liabilities and cash flows are disclosed in the Schedule of Administered Items and related Notes.

Except where otherwise stated below, administered items are accounted for on the same basis and using the same policies as for Departmental items, including the application of Australian Accounting Standards.

Administered cash transfers to and from the Official Public Account

Revenue collected by the Tribunal for use by the Government rather than the Agency is Administered Revenue. Collections are transferred to the Official Public Account (OPA) maintained by the Department of Finance and Administration. Conversely, cash is drawn from the OPA to make payments under Parliamentary appropriation on behalf of Government. These transfers to and from the OPA are adjustments to the administered cash held by the Tribunal on behalf of the Government and reported as such in the Statement of Cash Flows in the Schedule of Administered Items and in the Administered Reconciliation Table in Note 14B. The Schedule of Administered Items largely reflects the Government's transactions, through the Tribunal, with parties outside the Government.

Revenue

All administered revenues are revenues relating to the course of ordinary activities performed by the Tribunal on behalf of the Australian Government.

Revenue is generated from fees charged for lodgement of an application with the Tribunal.

Notes to and forming part of the financial statements for the year ended 30 June 2008

Indemnities

The maximum amounts payable under the indemnities given is disclosed in the Schedule of Administered Items - Contingencies. At the time of completion of the financial statements, there was no reason to believe that the indemnities would be called upon, and no recognition of any liability was therefore required.

Note 2 Events after the balance sheet date

There have been no events that significantly effect the balances in the accounts.

Note 3 Income

	2008 \$'000	2007 \$'000
Revenue		
Note 3A: Revenue from Government		
Appropriations:		
Departmental outputs	32,965	32,667
Total revenue from Government	32,965	32,667
Note 3B: Sale of goods and rendering of services		
Rendering of services - external parties	79	63
Total sale of goods and rendering of services	79	63
Note 3C: Interest		
On rental deposits	163	-
Total interest	163	-
Gains		
Note 3D: Sale of assets		
Infrastructure, plant and equipment		
Proceeds from sale	-	24
Carrying value of assets sold	-	(22)
Net gain from sale of assets	-	2

Note 4 Expenses

	2008 \$'000	2007 \$'000
Note 4A: Employee benefits		
Wages and salaries	14,060	13,092
Superannuation: Defined contribution plans	2,366	2,566
Leave and other entitlements	3,078	2,938
Separation and redundancies	227	321
Total employee benefits	19,731	18,916
Note 4B: Suppliers		
Provision of goods – external parties	612	436
Rendering of services – related entities	231	466
Rendering of services – external parties	6,043	5,108
Operating lease rentals:		
Minimum lease payments	2,951	2,362
Workers compensation premiums	123	198
Total supplier expenses	9,960	8,570
Note 4C: Depreciation and amortisation		
Depreciation:		
Infrastructure, plant and equipment	307	519
Buildings	61	132
Total depreciation	368	651
Amortisation:		
Intangibles: Computer Software	72	75
Total amortisation	72	75
Total depreciation and amortisation	440	726
Note 4D: Other expenses		
Loss resulting from assets write off	-	9
Total other expenses	-	9

Notes to and forming part of the financial statements for the year ended 30 June 2008

Note 5 Financial assets

	2008 \$'000	2,007 \$'000
Note 5A: Cash and cash equivalents		
Cash on hand or on deposit	595	456
Total cash and cash equivalents	595	456
Note 5B: Trade and other receivables		
Goods and services	132	46
Appropriations receivable:		
for additional outputs	15,709	12,750
Total appropriations receivable	15,841	12,796
GST receivable from the Australian Taxation Office	152	125
Total other receivables	152	125
Total trade and other receivables (gross)	15,993	12,921
Less Allowance for doubtful debts:		
Goods and services	(3)	(3)
Total trade and other receivables (net)	15,990	12,918
Receivables are represented by:		
Current	15,990	12,918
Non-current	-	-
Total trade and other receivables (net)	15,990	12,918
Receivables are aged as follows:		
Not overdue	15,990	12,918
Overdue by:		
Less than 30 days	3	-
30 to 60 days	-	-
61 to 90 days	-	2
More than 90 days	-	1
Total receivables (gross)	15,993	12,921
The allowance for doubtful debts is aged as follows:		
Not overdue	-	-
Overdue by:		
Less than 30 days	(3)	-
30 to 60 days	-	-
61 to 90 days	-	(2)
More than 90 days	-	(1)
Total allowance for doubtful debts	(3)	(3)

