

# Chapter 5

## Other Issues

5.1 This chapter reviews the inter-relationships of representative bodies with other organisations and stakeholders in native title processes. The chapter also discusses the issues of claimant applications pursued outside the representative body structure, non-claimant applications and respondent funding. The chapter concludes with a discussion of the role of Prescribed Bodies Corporate and issues related to their operations.

### Relations with other organisations

5.2 Native title arrangements in Australia are best conceptualised in terms of an interdependent system, with various organisations, agencies and institutions performing specific roles that together interact to provide native title outcomes.

5.3 The Committee received a range of views as to how effectively NTRBs interact with other organisations and stakeholders in native title processes.

5.4 Representative bodies indicated that they seek to establish effective working relations with stakeholders. Yamatji Aboriginal Corporation emphasised the importance of building solid relationships with these stakeholders. The Corporation stated that:

[it] has developed and fostered mutual trust and respect between the organisation, its staff, members and clients. The organisation understands that more will be achieved for its claimants through effective, supportive partnerships and will do its utmost to work with government and other parties to gain more for the Aboriginal people it represents.<sup>1</sup>

5.5 Similarly, the Kimberley Land Council stated that it recognises the importance of cooperative relationships and 'seek to foster such relationships with our stakeholder organisations as a means of making the most of the resources available to us' and where possible, seeks to agree priorities with other parties for the resolution of native title applications'.<sup>2</sup>

5.6 Native Title Services Victoria (NTSV) stated that it has developed good working relationships with stakeholders. NTSV noted that its capacity to engage with the State Government is enhanced by the fact that it is the only body in Victoria representing the interests of native title claimants.

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1 *Submission 29*, p.3 (Yamatji Aboriginal Corporation).

2 *Committee Hansard* 21 July 2004, p.5 (KLC).

This enables constructive working relationships and effective dialogue to be established by NTSV Board and staff with the relevant Ministers and departmental staff in resolving native title issues across Victoria.<sup>3</sup>

5.7 Several organisations indicated that they have established effective working relationships with NTRBs. The Indigenous Land Corporation (ILC), noting that it has a broad range of dealings with all NTRBs, stated that generally it has a 'good relationship' with most NTRBs. The Corporation stated, however, that the quality of interaction between the ILC and NTRBs has varied considerably and this is attributed to 'a range of dynamics, including corporate governance issues, individual relationships, coinciding and conflicting agendas and political perspectives'.<sup>4</sup> The National Native Title Tribunal (NNTT) in its submission cited several examples of collaborative relationships that it has established with NTRBs around Australia.<sup>5</sup>

5.8 Other stakeholders suggested, however, that problems exist in the relationship between NTRBs and others groups with which they interact. Rio Tinto argued that there is a problem of poor communication between NTRBs, claimants and communities in general, citing several examples including:

- decisions and positions presented by NTRBs without due consultation with, or understanding by, claimant groups or the general Indigenous community;
- NTRBs underestimating the effort required to bridge the linguistic and cultural gaps necessary to empower Aboriginal communities to participate in meaningful native title negotiations;
- NTRBs not seeking to understand the key interests, needs and concerns of claimant groups and others; and
- an unwillingness of NTRB staff, lawyers and advisors to be forthcoming with information and to explore options for mutual benefit.<sup>6</sup>

5.9 During the inquiry several examples were provided of Indigenous groups and individuals dissatisfied with the conduct of representative bodies in attempting to represent their interests. Often the disputes are long standing and involve a range of complex issues. One witness stated that:

We not believe in the pseudo bodies [rep bodies] that are there to look after Indigenous interests when, at the end of the day, the people on the ground in the communities get no results and see nothing happening for them for years and years on end. All this time, funding has been poured into these bodies and we still have Indigenous people in our communities living very meaningless lives because of neglect, not from governmental funding but

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3 *Submission 5*, p.2 (NTSV).

4 *Submission 21*, p.2 (ILC).

5 *Submission 23*, pp.9-11 (NNTT).

