

**REPORT  
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NATIONAL  
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TRIBUNAL**

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# REPORT OF THE NATIONAL NATIVE TITLE TRIBUNAL

## OVERVIEW OF THE TRIBUNAL

**In March 2018, the current Native Title Registrar was appointed. In April 2018, the current President of the National Native Title Tribunal was appointed. Since those appointments, the Tribunal has sought to focus more clearly upon its statutory functions (core business), having regard to proposed amendments to the *Native Title Act 1993* (Cth) (the Act). Such focus has involved identification of areas in which resources may be redeployed in order to achieve increased efficiency, thus developing a capacity to undertake new responsibilities which may result from the anticipated amendments.**

## ESTABLISHMENT

The Act establishes the Tribunal as an independent body with a wide range of functions. The Act is, itself, a 'special measure' for the advancement and protection of Aboriginal peoples and Torres Strait Islanders (Indigenous Australian peoples). The Act is intended to advance the process of reconciliation among all Australians.

The Act creates an Australia-wide native title scheme, the objectives of which include:

- providing for the recognition and protection of native title
- establishing a mechanism for determining claims to native title, and
- establishing ways in which future dealings affecting native title (future acts) may proceed.

The Act provides that the Tribunal must carry out its functions in a fair, just, economical, informal and prompt way. In carrying out those functions, the Tribunal may take account of the cultural and customary concerns of Indigenous Australian peoples.

## FUNCTIONS AND POWERS

Under the Act, the Tribunal, comprising the President and Members, has specific functions in relation to:

- mediating in native title proceedings, upon referral by the Federal Court of Australia (FCA)
- determining objections to the expedited procedure in the future act scheme
- mediating in relation to certain proposed future acts on areas where native title exists, or might exist
- determining applications concerning proposed future acts
- assisting people to negotiate Indigenous Land Use Agreements (ILUAs), and helping to resolve any objections to registration of ILUAs
- assisting with negotiations for the settlement of applications that relate to native title
- providing assistance to representative bodies in performing their dispute resolution functions
- reconsidering decisions of the Native Title Registrar not to accept a native title determination application (claimant application) for registration
- conducting reviews concerning native title rights and interests (upon referral by the FCA)
- conducting native title application inquiries as directed by the FCA, and
- conducting special inquiries under Ministerial direction.

The President is responsible for managing the administrative affairs of the Tribunal. The President is assisted by the Chief Executive Officer (CEO) and Principal Registrar of the FCA. The CEO and Principal

Registrar may delegate his or her responsibilities under the Act to the Native Title Registrar, Deputy Registrar or staff assisting the Tribunal. Deputy Registrars and staff assisting the Tribunal are made available for that purpose by the FCA.

The Act gives the Registrar specific responsibilities, including:

- assisting people to prepare applications and to help them, and other persons in matters relating to proceedings in the Tribunal
- considering whether claimant applications should be registered on the Register of Native Title Claims
- 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, and
- maintaining the Register of Native Title Claims, the National Native Title Register and the Register of ILUAs.

## THE PRESIDENT, MEMBERS AND THE NATIVE TITLE REGISTRAR

The President, other Members of the Tribunal and the Registrar are appointed by the Governor-General for specific terms of no longer than five years. The Act sets out the qualifications for appointment to, and respective responsibilities of, these offices.

The following particulars are provided concerning statutory office-holders:

**Table 5.1: Current Tribunal statutory office holders**

Name	Title	Appointed	Term	Location
The Hon John Dowsett AM	President	27 April 2018	Five years	Brisbane
Helen Shurven	Member	Reappointed 29 November 2017	Five years	Perth
James McNamara	Member	31 March 2014	Five years	Brisbane
Christine Fewings	Native Title Registrar	14 March 2018	Five years	Brisbane



## OFFICE LOCATIONS

The Tribunal maintains offices in Brisbane, Cairns, Melbourne, Perth and Sydney.

## THE YEAR IN REVIEW

From the end of March 2018 until the end of April 2018, Tribunal activities were somewhat limited as the result of the retirement of the former President and the departure of other senior personnel. May and June 2018 were largely devoted to planning a reorganisation of the Tribunal, including discussions with staff concerning such reorganisation and its implementation.

