



The Northern Territory of Australia

The Lands and Mining Tribunal

Level 3
9-11 Cavenagh Street
Darwin NT 0800
Website: www.nt.gov.au/oca/lands/lands_mining.htm
E-mail: landsmining.tribunal@nt.gov.au

GPO Box 2014
Darwin NT 0801
Telephone: (08) 8999 1471
Facsimile: (08) 8999 1473
Office open: 8:30am to 12noon; 1:00pm to 4:00pm

The Hon Peter Toyne MLA
Attorney-General
Parliament House
State Square
Darwin NT 0800

Dear Attorney-General

Pursuant to section 38 of the *Lands and Mining Tribunal Act*, I submit to you the Annual Report on the operations of the Lands and Mining Tribunal for the period 1 July 2001 to 30 June 2002.

During this period, the Tribunal's functions have been associated with compulsory land acquisitions under the *Lands Acquisition Act* and planning appeals under the *Planning Act*.

In providing this report, I advise that the Tribunal's financial services have been 'outsourced' to the Courts Administration section of Department of Justice and all financial statements and compliance with the financial Management Regulations have been vested with the Director of that Unit. As a consequence any financial and audit reports will be contained in the Annual Report of that body.

Yours faithfully

David Loadman
Chairperson

5 July 2002

Agency Access

Location: 3rd Floor, 9-11 Cavenagh Street, Darwin

Postal Address: GPO Box 2014, Darwin NT 0801

General Inquiries: Telephone 8999 1471
Facsimile: 8999 1473

Email: landsmining.tribunal@nt.gov.au

Website: www.nt.gov.au/oca/lands/lands_mining.htm

Chairperson David Loadman

Registrar Kathy Wadrop

From the Chairperson:

This is the second report in respect of the operations of the Lands and Mining Tribunal.

The Lands and Mining Tribunal came into effect on 1 June 2000 with the appointment of the inaugural Chairperson, Mr David Loadman.

Pursuant to the provisions of the *Lands and Mining Tribunal Act*, other jurisdictions are capable of being vested in the Tribunal. The jurisdiction of the Tribunal currently is confined to:

- (a) Planning appeals from decisions of the Development Consent Authority;
- (b) Consideration of applications for compulsory land acquisition by the Minister for Lands and Planning.

Pursuant to the Lands and Mining Act, other jurisdictions may be vested in the Tribunal but, to date that has not occurred.

The Tribunal has still not been vested with jurisdiction comprised of section 43AA of the Native Title Act. Current information is that it is highly unlikely to happen and consequently the Chairperson does not intend in future reports to canvass the topic.

Lands and Mining Tribunal Rules

The Rules governing proceedings before the Tribunal are contained in Regulation Gazette 2000 No 51 and commenced on 25 October 2000. There was an amendment to the Rules published in regulation Gazette No 63 and it commenced on 10 January 2001.

Both the *Lands Acquisition Act* and the *Planning Act* have procedural provisions of their own, which in some instances over-ride the Rules.

Planning Act

Pursuant to section 5(1)(j) of the *Lands and Mining Tribunal Act* the Tribunal is charged with discharging the functions of the Planning Appeals Tribunal. The power of the Tribunal to discharge this function is conferred by section 108 of the *Planning Act* NT.

The panel of mediators established pursuant to section 122(1) *Planning Act* is Attachment A to this Report.

Since June 2000, 18 planning appeals have been lodged with Tribunal. Of these appeals 10 were resolved as a consequence of the compulsory mediation processes set out under Division 4 of the *Planning Act*. These mediation conferences are conducted by the Tribunal's appointed mediators. The Tribunal reports an excellent response to the mediation process with a success rate of 66%.

The Chairperson was obliged to adjudicate and deliver written decisions in 5 matters. Of the 3 current matters, two are subject to the mediation process, The other has been referred back to the Tribunal for adjudication and is still in the submission stage.

Lands Acquisition

Pursuant to section 5 of the *Lands and Mining Tribunal Act*, the Tribunal has various specified functions.

The Tribunal has continued to discharge the functions specified in sub-section 5(1)(a) of the *Lands and Mining Tribunal Act*, namely to hear and make recommendations about objections to the acquisition of land under the *Lands Acquisition Act*, including objections by registered native title claimants and registered native title bodies corporate.