Note 5 Financial assets (continued)

Reconciliation of the allowance for doubtful debts:

	Goods & services 2008 \$'000	Total 2008 \$'000
Movements in relation to 2008		
Opening balance	3	3
Amounts written off	-	-
Amounts recovered and reversed	(3)	(3)
Increase/decrease recognised in net surplus	3	3
Closing balance	3	3

	Goods & services 2007 \$'000	Total 2007 \$'000
Movements in relation to 2007		
Opening balance	3	3
Amounts written off	-	-
Amounts recovered and reversed	-	-
Increase/decrease recognised in net surplus	-	-
Closing balance	3	3

Note 6 Non-financial assets

	2008 \$'000	2007 \$'000
Note 6A: Land and buildings		
Leasehold improvements		
fair value	4,590	4,542
accumulated depreciation	(4,491)	(4,400)
Total leasehold improvements	99	142
Total land and buildings (non-current)	99	142

No indicators of impairment were found for land and buildings.

Note 6B: Infrastructure, plant and equipment

Infrastructure, plant and equipment:		
gross carrying value (at fair value)	3,156	2,586
accumulated depreciation	(2,315)	(2,038)
Total infrastructure, plant and equipment	841	548
Total infrastructure, plant and equipment (non-current)	841	548

No indicators of impairment were found for infrastructure, plant and equipment.

Notes to and forming part of the financial statements for the year ended 30 June 2008

Note 6 Non-financial assets (continued)

	2008 \$'000	2007 \$'000
Note 6C: Intangibles		
Computer software at cost:		
Internally developed – in use	1,342	1,322
Total Computer Software	1,342	1,322
Accumulated amortisation	(1,258)	(1,186)
Total intangibles (non-current)	84	135

No indicators of impairment were found for intangible assets.

Note 6D: Other non-financial assets

Prepayments	978	1,129
Total other non-financial assets	978	1,129

All other non-financial assets are current assets.

No indicators of impairment were found for other non-financial assets.

Note 6E: Analysis of property, plant and equipment

Table A: Reconciliation of the opening and closing balances of property, plant and equipment (2007–08)

Item	Buildings \$'000	Other IP & E \$'000	Total \$'000
As at 1 July 2007			
Gross book value	4,542	2,585	7,127
Accumulated depreciation/amortisation and impairment	(4,400)	(2,037)	(6,437)
Net book value 1 July 2007	142	548	690
Additions:			
by purchase	48	570	618
Depreciation/amortisation expense	(91)	(277)	(368)
Other movements	-	-	-
Net book value 30 June 2008	99	841	940
Net book value as of 30 June 2008 represented by:			
Gross book value	4,590	3,156	7,746
Accumulated depreciation/amortisation and impairment	(4,491)	(2,315)	(6,806)
	99	841	940

Note 6 Non-financial assets (continued)**Table B: Reconciliation of the opening and closing balances of property, plant and equipment (2006–07)**

Item	Buildings \$'000	Other IP & E \$'000	Total \$'000
As at 1 July 2006			
Gross book value	4,537	3,034	7,571
Accumulated depreciation/amortisation and impairment	(4,278)	(2,028)	(6,306)
Net book value 1 July 2006	259	1,006	1,265
Additions:			
by purchase	5	79	84
Depreciation/amortisation expense	(122)	(528)	(650)
Other movements	-	(9)	(9)
Net book value 30 June 2007	142	548	690
Net book value as of 30 June 2007 represented by:			
Gross book value	4,542	2,585	7,127
Accumulated depreciation/amortisation and impairment	(4,400)	(2,037)	(6,437)
	142	548	690

Note 6F: Intangibles**Table A: Reconciliation of the opening and closing balances of intangibles (2007–08)**