6 *Submission 18*, pp.12-13 (Rio Tinto).

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from these bodies that are set up to handle our issues and supposedly are there for our benefit when we do not get any benefit at all.<sup>7</sup>

5.10 The Committee makes no judgement on this particular case or other cases brought before the inquiry but such instances serve to illustrate the often fraught relations that can develop between native title claimants and representative bodies.

5.11 The OIPC stated that the relations between NTRBs and stakeholders, whilst varying from one part of the country to another, 'have seen significant improvement', as evidenced in part by the number of successful agreements and ILUAs concluded.<sup>8</sup>

5.12 The OPIC indicated that there are various means for improving relationships. The OPIC argued that a key document that should be developed by all NTRBs is a *Service Charter*. Such a document can provide a ready guide to the objectives of, and services provided by, a representative body. It can demonstrate to clients and stakeholders that the body is committed to providing information about the range and standard of services offered. A Service Charter also provides a benchmark against which the work of the representative body can be judged at the community level, and thus enhances the accountability of the organisation to clients and stakeholders alike. The OPIC also suggested that representative bodies should conduct more surveys of clients to provide feedback on service delivery.<sup>9</sup>

5.13 Submissions noted that the range of organisations and other parties that NTRBs must interact with during the course of their work often creates tensions and problems that of themselves are difficult to resolve. These interactions represent ongoing challenges for representative bodies.

Representative bodies generally represent Aboriginal interests in dealings with governments, tribunals, courts and parties to native title claim proceedings. They are often responsible for deciding whether to proceed by way of negotiation or litigation. These are often difficult decisions. On the one hand, the private entities with which they are dealing often represent, or are comprised of, individuals with whom native title holders will continue to live on a day-to-day basis long after the claims have been determined. Government departments and officers, on the other hand, are persons with whom the representative bodies will have on-going dealings, both in relation to other claims and in relation to their own funding and regulation. The combined tensions created by these relationships are by no means easy to resolve. If they fail to maintain appropriate relationships, on behalf of their Aboriginal constituents, they will soon be discredited as institutions.<sup>10</sup>

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7 *Committee Hansard* 21 November 2005, p.11 (Mr C Budby). See also, for example, *Submission 30* (Walman Yawuru Aboriginal Corporation).

8 *Submission 1A*, p.33 (OIPC).

9 *Submission 1A*, p.33 (OIPC).

10 *Submission 11*, p.8 (Mr J Basten QC). See also *Submission 40*, p.16 (AIATSIS).

5.14 Evidence indicates an often antagonistic attitude to NTRBs on behalf of some stakeholders, including governments which can impede the work of these bodies.

Although many pastoralists and mining companies have established and maintained co-operative relationships with native title holders and claimants in their areas, the associations which represent such groups have often demonstrated a level of antagonism to native title and hence to representative bodies which is unfortunate...The other organisations which frequently enjoy antagonistic relationships with representative bodies are the various State, Territory and Commonwealth governments themselves.<sup>11</sup>

5.15 Submissions noted that there are often many third-party interests in native title proceedings, for example, pastoralists, miners, local government and industry peak bodies. Many of these are funded by the Attorney-General's Department to pursue their own interests. The conduct of third parties is beyond the control of representative bodies but third respondents can greatly affect the capacity of NTRBs to fulfil their statutory functions.<sup>12</sup> As one submission noted 'mediation is identified under the NTA as the preferred means by which native title claims should be resolved. However, the effectiveness of that mechanism is contingent upon the goodwill of those engaged in the process'.<sup>13</sup> This issue is discussed later in the chapter.

5.16 A number of consultative mechanisms exist at the Commonwealth level to improve the operation of the native title system. The Attorney-General's Department convenes the Native Title Coordination Committee (NTCC) and the Native Title Consultative Forum (NTCF). These bodies are designed to seek a system-wide perspective on native title issues with a view to developing a more efficient and effective system.

5.17 The NTCC is an inter-departmental committee chaired by the Attorney-General's Department and includes representatives of the Federal Court, the NNTT, the OIPC, the Department of Prime Minister and Cabinet and the Department of Finance. The NTCC meets regularly to consider the performance of the native title system.