### Service delivery

During the year the Tribunal developed a new online mapping application, showing the areas covered by determinations that native title exists, and in respect of which registered native title bodies corporate (RNTBC) have been appointed. This application is available from the Tribunal website.

The Tribunal has also extended the availability of web map services to members of the public. Users of existing mapping software can now display information in their own web applications, derived from the Tribunal. The same information can also be used in compatible desktop geographic information system (GIS) software.

In April 2018, the Tribunal added interactive maps to the search result pages on its website. When a visitor searches for a claim, determination or ILUA, the search result will include a map of the area concerned. The interactive map enables the user to zoom in and out, change the map background, and add layers to show other claims and determinations.

In response to requests from stakeholders, the Native Title Registrar approved the publication online of historical claim boundaries.

## Stakeholder engagement

The Office of the Registrar of Indigenous Corporations, the Tribunal and the Torres Strait Regional Authority have formalised arrangements to improve cooperation and information sharing to assist Torres Strait RNTBCs with governance, native title training and dispute resolution. The aim is to build stronger and more capable RNTBCs.

Continuing with its initiative to support and strengthen Prescribed Bodies Corporate (PBC), the Tribunal convened meetings of the PBC Support Forum in Perth, Adelaide and Melbourne. This unique inter-agency forum brings together government and non-government bodies to identify ways in which to deliver more targeted support to PBCs. After taking the lead on this forum for the past two years, the Tribunal will continue to actively contribute under the leadership of the National Native Title Council.

During the year, the Tribunal delivered native title information sessions tailored to the needs of relevant client groups. On 26 October 2017, Member McNamara and former Director of Research and Business Development, Dr Pamela McGrath, delivered a workshop to Queensland local governments. Attended by representatives from 11 regions and the Local Government Association of Queensland, the aim of the workshop was to foster better understanding of native title issues and potential information needs of local government.

At the request of the Kimberley Land Council, the Tribunal undertook professional legal development training for lawyers in Western Australia's Native Title Representative Bodies. The program was launched in Broome in December 2017 and repeated in Perth in March 2018. Over 80 of Western Australia's native title lawyers attended. The Tribunal has received expressions of interest in the provision of similar training in other states.

## External factors

In December 2017 the Commonwealth Attorney-General's Department released an options paper entitled *Reforms to the Native Title Act 1993* (Cth). Submissions concerning the proposals closed on 28 February 2018. The options paper draws on previous reviews and focuses on achieving improved efficiency and transparency in the operation of the Act. Some of the proposed amendments will affect the role of the Tribunal and/or that of the Native Title Registrar. These amendments will affect s 31 agreements and ILUAs, confer improved powers to facilitate native title outcomes and improve transparency and accountability of PBCs in relation to membership and funds management, with additional support from the Office of the Registrar of Indigenous Corporations, the Tribunal and the FCA.

## Court decisions

During the reporting period, several High Court and FCA decisions have affected the Tribunal's work.

In *Charles v Sheffield Resources Limited* [2017] FCAFC 218 (Sheffield), the Full Court of the FCA held that a good faith issue may be raised at any time during the Tribunal's future act determination process. The Full Court remitted the matter to the Tribunal for rehearing.

In *Forrest v Wilson* [2017] HCA 30, the High Court held certain mining lease applications to be invalid because such applications were not accompanied by mineralisation reports as required by the relevant Western Australian legislation. The Western Australian Government has identified 40 pending applications that are invalid by virtue of the High Court's decision. Another 14 applications may be invalid. Of these applications, seven are currently in the Tribunal's future act process.