Item	Computer software internally developed \$'000	Total \$'000
As at 1 July 2007		
Gross book value	1,321	1,321
Accumulated depreciation/amortisation and impairment	(1,186)	(1,186)
Net book value 1 July 2007	135	135
Additions:		
by purchase or internally developed	21	21
Amortisation	(72)	(72)
Other movements	-	-
Net book value 30 June 2008	84	84
Net book value as of 30 June 2008 represented by:		
Gross book value	1,342	1,342
Accumulated depreciation/amortisation and impairment	(1,258)	(1,258)
	84	84

Notes to and forming part of the financial statements for the year ended 30 June 2008

Note 6 Non-financial assets (continued)

Table B: Reconciliation of the opening and closing balances of intangibles (2006–07)

Item	Computer software internally developed \$'000	Total \$'000
As at 1 July 2006		
Gross book value	1,321	1,321
Accumulated depreciation/amortisation and impairment	(1,111)	(1,111)
Net book value 1 July 2006	<u>210</u>	<u>210</u>
Additions:		
by purchase or internally developed	-	-
Amortisation	(75)	(75)
Other movements	-	-
Net book value 30 June 2007	<u>135</u>	<u>135</u>
Net book value as of 30 June 2007 represented by:		
Gross book value	1,321	1,321
Accumulated depreciation/amortisation and impairment	(1,186)	(1,186)
	<u>135</u>	<u>135</u>

Note 7 Payables

	2008 \$'000	2007 \$'000
Note 7A: Suppliers		
Trade creditors	404	479
Operating lease rentals	-	-
Total supplier payables	<u>404</u>	<u>479</u>
Supplier payables are represented by:		
Current	404	479
Non-current	-	-
Total supplier payables	<u>404</u>	<u>479</u>

Settlement is usually made net 30 days.

Note 7B: Other payables

Unearned Revenue	-	14
GST payable to ATO	-	1
FBT payable to ATO	40	-
Total Other Payables	<u>40</u>	<u>15</u>

Note 8 Provisions

	2008 \$'000	2007 \$'000
Note 8A: Employee provisions		
Salaries and wages	202	146
Leave	3,655	3,569
Superannuation	592	502
Total employee provisions	4,449	4,217
Employee provisions are represented by:		
Current	3,398	2,839
Non-current	1,051	1,378
Total employee provisions	4,449	4,217

The classification of current includes amounts for which there is not an unconditional right to defer settlement by one year, hence in the case of employee provisions the above classification does not represent the amount expected to be settled within one year of reporting date. Employee provisions expected to be settled in twelve months from the reporting date are \$2,673,000, and in excess of one year \$725,000.

	2008 \$'000	2007 \$'000
Note 8B: Other provisions		
Restoration obligations	457	457
Total other provisions	457	457
Other provisions are represented by:		
Current	-	-
Non-current	457	457
Total other provisions	457	457
	Provision for restoration	Total
	\$'000	\$'000
Carrying amount 1 July 2007	457	457
Movements during the year	-	-
Closing balance 2008	457	457

The Agency currently has 6 agreements for the leasing of premises which have provisions requiring the Agency to restore the premises to their original condition at the conclusion of the lease. The Agency has made a provision to reflect the present value of this obligation.

Notes to and forming part of the financial statements for the year ended 30 June 2008

Note 9 Cash flow reconciliation

	2008 \$'000	2007 \$'000
Reconciliation of cash and cash equivalents as per Balance Sheet to Cash Flow Statement		
Report cash and cash equivalents as per:		
Cash Flow Statement	595	456
Balance Sheet	595	456
Difference	-	-
Reconciliation of operating result to net cash from operating activities:		
Operating result	3,077	4,511
Depreciation /amortisation	440	726
Net write down of non-financial assets	-	9
Gain on disposal of assets	-	(2)
(Increase) / decrease in net receivables	(3,072)	(4,046)
(Increase) / decrease in prepayments	151	(1,066)
Increase / (decrease) in employee provisions	232	674
Increase / (decrease) in supplier payables	(50)	153
Increase / (decrease) in other provisions	-	15
Return of funds	-	(1,921)
Adjustment for error	(1)	36
Net cash from / (used by) operating activities	777	(910)

Note 10 Contingent liabilities and assets

Quantifiable and unquantifiable contingencies

The tribunal has no quantifiable or unquantifiable contingencies as at 30th of June 2008.