Although section 37 of the *Lands Acquisition Act* provides for a reference to mediation in sub-section 4A, the Tribunal is unaware of any reference to mediation having occurred pursuant to those provisions.

Sub-section 4 *Lands Acquisition Act* refers to a reference to mediation by agreement. The Tribunal is not aware of any such a reference.

Section 37 *Lands Acquisition Act* is a “prescribed provision” pursuant to the provisions of section 36(5) *Lands and Mining Tribunal Act*. For that purpose and in compliance with section 36(3) the Chairperson has appointed a panel of mediators who are willing to act as mediators for the purpose of section 37 *Lands Acquisition Act*. A copy of that panel of mediators so appointed is included in Attachment A to this Report.

Despite continuing invitations to the parties in the Lands Acquisition jurisdiction to submit their disputes to mediation by the Tribunal, no party has elected to pursue that course.

Because of a perception that there may be undue or inappropriate co-operation with objectors by certain persons employed by Government agencies, the Chairperson advised the Attorney-General of his concerns in that direction. As a consequence the Attorney arranged an appointment for the Chairperson with the Minister for Lands in September 2001. Unfortunately at the appointed time the Minister for Lands was called to other business and the Chairperson’s concerns were expressed to his nominated representative. There was no further direct communication from that Minister.

It seems to the Chairperson, however, that the anecdotal information to the effect that greater focus was going to be provided by the Minister of Lands and Planning and his staff in resolving matters by consent was demonstrated by an absence of any referral of a lands acquisition matter to the Tribunal between the period November 2001 and June 2002.

There have been indications that Indigenous Land Use Agreements are to be or prospectively to be reached, in relation to certain land acquisitions, some of which are currently before the Tribunal. As must be apparent from its primary and current report, the Tribunal believes that disposition by agreement would be notionally more expeditious than resolution by decision of the Tribunal. The Tribunal however became concerned at the lack of reference of new matters and referred those concerns to the CEO Department of Justice in May 2002. A copy of that communication (without the file note) is attached to this Annual Report at Attachment B. Mr Coates undertook to refer the matter to the Minister of Lands and Planning.

As outlined in the Chairperson’s minute, it is the Tribunal’s view that negotiation and consultation beyond the statutory consultation period could continue conjointly with the referral of an acquisition to the Tribunal. This is for reason of a perception that since 7.2 months is the average time for a matter to be heard and decision handed down by the Tribunal from the time the application is referred to the Tribunal, it would be in everyone’s interests that all procedural steps proceeded in tandem with any steps or consultations designed to achieve agreement whether to result in the embracement of Indigenous Land Use Agreement or not.

There has not been any direct response to expression of these concerns.

Administration

The procedure of the Tribunal in this jurisdiction continues to be governed by the Rules and its Practice Directions.

The Tribunal has issued Practice Directions dealing with those functioning jurisdictions it is required to discharge and referred to above.

The Tribunal has established a website which contains the Tribunal's Decisions, Practice Directions, Rules, Panels of Mediators and Forms. The website address is shown as page 2 of this Report.

Mrs Kathy Wadrop is appointed as Registrar of the Tribunal pursuant to section 33(1) of the Lands and Mining Tribunal Act. No further staff have been appointed by the Chairperson.

Financial Statements

Because of the curtailment of the Tribunal's staffing at the instance of the Chairperson, the financial aspects of the Tribunal's operations are in the hands of the Courts Administration section of Department of Justice. The financial statements relating discretely to the Tribunal will be published by that Unit as part of its duties.

Function

Largely the practice before the Tribunal remains similar to that referred to in its initial report.

The Tribunal regularly convenes directions hearings or mentions in relation to matters filed with it pursuant to the *Lands Acquisition Act*, for the purposes of issuing directions in respect of matters referred to it. As a matter of practice there evolved a procedure whereby orders were made pursuant to signed consent minutes lodged by the relevant parties with the Tribunal. Most decisions of the Tribunal to date in respect of proceedings under the *Lands Acquisition Act* and at the request of the relevant parties have involved the Tribunal in making those decisions on written material lodged.

There have been 2 formal oral hearings in relation to two land acquisitions.

In respect to the first of those hearings, relating to proposed acquisitions in Timber Creek, the Tribunal travelled to Timber Creek for a view and to record certain evidence there. It also heard evidence and submissions in the same matter in Darwin. A decision was handed down in March 2002 recommending that the Minister acquire the land conditionally. The objectors

have initiated proceedings which appear to be under the Supreme Court Rules relating to judicial review of that decision. The Minister and the applicants have entered into an agreement and consequently the review process has been halted.