5.18 The NTCF, which meets quarterly, is also chaired by the Attorney-General's Department and includes representatives of State and Territory Governments, local government, peak bodies (such as the National Farmers Federation and the Minerals Council of Australia), some NTRBs, the Federal Court, the OIPC and the NNTT. The NTCF is designed to be a forum where key stakeholders in the native title system can discuss and exchange views on recent developments, legal aid issues and emerging trends. The Forum also enables members to be more informed in their consideration of particular issues affecting the implementation of native title matters.<sup>14</sup> The OIPC

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11 *Submission 11*, p.7 (Mr J Basten QC)

12 *Submissions 4*, pp.19-24 (QIWG); 8, pp.12-14 (NSWNTS).

13 *Submission 4*, p.20 (QIWG).

14 *Submissions 16*, pp.2,9 (AGs Department); 23, p.9 (NNTT).

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stated that the Forum can provide an 'important role' in maintaining an Indigenous perspective in native title service delivery arrangements.<sup>15</sup>

5.19 At a State or regional level, NTRBs are engaged in regional planning with governments, the Federal Court and other stakeholders. The NNTT illustrated the importance of regional planning on a cooperative basis in dealing with claimant applications.

The tribunal is able to work with representative bodies in many regions, along with relevant governments and major parties, to develop priorities for the resolution of claimant applications and work plans or timetables for dealing with claimant applications across a region. Where this approach works well in conjunction with the Federal Court, the resources of the parties and bodies – including representative bodies – can be put to optimal use to achieve outcomes.<sup>16</sup>

5.20 The WA Office of Native Title provided the example of regional planning through the use of Regional Case Management Conferences (RCMC) to better plan priorities for claims. These conferences occur within all regions of Western Australia twice a year. The main outcome of each RCMC is to develop a list of native title application priorities in the region that the Western Australian Government, the NNTT, the Federal Court and the NTRBs agree on. The Association of Mining and Exploration Companies (AMEC) noted, however, that apart from informing the Association of the Federal Court hearing timetable the RCMC process is 'not of great value'.<sup>17</sup>

### ***Conclusion***

5.21 The Committee believes that the fostering of effective inter-relationships between representative bodies and other stakeholders is vital to the proper functioning of the native title system. It is self-evident that unsatisfactory relations between NTRBs and other stakeholders can impact negatively on the conduct of claims and negotiation processes and on achieving positive outcomes. The Committee recognises that NTRBs operate in a difficult working environment with the attitude and actions of some other stakeholders often posing ongoing challenges for these bodies.

5.22 The Committee supports the consultative mechanisms established at the Commonwealth level, especially through the Native Title Consultative Forum, as a means of exchanging views on native title matters and enabling members of the Forum to be more informed in their consideration of particular issues affecting the implementation of native title matters.

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15 *Submission 1A*, pp.32-33 (OIPC).

16 *Committee Hansard* 21 November 2005, p.59 (NNTT).

17 *Committee Hansard* 19 July 2005, p.13 (AMEC).

5.23 The Committee also supports the regional planning initiatives as a means of setting native title priorities amongst interested parties. The Committee believes that these initiatives serve to improve the relations of representative bodies with key stakeholders and ensure that the resources of the parties involved are put to optimal use in achieving positive outcomes.

### **Native title claims outside the NTRB system**

5.24 The NNTT stated that claimants pursue applications outside the NTRB structure for a number of reasons including:

- they do not accept the regional NTRB policy, procedures and priorities;
- they do not think the NTRB is representative of them;
- they belong to a corporation that has previously made an application to become a NTRB which was rejected;
- the NTRB has refused to represent them;
- they have sought funding from a NTRB which was refused; or
- the NTRB may not be able to represent them due to a conflict of interest.<sup>18</sup>