Remote contingencies

The Tribunal on behalf of the Commonwealth has indemnified State Governments of Western Australia and Queensland and the Northern Territory Government, against any action brought against those Governments which results from spatial data provided to the Tribunal by those Governments. The indemnities are unlimited.

At 30th June 2008, the Tribunal has indemnified the Lessors of the buildings in which the South Australia, Queensland and Cairns, Northern Territory, Victoria/Tasmania, New South Wales/ Australian Capital Territory, and Western Australia registry offices are located against any action brought against the Lessors which results from actions of Tribunal staff. These indemnities are unlimited.

Note 11 Senior executive remuneration

	2008	2007
The number of senior executives who received or were due to receive total remuneration of \$130,000 or more:		
\$160 000 to \$174 999	1	-
\$175 000 to \$189 999	1	-
\$190 000 to \$204 999	-	2
Total	2	2
The aggregate amount of total remuneration of senior executives shown above.	323,966	377,846
The aggregate amount of separation and redundancy/termination benefit payments during the year to executives shown above.	-	-

Note 12 Remuneration of auditors

	2008 \$'000	2007 \$'000
Financial statement audit services are provided free of charge to the agency.		
The fair value of the audit services provided	23	25
	23	25
No other services were provided by the Auditor-General.		

Notes to and forming part of the financial statements for the year ended 30 June 2008

Note 13 Financial instruments

	Notes	2008 \$'000	2007 \$'000
13A: Categories of financial instruments			
Financial Assets			
Loans and receivables financial assets			
Cash at Bank	5A	595	456
Receivables for goods and services	5B	132	46
Allowance for doubtful debts	5B	(3)	(3)
		<u>724</u>	<u>499</u>
<i>Carrying amount of financial assets</i>		<u>724</u>	<u>499</u>
Financial Liabilities			
At amortised cost			
Trade creditors	7A	404	479
Other Payables	7B	40	15
		<u>444</u>	<u>494</u>
<i>Carrying amount of financial liabilities</i>		<u>444</u>	<u>494</u>
13B: Net income and expense from financial assets			
Loans and receivables			
Interest revenue	3C	163	-
Gain/loss on disposal		-	2
<i>Net gain/(loss) from financial assets</i>		<u>163</u>	<u>2</u>

The average rate of interest for the year was 6.72%.

The net income/expense from financial assets not at fair value from profit and loss is Nil.

13C: Fair value of financial instruments

	Notes	Carrying amount 2008 \$'000	Fair value 2008 \$'000	Carrying amount 2007 \$'000	Fair value 2007 \$'000
Financial Assets					
Cash at Bank	5A	595	595	456	456
Receivables for goods and services	5B	129	129	43	43
Total	13A	<u>724</u>	<u>724</u>	<u>499</u>	<u>499</u>
Financial Liabilities					
Trade creditors	7A	404	404	479	479
Other Payables	7B	40	40	15	15
Total	13A	<u>444</u>	<u>444</u>	<u>494</u>	<u>494</u>

Note 14 Income administered on behalf of government

Notes to the Schedule of Administered Items

	2008	2007
	\$'000	\$'000

Revenue

Non-taxation revenue

Note 14A: Fees and fines

Other fees from regulatory services

13

5

Total fees and fines

13

5

Note 14B: Administered Reconciliation Table

*Opening administered assets less administered liabilities
as at 1 July*

-

-

Adjusted opening administered assets less administered liabilities

Plus: Administered income

13

5

Transfers to OPA

(13)

(5)

**Closing administered assets less administered liabilities
as at 30 June**

-

-

Notes to and forming part of the financial statements for the year ended 30 June 2008

Note 15 Appropriations

Table A: Acquittal of authority to draw cash from the consolidated revenue fund for ordinary annual services appropriations