In *BHP Billiton Nickel West Pty Ltd v KN (deceased) (TJIWAL and TJIWAL #2)* [2018] FCAFC 8, the Full Court of the FCA considered whether the term 'lease' in s 47B(1)(b)(i) of the Act included an exploration licence issued pursuant to Western Australian legislation. Section 47B of the Act provides that historical extinguishment of native title over an area can be disregarded if, at the time at which the native title claim is lodged, that area is occupied by the claim group and is not covered by a freehold estate, lease or reservation. The trial judge found that the term 'lease' included a mining lease, but did not include an exploration licence. The Full Court held that the term 'lease' included an exploration licence. This finding may have significant consequences for native title applicants as exploration licences typically cover much larger areas than do mining leases. For example, in 2016, approximately 2.4 million hectares of Western Australia were covered by mining leases, while 31 million hectares were covered by exploration licences. Hence it seems likely that it will be more difficult for native title applicants to establish rights to exclusive possession.

## Cultural understanding and respect

In conjunction with the FCA, the Tribunal is developing an Indigenous employment strategy. It is also supporting the FCA's development of a new Reconciliation Action Plan.

Other steps designed to foster an understanding of and respect for Indigenous culture include:

- maintaining the Indigenous Advisory Group
- classifying all Tribunal positions as identified positions, so that all employees will have effective communications skills and an understanding of the issues affecting Indigenous Australian peoples
- meeting the Australian Public Service Commission guidelines, particularly in ensuring that Aboriginal and Torres Strait Islander selection criteria are in all job descriptions
- ensuring that, where possible, recruitment panels include an Indigenous panel member (at level of position or above) and requiring recommended applicants to provide Indigenous referees
- ensuring practices and procedures within the Tribunal are delivered in a manner that is consistent with the requirements of the Act, it being beneficial legislation for Indigenous Australian peoples, and
- creating more culturally acceptable spaces for Indigenous Australian peoples in office redevelopment plans.

## Creating efficiencies

The Tribunal has revised and improved a number of business processes, including concurrent processing of registration testing, the use of plain English in all documentation, and regular reporting to the FCA in relation to notification and registration timeframes.

There have been improvements to the future act processes, including a revised case management approach to the expedited procedure inquiry process in Western Australia. The Tribunal's policies and practices library has been updated and a new, user friendly format has been adopted. The case management system now includes automated templates for regular correspondence. Notification advertising is also being brought in-house in order to shorten timeframes and reduce costs.

In compliance with the Australian Government digital transition policy, the Tribunal creates, manages and stores the majority of its records digitally, allowing files to be shared and accessed seamlessly across the country.

# THE TRIBUNAL'S WORK IN 2017–18

## General overview

Information about statutory functions and trends and quantitative data relating to services provided by the Tribunal and the Registrar is detailed below.

## FUNCTIONS OF THE TRIBUNAL

### Future acts

#### Overview

A primary function of the Tribunal is the resolution, by mediation or arbitration, of issues involving proposed future acts (primarily, in practice, the grant of exploration and mining tenements) on land where native title has been determined to exist, or where native title might exist.

As outlined in Table 5.2, the disproportionate numbers of objection applications between Western Australia and Queensland are, in part, due to differing attitudes between the relevant state departments concerning future act negotiations.

#### Expedited procedure objection applications and inquiries

Under s 29(7) of the Act, a government party may assert that the proposed future act is an act that

attracts the expedited procedure (i.e. that it is an act that will have minimal impact on native title) and, as such, does not give rise to procedural rights to negotiate which would otherwise vest in native title parties. If a native title party considers that the expedited procedure should not apply to the proposed future act, it may lodge an expedited procedure objection application (objection application) with the Tribunal.

A total of 928 objection applications were lodged during the reporting period. The ratio of objection applications lodged to notices issued remained at a similar level to that in the preceding reporting period, with approximately 26 per cent of notices attracting objection applications. However, fewer objection applications were lodged.

The number of active applications at the end of the reporting period was 527, roughly comparable with figures across the last few years. More than 400 objections were withdrawn after agreement was reached between the native title party and the relevant proponent. A further 245 objection applications were finalised by the withdrawal of the tenement applications by the proponents.

Forty-eight determinations of objection applications were made during the reporting period, a small increase from the previous year. The expedited procedure was determined to apply on 39 occasions, and on nine occasions, the expedited procedure was determined not to apply.