In some applications the objectors have sought orders seeking a stay of the Tribunal's decision for want of jurisdiction. Apart from a temporary cessation in delivering recommendations which the Tribunal decided was appropriate other such stay applications are dealt with on a piecemeal basis. The Tribunal has reserved one decision on an application for a stay.

A further hearing has been commenced in respect of proposed industrial and rural residential sub-division and for the acquisition of land to establish the operation of a prawn farm adjacent to the Blackmore River. Those applications are part-heard and will continue in July 2002.

In respect of appeals under the *Planning Act*, the position is governed by section 129 of that Act. Save for a power in the Tribunal conferred by section 129(2), by virtue of which the Tribunal is empowered to hear evidence, it is directed to determine the Appeal in the absence of the parties and in regard to the material referred to in the section. That has hitherto been the practice of the Tribunal.

Formal Tribunal sittings

As set out above, the majority of the Tribunal's functions can be dealt with on the papers, i.e. on written material filed at the Tribunal. However, it has been the case that the Tribunal has to formally convene to issue directions, hear applications and conduct oral hearings. The Tribunal has no hearing room, but has been offered and continues to use hearing rooms made available by the Anti-Discrimination Commission, the Aboriginal Land Commissioner and the Magistrates Court.

In the financial year 2001 – 2002 the Tribunal formally convened: 38 days.

Performance Measurement

From its inception in 1 June 2000 to 30 June 2002 the following new matters were received at the Tribunal.

Planning Act	18
Lands Acquisition Act	37

Of these matters, the following number have been finalised

Planning Act	15
Lands Acquisition Act	29

Over this period a timeline has been established. The Tribunal's average turnover for cases to be dispensed with, from date of filing to decision has been:-

Planning Act	2.7 months
Lands Acquisition Act	7.2 months

Chairperson's Travel or attendance at Conferences

The Chairperson travelled to Timber Creek for the view and oral evidence in the lands acquisition hearing mentioned above.

The Chairperson attended no conferences during this financial year.

Chairperson's other activities

The Chairperson holds office as Stipendiary Magistrate conjointly with his position as Chairperson. The Chairperson discharges his duties in relation to both those offices as circumstances dictate.

Attachment A

LANDS AND MINING TRIBUNAL

PANELS OF MEDIATORS

Panel for Lands and Mining Tribunal Act Section 36(3)

Panel for Planning Act Section 122(1)

NAME	Phone Number	Workplace
Barker-Hudson, Brydget	Ph: 89481828 Fax: 89483221	NT Dept Primary Industry & Fisheries PO Box 42828 Casuarina NT 0811
Brears, John	Ph: 89418948	Sumarto Pty Ltd GPO Box 3521 Darwin NT 0801
Collier, Nardine	Ph: 89526566 Fax: 89530876	Bowden Collier & Deane PO Box 8245 Alice Springs NT 0871
Elliott, Peter	Ph: 89413070 Fax: 89419978	Edmund Barton Chambers GPO Box 3650 Darwin NT 0801
Fitzgerald, Tony	Ph: 89860050 Fax: 89850001	Resolve PO Box 36506 Winnellie NT 0821
Franklin, Anthony	Ph: 89459989 Fax: 89452560	Franklin de Ionno PO Box 42526 Casuarina NT 0811
Leahy, Elizabeth	Ph: 89819517 Fax: 89819517	Darwin Dispute Resolution Centre GPO Box 21944 Darwin NT 0801
McIntyre, Patrick	Ph: 89413373 Fax: 89417018	John Toohey Chambers GPO Box 3348, Darwin NT 0801
Storey, Matthew	Ph: 8999 1444 Fax: 8999 1466	Office of the NT Anti-Discrimination Commissioner LMB 22, GPO, Darwin NT 0801

Mediators are on both panels, for the Planning Act and the Lands and Mining Tribunal Act, unless indicated otherwise.