Particulars	Administered Expenses		Departmental Outputs		Total	
	2008 \$'000	2007 \$'000	2008 \$'000	2007 \$'000	2008 \$'000	2007 \$'000
Balance brought forward from previous period	-	-	13,267	14,310	13,267	14,310
Adjustment to prior year disclosures	-	-	-	(4,029)	-	(4,029)
Departmental adjustments by Finance Minister (Appropriation Acts)	-	-	-	(1,921)	-	(1,921)
Total prior year adjustments	-	-	-	(5,950)	-	(5,950)
Adjusted prior year balance	-	-	13,267	8,360	13,267	8,360
Appropriation Act:						
Appropriation Act (No. 1) 2007-08	-	-	32,965	32,667	32,965	32,667
FMA Act:						
Appropriations to take account of recoverable GST (FMA section 30A)	-	-	824	795	824	795
Annotations to 'net appropriations' (FMA section 31)	-	-	79	36	79	36
Total appropriation available for payments	-	-	47,135	41,858	47,135	41,858
Cash payments made during the year (GST inclusive)	-	-	(30,743)	(28,591)	(30,743)	(28,591)
Balance of Authority to Draw Cash from the Consolidated Revenue Fund for Ordinary Annual Services Appropriations	-	-	16,392	13,267	16,392	13,267
Represented by:						
Cash at bank and on hand	-	-	552	413	552	413
Departmental appropriations receivable	-	-	15,709	12,750	15,709	12,750
Cash held not appropriated	-	-	(21)	(21)	(21)	(21)
GST recoverable	-	-	152	125	152	125
Total	-	-	16,392	13,267	16,392	13,267

Note 15 Appropriations (continued)

Table B: Acquittal of authority to draw cash from the consolidated revenue fund for other than ordinary annual services appropriations

Particulars	Operating Outcome 1		Total	
	2008 \$'000	2007 \$'000	2008 \$'000	2007 \$'000
Balance brought forward from previous period	43	43	43	43
Appropriation Act	-	-	-	-
FMA Act:				
Refunds credited (FMA section 30)	-	-	-	-
Appropriations to take account of recoverable GST (FMA section 30A)	-	-	-	-
Adjustment of appropriations on change of entity function (FMA section 32)	-	-	-	-
Total appropriations available for payments	43	43	43	43
Cash payments made during the year (GST inclusive)	-	-	-	-
Balance of Authority to draw cash from the Consolidated Revenue Fund for other than ordinary annual services appropriations	43	43	43	43
<i>Represented by:</i>				
Cash at bank and on hand	43	43	43	43
Total	43	43	43	43

Notes to and forming part of the financial statements for the year ended 30 June 2008

Note 16 Special accounts

Other Trust Moneys Special Account

Legal Authority: *Financial Management and Accountability Act 1997*; (s20)

Appropriation: *Financial Management and Accountability Act 1997*; (s21)

Purpose: To hold monies advanced to the Tribunal by COMCARE for the purpose of distributing compensation payments made in accordance with the *Safety Rehabilitation and Compensation Act 1988*. Where the Tribunal makes payment against accrued sick leave entitlements pending determination of an employee's claim, permission is obtained in writing from each individual to allow the Tribunal to recover the monies from this account. This account is non-interest bearing.

	2008 \$'000	2007 \$'000
Balance carried from previous period	20	15
Appropriation for reporting period	-	-
Other receipts	18	82
Total credits	38	97
Payments made	(38)	(77)
Total debits	(38)	(77)
Balance carried to next period	-	20
Represented by:		
Cash—transferred to the Official Public Account	-	-
Cash—held by the Agency	-	20
Total balance carried to the next period	-	20

Note 17 Reporting of outcomes

The Tribunal has one outcome, the resolution of native title issues over land and waters. The level of achievement against this outcome is constituted by activities that are grouped into the three output groups of Stakeholder and Community Relations (Group 1), Agreement-making (Group 2) and Decisions (Group 3). The basis of cost allocation in the table below is consistent with the basis used for the 2007–8 Budget.