**Table 5.2: Number of applications lodged with the Tribunal in 2017–18**

Future act	QLD	WA	Total
Objections to expedited procedure	64	864	928
Future act determination applications	16	13	29
<b>Total</b>	<b>80</b>	<b>877</b>	<b>957</b>



### Future act determination applications, negotiation, good faith requirements and inquiries

If a proposed future act does not attract the expedited procedure, the parties seek to negotiate agreement to the proposed future act. Any party may request Tribunal assistance in mediating among parties in order to reach agreement. During the reporting period, there were 21 new requests for Tribunal mediation assistance.

The Act prescribes a minimum six-month negotiation period. After that time, any party to the negotiation may lodge a future act determination application. During the reporting period, 29 applications were lodged, eight more than in the previous reporting period.

The Act requires that the parties negotiate in good faith concerning the proposed future act. If there has been a failure to negotiate in good faith by a party, other than a native title party, the Tribunal has no power to determine the application. If any party asserts that negotiations in good faith have not occurred, the Tribunal will hold a preliminary inquiry to establish whether or not that is the case. During the reporting period, there were five 'good faith' determinations. In one case, the Tribunal

determined that good faith negotiations had not occurred. The parties were required to negotiate further before the matter could be brought back to the Tribunal for arbitration.

Thirty-eight future act determination applications were finalised during the reporting period, a 40 per cent increase compared with the prior reporting period. In nine cases, the Tribunal determined that the future act might be done. In ten cases, it determined that the act might be done, subject to conditions. The remaining future act determination applications were either withdrawn or dismissed. Three applications were withdrawn following agreement between the parties.

### Mediation

Section 203BK(3) of the Act provides that a representative Aboriginal/Torres Strait Islander body may seek the assistance of the Tribunal in dispute resolution, subject to there being agreement for payment for such assistance. In the reporting period, the Tribunal provided such assistance in four cases.

During the reporting period, no assistance in negotiating an agreement under s 86F of the Act was provided.

## FUNCTIONS OF THE NATIVE TITLE REGISTRAR

**Table 5.3: Number of applications referred to or lodged with the Native Title Registrar for registration in 2017–18**

Native title determination applications	NSW	NT	QLD	SA	VIC	WA	Total
Claimant (new)	7	9	9	3	0	15	43
Non-claimant	13	0	17	0	0	0	30
Compensation (new)	0	0	0	0	0	0	0
Compensation (amended)	0	0	0	0	0	0	0
Revised native title determination	0	0	0	0	0	0	0
<b>Total</b>	<b>20</b>	<b>9</b>	<b>26</b>	<b>3</b>	<b>0</b>	<b>15</b>	<b>73</b>

## **Claimant and amended applications: assistance and registration**

Sections 190A–190C of the Act require the Registrar to decide whether native title determination applications (claimant applications), and applications for certain amendments to claimant applications, should be accepted for registration on the Register of Native Title Claims. To that end, the CEO and Principal Registrar provides the Registrar with a copy of each new or amended claimant application and accompanying documents filed in the FCA.

The Registrar considers each relevant application against the relevant requirements of the Act. The Registrar may also undertake preliminary assessments of such applications, and draft applications, by way of assistance provided pursuant to s 78(1)(a) of the Act.

During the reporting period, the Registrar received 43 new claimant applications, almost double the number received in the previous reporting period. Most new applications and amended applications were filed in Queensland and Western Australia.

Fifty-two applications were considered for registration during the reporting period. Thirty-three were accepted for registration, and 19 were not accepted.

During the reporting period, 10 applications were subjected to preliminary assessment.

## **Indigenous land use agreements: assistance and registration**

Under ss 24BG(3), 24CG(4) and 24DH(3) of the Act, the Registrar may provide assistance in the preparation of applications to register ILUAs. Often, this assistance takes the form of pre-lodgment comments upon the draft ILUA and the application for registration.

During the reporting period, assistance was provided on 107 occasions, generally in the form of mapping assistance and the provision of related information.

Under the Act, parties to an ILUA (whether a body corporate agreement, area agreement or alternative procedure agreement) must apply to the Registrar for registration on the Register of ILUAs. Each registered ILUA, in addition to taking effect as a contract among the parties, binds all persons who hold, or may hold, native title in relation to any of the land or waters in the area covered by the ILUA.