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The Lands and Mining Tribunal

MINUTE

Chairperson: David Loadman
Level 3, 9-11 Cavenagh Street
Darwin NT 0800
E-mail: landsmining.tribunal@nt.gov.au
Website: www.nt.gov.au/oca/main.htm

GPO Box 2014
Darwin NT 0801
Telephone: (08) 8999 1471
Facsimile: (08) 8999 1473

**Subject: REFERRAL OF NEW MATTERS TO THE TRIBUNAL BY
MINISTER FOR LANDS AND PLANNING**

TO: RICHARD COATES, CEO, DEPARTMENT OF JUSTICE

THROUGH: LYN MCDADE, EXECUTIVE DIRECTOR

FROM: DAVID LOADMAN, CHAIRPERSON

As you are aware in relation to that part of the Tribunal jurisdiction dealing with Lands Acquisition, there has not been a new matter referred to the Tribunal since October 2001.

The Tribunal has been or is seized of “acquisition matters” which were referred to it prior to October 2001. But for that fact, that entire aspect of the lands acquisition jurisdiction would simply not have occupied the Tribunal at all.

A telephone conversation between the appropriate section of the Department of Infrastructure and the Registrar has been recorded as accurately as possible in the accompanying file note.

Whilst it is the case that in terms of expense and expedition negotiation is a preferable course if it results in resolution, it is my belief is that there is a better way of achieving a more expeditious outcome. This is reinforced by my belief that not a single matter set aside by negotiation, rather than referral to the Tribunal, has achieved any result.

It is the case that the Act itself does not preclude negotiations continuing whilst any matter is proceeding in the Tribunal. It must be borne in mind that either 3 or 4 months at the minimum will have passed to allow for negotiations prior to the matter being legally capable of referral to the Tribunal.

As a matter of logic and common-sense it seems that it would be better for matters to be referred to the Tribunal and for those matters contemporaneously to be the subject of formal procedural steps to advance the matter in the event of a lack of resolution. Contemporaneously every effort should be made to resolve the issues between the parties.

By way of one example of a matter in respect of which procedural steps have continued whilst negotiation contemporaneously continues is the “prawn farm” matter (official reference LMT-43 *Minister for Lands Planning and Environment –v- Risk and others*). In this matter, if negotiation was something to have been focused on absolutely, there is little doubt that an already complex and protracted procedural matter would have been protracted by a substantial further period of time perhaps up to 18 months.

It is worth noting that in LMT-43 the Notice of Proposal was dated 26 September 2000 and the matter was not referred to the Tribunal until 11 July 2001. This seems ample time for consultation and negotiation between the parties. This is a typical timeline for all referrals to the Tribunal. It seems unnecessary to extend this timeline even further, given that negotiation is still possible even if the matter is with the Tribunal. The fact of the matter statistically is

that any matter referred to the Tribunal and opposed by native title interests has on average taken the Tribunal 7 months to complete.

Further, curial experience certainly leads to a conviction amongst many that it is the pressure of a proximate hearing which is the greatest incentive to settlement or resolution. It is my belief that for that reason alone there should not be a continuation of the compulsory negotiation period specified in the lands acquisition act which after all is between 3 and 4 months depending on circumstances in any event. If there is no good will such that any resolution is at least prospective at the expiration of that period, what legitimate hope is there that endless passage of time is going to improve the lack of movement on the part of the parties.

On a completely different topic of course another tack that may be considered and has certainly not been embraced by either of the parties voluntarily is compulsory mediation. The Federal Court will not hear any determination proceeding until or unless there has been compulsory mediation. It is my view that compulsory mediation rather than negotiation periods specified in the Lands Acquisition Act would be more fruitful in bringing about resolution of land acquisition.

For at least a year a standard question posed upon receiving a reference to the Tribunal at its very inception is to request of the parties a consideration that they embark on a mediation process. There is not a single matter where any response has been positive. It is my conviction that they will not submit to mediation voluntarily. Whilst philosophically it may be the case that in concept compulsory mediation might not achieve any greater resolution than negotiation, there is at least some prospect that may occur, because the process is not driven by either or both of the parties.

To summarise then, it is my perception that the Minister ought to consider:

- (a) abandoning the current philosophies and allowing referral to the Tribunal after the compulsory negotiation period;
- (b) allowing the Tribunal to endeavour to revive or initiate negotiation as a primary step upon a matter being referred to it;
- (c) entertaining the notion of amending the *Lands Acquisition Act* so as to provide for mediation to be compulsory as it is in the *Planning Act*.

David Loadman
Chairperson
31 May 2002