Output Group 1

1.1 Capacity-building and strategic/sectoral initiatives

1.2 Assistance and information

Output Group 2

2.1 Indigenous land use agreements

2.2 Native title agreements and related agreements

2.3 Future act agreements

Output Group 3

3.1 Registration of native title claimant applications

3.2 Registration of indigenous land use agreements

3.3 Future act determinations

3.4 Finalise objections to the expedited procedure

Note 17A: Net cost of outcome delivery

	Outcome 1		Total	
	2008	2007	2008	2007
	\$'000	\$'000	\$'000	\$'000
Expenses				
Administered	-	-	-	-
Departmental	30,131	28,221	30,131	28,221
Total expenses	30,131	28,221	30,131	28,221
Costs recovered from provision of goods and services to the non government sector				
Administered	-	-	-	-
Departmental	243	65	243	65
Total costs recovered	243	65	243	65
Other external revenues				
Administered	-	-	-	-
Departmental	-	-	-	-
Total other external revenues	-	-	-	-
Net cost/(contribution) of outcome	29,888	28,156	29,888	28,156

Notes to and forming part of the financial statements for the year ended 30 June 2008

Note 17 Reporting of outcomes (continued)

Note 17B: Major classes of departmental revenues and expenses by output groups and outputs

Output Group 1	Output 1.1		Output 1.2		Total Output 1	
	2008	2007	2008	2007	2008	2007
	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000
Departmental expenses						
Employees	469	537	2,190	1,765	2,659	2,302
Suppliers	237	243	1,105	800	1,342	1,043
Depreciation and amortisation	10	21	49	69	59	89
Total departmental expenses	716	801	3,344	2,633	4,060	3,434
Funded by:						
Revenues from government	782	927	3,660	3,048	4,442	3,975
Sale of goods and services	2	2	9	6	11	8
Other non-taxation revenues	4	-	18	-	22	-
Total departmental revenues	788	929	3,687	3,054	4,475	3,983

Output Group 2	Output 2.1		Output 2.2		Output 2.3		Total Output 2	
	2008	2007	2008	2007	2008	2007	2008	2007
	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000
Departmental expenses								
Employees	2,247	1,699	7,273	5,990	1,257	1,796	10,777	10,888
Suppliers	1,134	836	3,672	2,714	634	814	5,440	4,933
Depreciation and amortisation	50	57	162	233	29	70	241	423
Total departmental expenses	3,431	2,592	11,107	8,936	1,919	2,679	16,457	16,244
Funded by:								
Revenues from government	3,781	2,589	12,063	10,344	2,161	3,102	18,005	18,803
Sale of goods and services	9	3	29	21	5	6	43	37
Other non-taxation revenues	19	-	60	-	11	-	89	-
Total departmental revenues	3,809	2,592	12,152	10,365	2,177	3,108	18,138	18,840

Note 17 Reporting of outcomes (continued)

Note 17B: Major classes of departmental revenues and expenses by output groups and outputs (continued)

Output Group 3	Output 3.1		Output 3.2		Output 3.3		Output 3.4		Total Output 3	
	2008	2007	2008	2007	2008	2007	2008	2007	2008	2007
	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000
Departmental expenses										
Employees	2,462	2,175	1,591	1,279	366	1,027	1,877	1,245	6,296	5,726
Suppliers	1,243	985	803	580	185	465	948	564	3,178	2,594
Depreciation and amortisation	55	85	35	50	8	40	42	48	140	222
Total departmental expenses	3,759	3,245	2,429	1,909	559	1,532	2,867	1,857	9,614	8,543
Funded by:										
Revenues from government	4,102	3,756	2,630	2,209	631	1,773	3,155	2,150	10,518	9,889
Sale of goods and services	10	7	6	4	2	4	8	4	25	20
Other non-taxation revenues	20	-	13	-	3	-	16	-	52	-
Total departmental revenues	4,132	3,764	2,649	2,214	636	1,777	3,179	2,154	10,596	9,908

Note 17C: Major classes of administered revenues and expenses by outcomes

	Outcome 1		Total	
	2008	2007	2008	2007
	\$'000	\$'000	\$'000	\$'000
Administered Income				
Sale of goods and services	13	5	13	5
Total administered income	13	5	13	5
Administered Expenses				
Refund of fees	3	1	3	1
Total Administered Expenses	3	1	3	1

Appendix VII Glossary

Access agreement: An agreement between native title holders and non-native title holders about access to areas of land and waters where native title may exist or has been recognised.