A total of 1220 ILUAs are currently on the Register of ILUAs, the majority of which are in Queensland. Many provide for the exercise of native title rights and interests over pastoral leases. Others deal with a wide range of native title related matters, including local government issues, mining, state-protected areas and community infrastructure such as social housing.

A total of 50 ILUAs were considered for registration during the reporting period. Twenty-nine body corporate and 19 area agreement ILUAs were accepted for registration and entered in the register. One body corporate ILUA and one area agreement ILUA were not accepted for registration.

The average time taken to register an area agreement increased as compared to the average time in the last reporting period.

## **Assistance in negotiating Indigenous land use agreements**

During the reporting period the Tribunal received one request for assistance in negotiating an ILUA pursuant to s 24BF (body corporate agreements) of the Act.

## **Notification**

During the reporting period, 59 native title determination applications were notified, compared with 51 in the previous reporting period. Of the 59, 34 were claimant applications, 24 were non-claimant applications, and one was a revised determination.

A total of 55 ILUAs were notified during the period.

## Other forms of assistance

### Assistance in relation to applications and proceedings

Section 78(1) of the Act authorises the Registrar to give such assistance as he or she thinks reasonable to people preparing applications and at any stage in subsequent proceedings. That section also provides that the Registrar may help other people in relation to those proceedings. During the reporting period, such assistance was provided on 195 occasions.

As in previous years, many of the requests were for the provision of geospatial products.

### Searches of registers

Pursuant to s 78(2) of the Act, 1653 searches of registers and other records were conducted during the reporting period, an increase of about 300 on the number in the previous reporting period.

## The Register of Native Title Claims

Under s 185(2) of the Act the Registrar has responsibility for establishing and keeping a Register of Native Title Claims. This register records the details of claimant applications that have met the statutory conditions for registration prescribed by ss 190A–190C of the Act. As at 30 June 2018, there was a total of 188 claimant applications on this register.

## The National Native Title Register

Under s 192(2) of the Act, the Registrar must establish and keep a National Native Title Register, recording approved determinations of native title.

As at 30 June 2018, a total of 418 determinations had been registered, including 69 determinations that native title does not exist.

Map 1 shows registered native title determinations as at 30 June 2018.