5.25 If an NTRB refuses to provide financial assistance to a group of people who wish to make a native title application, that decision can be subject to internal review (s.203BI of the NTA), review by the Secretary of the Department (s.203FB) and ultimately review by the Federal Court.<sup>19</sup>

5.26 The NNTT statistics show that, as at 18 November 2005, of the total number of claimant applications (580), some 164 (or 28 per cent), were either unrepresented or have a representative other than an NTRB. Unrepresented claimants are usually individuals representing themselves, while those who have a representative other than an NTRB are more likely to have engaged a legal practitioner to work *pro bono* on their behalf.<sup>20</sup>

5.27 Submissions from representative bodies noted that NTRBs are not in a position to prevent individual native title applicants or claimant groups from seeking their own legal representation if they prefer that course of action. NTRBs are only required to represent a claimant group if requested to do so.

5.28 Submissions argued that many NTRBs have had problems with external lawyers acting directly for claimant groups. The difficulty with lawyers not retained by NTRBs, it is argued, is that they have no regard for the regional needs and

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18 *Submission 23*, p.12 (NNTT).

19 *Submission 23*, p.12 (NNTT).

20 NNTT, *Tabled Document*, 21 November 2005. See also *Committee Hansard* 21 November 2005, p.59 (NNTT). Some 416 claimant applications (or 72 per cent) were represented by representative bodies.

perspectives which NTRBs must consider in prioritising claims. In many respects external lawyers see NTRBs as legal aid funding bodies which should provide resources for those lawyers to run claims undirected. The only formal means by which NTRBs can control such action is to refuse to provide any resources to the solicitors concerned. However, this does not prevent the actions of those individuals from straining the resources of NTRBs.<sup>21</sup>

5.29 The Parker report recommended that NTRBs should be the appropriate first point of contact for Indigenous groups seeking representation to have their native title rights determined and negotiated.<sup>22</sup>

### **Non-claimant applications**

5.30 A non-claimant application is an application filed by a person who has a non-native title interest in a particular area. It is generally filed over relatively small areas where there are no existing native title claims. Non-claimant applications are usually made for the purpose of obtaining a determination that native title does not exist or to provide a procedural clearance to enable future acts to occur within the area. People who wish to be recognised as native title holders for an area subject to a non-claimant application can respond by filing a native title claim within the relevant period. Unless a claimant application is filed in response, the non-claimant applicant and others can proceed to do any future acts in relation to the area (that are otherwise legally allowed) without going through any of the other future act processes set out in the Act.<sup>23</sup>

5.31 Most non-claimant applications are made in areas where there are not many claimant applications and particularly in relation to future acts where the other future act activity provisions of the Act, apart from ILUAs, are not appropriate. The areas with most future act activity, Western Australia and Queensland, are also areas with the most claimant applications covering vast areas. This accounts for the low number of non-claimant applications in those States.

5.32 There are 35 current non-claimant applications, of which 32 are in NSW, one is in Queensland and two are in Western Australia (as at 17 November 2005). The 35 non-claimant applications constitute five per cent of the current 628 applications under the NTA. The majority of the current applications are claimant applications (580) and the remaining 13 applications are compensation applications. There are currently 13 native title determinations of the Federal Court involving non-claimant applications. Eleven of those determinations are in NSW and two are in Queensland.<sup>24</sup>

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21 *Submissions* 8, p.23 (NSWNTS); 4, pp.25-26 (QIWG); 13, p.4 (ALRM).

22 G Parker *et.al.*, *Review of Native Title Representative Bodies*, ATSIC, Canberra, 1995, p.37.

23 *Submission* 23, p.13 (NNTT).

24 *Committee Hansard* 21 November 2005, pp.59-60 (NNTT).