AIATSIS: Australian Institute of Aboriginal and Torres Strait Islander Studies.

Alternative procedure agreement: A type of indigenous land use agreement.

Amendment Act: An Act of the Australian Parliament that amended the Native Title Act.

Applicant: The person or persons who make an application for a determination of native title or a future act determination.

Appropriations: Amounts authorised by Parliament to be drawn from the Consolidated Revenue Fund or Loan Fund for a particular purpose. Specific legislation provides for appropriations—notably, but not exclusively, the Appropriation Acts.

APS: Australian Public Service.

Arbitration: The hearing or determining of a dispute between parties.

Area agreement: A type of indigenous land use agreement.

Authorisation: The process native title holders must use to give permission for an area agreement (a type of indigenous land use agreement) to be made on their behalf, or an application for a determination of native title or compensation application to be made on their behalf and to give the applicant the power to deal with matters arising in relation to the application.

Body corporate agreement: A type of indigenous land use agreement.

Claimant application/claim: See native title claimant application/claim.

Claims Resolution Review: Established by the Attorney-General to consider the process by which native title applications are resolved. The Review examined the roles of the National Native Title Tribunal and the Federal Court and considered measures for the more efficient management of native title claims within the existing framework of the *Native Title Act 1993* (Cwlth).

Compensation application: An application made by Indigenous Australians seeking compensation for loss or impairment of their native title.

Competitive tendering and contracting: The process of contracting out the delivery of government activities to another organisation. The activity is submitted to competitive tender, and the preferred provider of the activity is selected from the range of bidders by evaluating offers against predetermined selection criteria.

Consolidated Revenue Fund; Reserved Money Fund; Loan Fund; Commercial Activities Fund: These funds comprise the Commonwealth Public Account.

Consultancy: One particular type of service delivered under a contract for services. A consultant is an entity—whether an individual, a partnership or a corporation—engaged to provide professional, independent and expert advice or services.

Corporate governance: The process by which agencies are directed and controlled. It is generally understood to encompass authority, accountability, stewardship, leadership, direction and control.

CPA: Commonwealth Public Account, the Commonwealth's official bank account kept at the Reserve Bank. It reflects the operations of the Consolidated Revenue Fund, the Loan Funds, the Reserved Money Fund and the Commercial Activities Fund.

Current assets: Cash or other assets that would, in the ordinary course of operations, be readily consumed or convertible to cash within 12 months after the end of the financial year being reported.

Current liabilities: Liabilities that would, in the ordinary course of operations, be due and payable within 12 months after the end of the financial year under review.

Determination: A decision by an Australian court or other recognised body that native title does or does not exist. A determination is made either when parties have reached an agreement after mediation (consent determination) or following a trial process (litigated determination).

Expenditure: The total or gross amount of money spent by the Government on any or all of its activities.

Expenditure from appropriations classified as revenue: Expenditures that are netted against receipts. They do not form part of outlays because they are considered to be closely or functionally related to certain revenue items or related to refund of receipts, and are therefore shown as offsets to receipts.

Financial Management and Accountability Act 1997 (Cwlth) (FMA): The principal legislation governing the collection, payment and reporting of public moneys, the audit of the Commonwealth Public Account and the protection and recovery of public property. FMA Regulations and Orders are made pursuant to the FMA Act. Financial results: the results shown in the financial statements.

Future act: A proposed activity on land and/or waters that may affect native title.

Future act determination application: An application requesting the Tribunal to determine whether a future act can be done (with or without conditions).

IAG: Indigenous Advisory Group comprised of Indigenous employees of the Tribunal.

ILUA: Indigenous land use agreement, a voluntary, legally binding agreement about the use and management of land or waters, made between one or more native title groups and others (such as miners, pastoralists, governments).

Liability: The future sacrifice of service potential or economic benefits that the Tribunal is presently obliged to make as a result of past transactions or past events.