## The Register of Indigenous Land Use Agreements

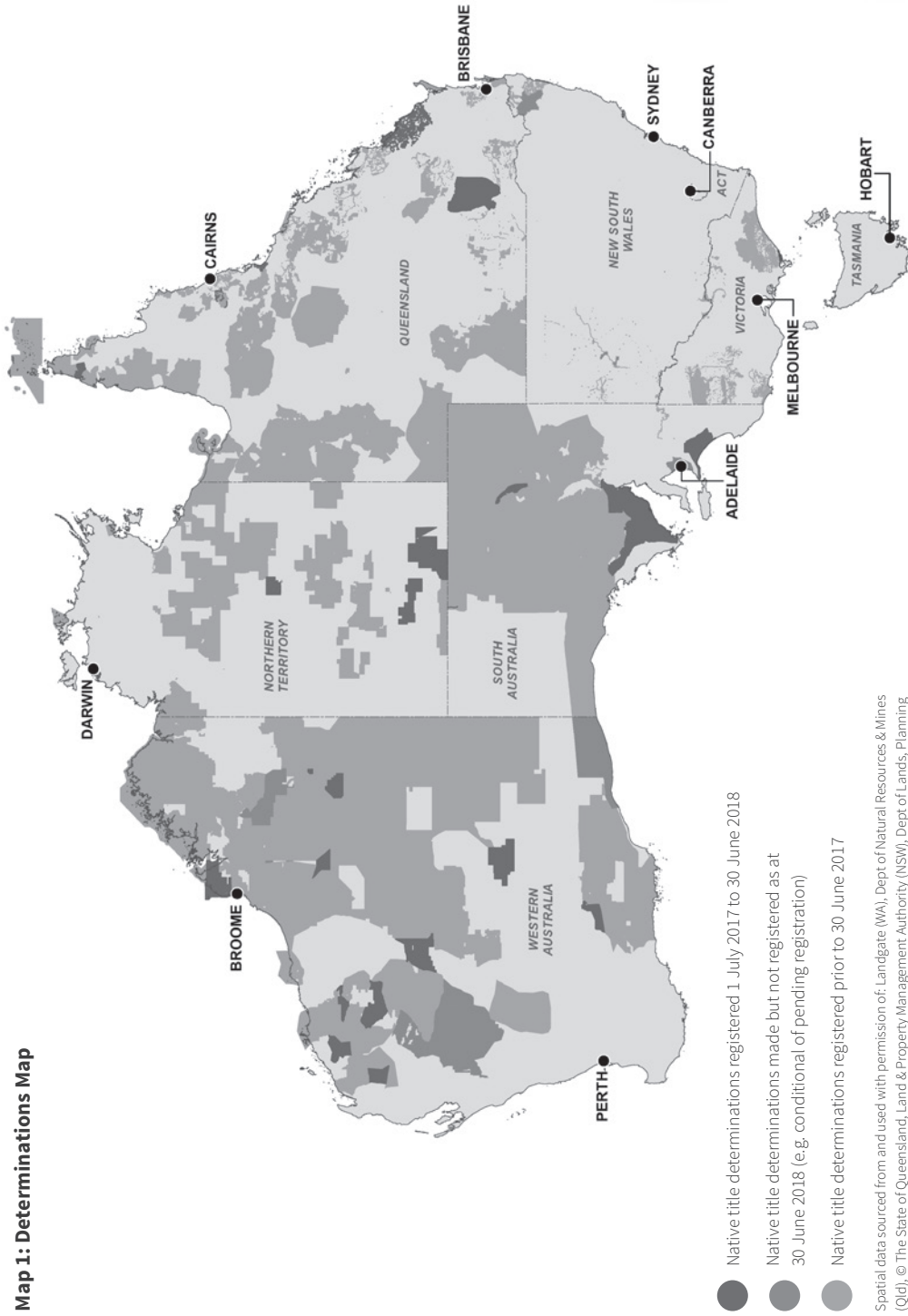
Under s 199A(2) of the Act, the Registrar must establish and keep a Register of Indigenous Land Use Agreements, in which area agreements and body corporate and alternative procedure ILUAs are registered. At 30 June 2018, there were 1220 ILUAs registered on the Register of Indigenous Land Use Agreements.

## MAPS

The 428 registered determinations as at 30 June 2018 covered a total area of about 3,067,526 square kilometres or 37.8 per cent of the land mass of Australia and approximately 103,788 square kilometres of sea (below the high water mark) (see Map 1).

Registered ILUAs cover about 2,325,827 square kilometres or 30.2 per cent of the land mass of Australia and approximately 29,764 square kilometres of sea (see Map 2).