5.33 The majority of the non-claimant applications are from State Governments, shire councils or property developers. Non-claimant applications can also be brought about by Indigenous people. This most often occurs in NSW, because under s.40AA of the *Aboriginal Land Rights Act 1983* (NSW), in some circumstances, a local Aboriginal Land Council must obtain a determination of native title before leasing or selling land it holds in freehold.<sup>25</sup>

5.34 Submissions noted that once a non-claimant application is lodged it is necessary for an NTRB to respond to the application if instructed to do so. Failure to do so may result in the permanent and total extinguishment of native title. Parties lodging non-claimant applications may well have received funding from the Commonwealth Attorney-General to maintain those proceedings. Submissions noted that on the one hand the Commonwealth funds NTRBs to develop strategic plans and to operate in accordance with those plans, yet on the other hand the Commonwealth funds third parties to commence proceedings that can severely disrupt those plans.<sup>26</sup>

5.35 The National Native Title Tribunal also commented on the problems these applications pose for NTRBs in terms of resourcing:

NTRBs must respond to all non-claimant applications. They may have to locate the local Indigenous community or group that may have native title rights and determine whether they wish to respond and in what way. As non-claimant applications can be sporadic, they cannot be planned for. As a result they divert NTRB resources from other priorities.<sup>27</sup>

5.36 The Committee notes that responding to non-claimant applications can impose significant additional workloads on NTRBs and believes that funding to representative bodies should take account of the relative workloads resulting from non-claimant applications.

### **Respondent funding**

5.37 The Commonwealth Attorney-General's Department provides financial assistance to respondents to native title claims. Under subsection 183(1) of the NTA assistance is available to any person who is a party or intends to become a party to native title proceedings. There is no 'hardship test': financial assistance can be provided to peak bodies or organisations for members in relation to specific claims, as well as individuals or groups of persons with similar interests in a matter.

5.38 The NNTT observed that:

The provisions of the Native Title Act regarding who can be a party are fairly broadly cast, and the Federal Court has interpreted fairly broadly the amount of interest that one needs in order to establish that one's interest

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25 *Submission 23*, p.14 (NNTT).

26 *Submissions 8*, p.20 (NSW Native Title Services); 4, p.19 (QIWG).

27 *Submission 23*, p.14 (NNTT).

could be affected by a determination of native title. The consequence of that is that it is relatively easy for a person or a body to acquire party status in relation to a claimant application.<sup>28</sup>

5.39 Expenditure on financial assistance for respondents since 2001-02 is provided below.

**Table 5.1: Financial assistance for respondents**

<b>Year</b>	<b>Respondent financial assistance – spending</b>	<b>Native title system funding</b>	<b>% of total funding</b>
2001-02	\$6m	\$100.1m	5.99%
2002-03	\$8.050m	\$106.45m	7.56%
2003-04	\$9.890m	\$112.25m	8.81%
2004-05	\$6.993m	\$110.77m	6.31%
2005-06 (to 28 Nov 2005)	\$1.992m	\$106.6m full year (est.)	

Source: Attorney-General's Department, *Tabled Document*, 29 November 2005.

5.40 As illustrated above, in 2004-05, almost \$7 million was spent on respondent funding. The Department estimated that between \$5.5-\$6 million will be spent on respondent funding this financial year.<sup>29</sup>

5.41 The ATSI Social Justice Commissioner noted that funding to respondent parties has increased over the years, while funding for NTRBs has decreased in real terms.<sup>30</sup> A different perspective was taken by the NSW Farmers' Association who argued that there are significant funding disparities between total funding received by NTRBs compared with total funding for respondent parties.<sup>31</sup>

5.42 A number of concerns with the operation of the scheme were expressed during the inquiry especially in relation to its perceived bias in encouraging a litigation approach in native title disputes and the relative ease with which respondent parties can obtain funding from the Attorney-General's Department.

28 *Committee Hansard* 21 November 2005, p.63 (NNTT).

29 *Committee Hansard* 21 November 2005, p.26 (AGs Department)

30 *Submission* 15, p.10 (ATSI Social Justice Commissioner). Reference to funding increases for respondent parties relate to the period 1992-93 to 2002-03.

31 *Submission* 27, p.2 (NSW Farmers' Association).