Mediation: The process of bringing together all people with an interest in an area covered by an application to help them reach agreement.

Member: A person who has been appointed by the Governor-General as a member of the Tribunal under the Native Title Act. Members are classified as presidential and non-presidential. Some members are full-time and others are part-time appointees.

National Native Title Register: The record of native title determinations.

Native title application/claim: See native title claimant application/claim, compensation application or non-claimant application.

Native title claimant application/claim: An application made for the legal recognition of native title rights and interests held by Indigenous Australians.

Native Title Registrar: See Registrar

Native title representative body: Representative Aboriginal/Torres Strait Islander Body also known as Native Title Representative Bodies are recognised and funded by the Australian government to provide a variety of functions under the *Native Title Act 1993* (Cwlth). These functions include assisting and facilitating native title holders to access and exercise their rights under the Act, certifying applications for determinations of native title and area agreements (ILUA), resolving intra-indigenous disputes, agreement-making and ensuring that notices given under the NTA are brought to the attention of the relevant people.

Non-claimant application: An application made by a person who does not claim to have native title but who seeks a determination that native title does or does not exist.

Non-current assets: assets other than current assets.

Non-current liabilities: liabilities other than current liabilities.

Notification: The process by which people, organisations and/or the general public are advised by the relevant government of their intention to do certain acts or by the National Native Title Tribunal that certain applications under the Act have been made.

Party: A person or organisation that either enters into an agreement, such as an indigenous land use agreement, with another person or organisation or is a participant in a legal action or proceeding, such as an application for a determination of native title.

PBS: Portfolio budget statements.

PBC: Prescribed body corporate, a body nominated by native title holders which will represent them and manage their native title rights and interests once a determination that native title exists has been made.

Principal Registry: The central office of the Tribunal. It has a number of functions that relate to the operations of the Tribunal nationwide.

Receipts: The total or gross amount of moneys received by the Commonwealth (i.e. the total inflow of moneys to the Commonwealth Public Account including both 'above the line' and 'below the line' transactions). Every receipt item is classified to one of the economic concepts of revenue, outlays (i.e. offset within outlays) or financing transactions. See also Revenue.

Receivables: Amounts that are due to be received by the Tribunal but are uncollected at balance date.

Register of Indigenous Land Use Agreements: A record of all indigenous land use agreements that have been registered. An ILUA can only be registered when there are no obstacles to registration or when those obstacles have been resolved.

Register of Native Title Claims: The record of native title claimant applications that have been filed with the Federal Court, referred to the Native Title Registrar and generally have met the requirements of the registration test.

Registered native title claimant: A person or persons whose names(s) appear as ‘the applicant’ in relation to a claim that has met the conditions of the registration test and is on the Register of Native Title Claims.

Registrar: An office holder who heads the Tribunal’s administrative structure, who helps the President run the Tribunal and has prescribed powers under the Act.

Registration test: A set of conditions under the *Native Title Act 1993* (Cwlth) that are applied to native title claimant applications. If an application meets all the conditions, it is included in the Register of Native Title Claims, and the claimants then gain the right to negotiate, together with certain other rights, while their application is under way.

Revenue: ‘Above the line’ transactions (those that determine the deficit/surplus), mainly comprising receipts. It includes tax receipts (net of refunds) and non-tax receipts (interest, dividends etc.) but excludes receipts from user charging, sale of assets and repayments of advances (loans and equity), which are classified as outlays.

Running costs: Salaries and administrative expenses (including legal services and property operating expenses). For the purposes of this report the term refers to amounts consumed by an agency in providing the government services for which it is responsible, i.e. not only those elements of running costs funded by Appropriation Act No. 1 but also Special Appropriations and receipts (known as ‘section 31 receipts’) raised through the sale of assets or interdepartmental charging and received via annotated running costs appropriations.

Sections of the Native Title Act: Parts of the Act available online from the Australasian Legal Information Institute at http://www.austlii.edu.au/au/legis/cth/consol_act/nta1993147/.

Section 29 of the Native Title Act: Describes how a government must give notice of a proposal to do a future act (usually the grant of a mining tenement or a compulsory acquisition of land).

SES: Senior executive service.

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