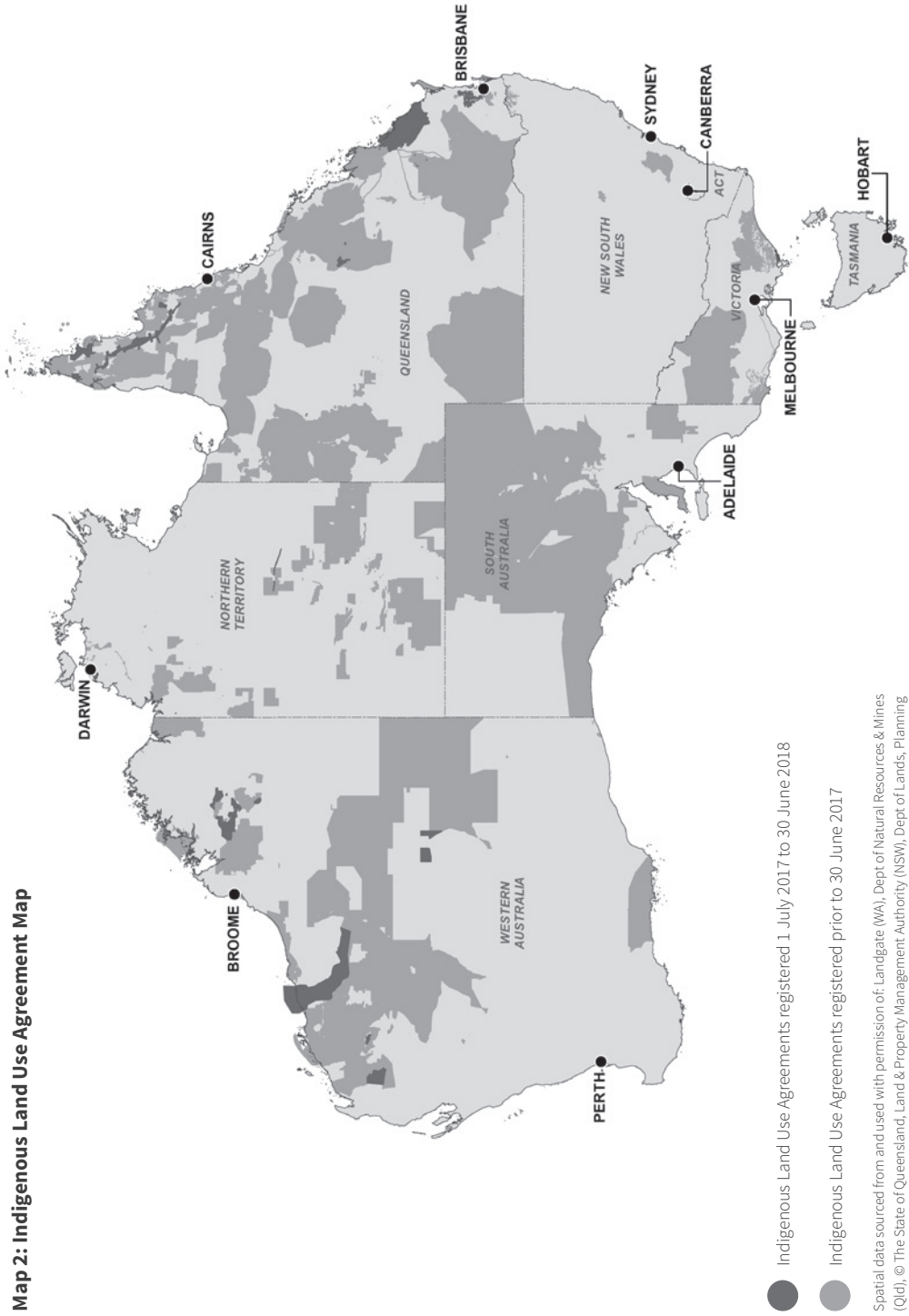
**Map 1: Determinations Map**



- Native title determinations registered 1 July 2017 to 30 June 2018
- Native title determinations made but not registered as at 30 June 2018 (e.g. conditional of pending registration)
- Native title determinations registered prior to 30 June 2017

Spatial data sourced from and used with permission of: Landgate (WA), Dept of Natural Resources & Mines (Qld), © The State of Queensland, Land & Property Management Authority (NSW), Dept of Lands, Planning & the Environment (NT), Dept for Planning, Transport & Infrastructure (SA), Dept of Environment and Primary Industries (Vic) and Geoscience Australia, Australian Government, © Commonwealth of Australia.

**Map 2: Indigenous Land Use Agreement Map**



- Indigenous Land Use Agreements registered 1 July 2017 to 30 June 2018
  - Indigenous Land Use Agreements registered prior to 30 June 2017
- Spatial data sourced from and used with permission of: Landgate (WA), Dept of Natural Resources & Mines (Qld), © The State of Queensland, Land & Property Management Authority (NSW), Dept of Lands, Planning & the Environment (NT), Dept for Planning, Transport & Infrastructure (SA), Dept of Environment and Primary Industries (Vic) and Geoscience Australia, Australian Government, © Commonwealth of Australia.

## MANAGEMENT OF THE TRIBUNAL

### Tribunal governance

The President has statutory responsibility for the administration of the Tribunal. The President and Registrar set the strategic direction of the Tribunal and are responsible for its performance. During the reporting period, the President and other Members met regularly.

### Financial review

The FCA's appropriation includes funding for the operations of the Tribunal. This funding is set out as sub-program 1.1.2 in the Court's Portfolio Budget Statements. \$10.193 million was allocated for the Tribunal's operations in 2017–18.

Appendix 1 shows the consolidated financial results for both the Court and the Tribunal.

Table 5.4 presents the financial operating statement, summarising the Tribunal's revenue and expenditure for 2017–18.

**Table 5.4: Financial operating statement**

Year ending 30 June 2018	Actual (\$'000)	Budget (\$'000)	Variance (\$'000)
Appropriation	10,193	10,193	0
Service receipts	7	8	-1
<b>Total revenue</b>	<b>10,199</b>	<b>10,200</b>	<b>-1</b>
Staff expenses	9,169	9,207	38
Supplier expenses	799	992	193
<b>Total expenses</b>	<b>9,968</b>	<b>10,199</b>	<b>231</b>
<b>Surplus/Deficit</b>	<b>231</b>	<b>1</b>	<b>230</b>



## EXTERNAL SCRUTINY

### Accountability to clients

The Tribunal maintains a Client Service Charter (Commitment to Service Excellence) to ensure that service standards meet client needs. During the reporting period there were no complaints requiring action under the Charter.

### Members' Code of Conduct

Members of the Tribunal are subject to various statutory provisions relating to behaviour and capacity. While the Registrar is subject to the Australian Public Service Code of Conduct, this does not apply to Tribunal Members, except where they may be, directly or indirectly, involved in the supervision of staff.

Tribunal Members have voluntarily adopted a code of conduct, procedures for dealing with alleged breaches of the code and an expanded conflict of interest policy. During the reporting period, there were no complaints under these documents.

### Online services

The Tribunal maintains a website at [www.nntt.gov.au](http://www.nntt.gov.au). During the reporting period, online functionality was expanded in relation to statistical and geospatial information.

### Australian Human Rights Commission

Under s 209 of the Act, the Aboriginal and Torres Strait Islander Social Justice Commissioner must 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 Tribunal continues to assist the Commissioner as requested.

## ANNEXURE

### President's presentations

#### Former President Raelene Webb: presentations 1 July 2017 to 30 March 2018

Date	Title	Event	Organisers
20 July 2017	Native title re-imagined: the perspective of Justice Kirby	Annual Michael Kirby Lecture	Southern Cross University, Gold Coast campus
23 August 2017	The National Native Title Tribunal	Judges NT Education Day	Federal Court of Australia
6 September 2017	Leading with purpose and influence	Continuing professional development legal training	Legalwise
16–18 October 2017	Stronger partners, stronger futures	Co-designing the future workshop	Department of Premier and Cabinet, South Australia
14 November 2017	The evolution of native title law: swings and roundabouts	Continuing professional development legal training	Legalwise Seminars
18–23 March 2018	Management of native title – treaties and land governance – whose land is it anyway? Australia's next 'wicked' problem	Annual conference on land and poverty 2018, Washington DC	World Bank

### Members' presentations

#### Member Helen Shurven: presentations 1 July 2017 to 30 June 2018

Date	Title	Event	Organisers
July 2017	Future acts	Internal training for staff	National Native Title Tribunal
February 2018	Mediation	Internal training for staff	National Native Title Tribunal
23 March 2018	Native title workshops	Training for representative bodies	National Native Title Tribunal
30 May 2018	The National Native Title Tribunal	Law student workshop	Murdoch University
21 June 2018	Mediation in native title	Continuing professional development seminar	Legalwise

#### Member James McNamara: presentations 1 July 2017 to 30 June 2018

Date	Title	Event	Organisers
10 April 2018	Native title	Workshop	Blue Mountains City Council
13 April 2018	Native title and local government	Workshop	Gilkerson Legal
20 June 2018	Native title	Canberra workshop	Clean Energy Regulator
21 June 2018	Native title	Canberra workshop	Department of Environment and Energy