5.43 The ATSI Social Justice Commissioner argued that the scheme promotes a litigation approach 'rather than focussing on the economic and social development needs of claimant groups through agreement-making. This creates a considerable drain on NTRB resources'.<sup>32</sup>

5.44 The Commissioner also questioned whether many respondents have a legitimate claim on public funding in the light of High Court decisions such as *Wik, Wilson-v-Anderson* and *Yorta Yorta*.<sup>33</sup> These cases, it was argued, ensured that all non-Indigenous interests in land prevail over native title rights, and that, in the case of native title co-existing with non-Indigenous interests over the same land, native title rights that survive are of little threat to these other interests. This is because native title rights are either extinguished wherever there is an inconsistency between the two sets of interests, or, where the non-extinguishment principle applies, has no affect on the other interest. The result of providing financial support to third parties to participate in proceedings in which their interests cannot be affected is to encourage a litigation approach to native title, or, where claims are settled through negotiation, agreements that provide no more than the meagre rights available trough the NTA.<sup>34</sup>

5.45 The lack of stringent eligibility requirements for assistance was also commented on in evidence. The Yamatji Aboriginal Corporation noted that:

It is not that non-government third party respondents should not be adequately represented ... when their rights are threatened, but I cannot think of any other area of the law where the test for party status is so low and the invitation for anyone and everyone to get involved is so broadly painted.<sup>35</sup>

5.46 Evidence also commented on the 'unnecessary plethora of respondent parties' allowed to become involved in proceedings. The Queensland Indigenous Working Group (QIWG) stated that 'people who have no greater interest than any member of the public are being admitted as respondent parties'; and:

We have had cases in the North Queensland region where people have been admitted as parties simply on the basis that on the weekend they liked to get in their tinny and visit certain islands off the coast which were under native title claim.<sup>36</sup>

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32 *Submission* 15, p.10 (ATSI Social Justice Commissioner).

33 This position was disputed by the NSW Farmers' Association. See *Submission* 27, p.2 (NSW Farmers' Association).

34 *Submission* 15, p.10 (ATSI Social Justice Commissioner). See also *Submission* 4, pp.13-14 (QIWG).

35 *Committee Hansard* 19 July 2005, p.43 (Yamatji Aboriginal Corporation).

36 *Committee Hansard* 21 November 2005, p.47 (QIWG). See also North Queensland Land Council, *Tabled Document*, 21 November 2005.

5.47 Evidence also pointed to the existence of 'nuisance parties' – 'people who have no particular legal interest to be protected'.<sup>37</sup>

5.48 NSW Native Title Services observed that organisations with the most obscure interests can be a party to native title claims, yet are capable of being funded by the Attorney-General's Department.<sup>38</sup> The QIWG cited several examples in relation to this issue:

There are parts of the Mandingalbay Yidinji Gungganji claim in the North Queensland region which cover some small islands ... where there were in the order of 35 individual recreational users who filed 5 applications with the court and were allowed to become parties. There are some who are more organised. An example of the organised parties is the [named association]. They are fossickers, and the Fossicking Act allows there to be either club licences – whereby if you are a member of a registered club you are covered by their fossicking licence – or individual fossicking licences. We find that the fossickers become respondent parties to many of our claims.<sup>39</sup>

5.49 Submissions and other evidence also pointed to the lack of accountability for third party funding, especially compared with the strict funding guidelines imposed on NTRBs.<sup>40</sup>

There is much more flexibility – just send us the bill if you are a non-Aboriginal person being funded by the Attorney-General. Whereas with the rep bodies, it is "terms and conditions and cheapest fares, and we won't tell you that your senior counsel can turn up until the day before".<sup>41</sup>

5.50 Groups representing respondents took a contrary view on the need for funding under the scheme. The NSW Farmers' Association argued that native title is a new and evolving area of law in which many issues remain unsettled. The Association also expressed the view that many native title applications lodged by applicants are vague and cover a wide geographic area, and the potential effect of these claims on interests held by landholders can be uncertain – 'it is therefore prudent for landholders, with interests within a native title claim area, to become involved in proceedings'. Respondent parties join in native title proceedings 'so as to "have a seat at the table" in terms of negotiations and legal proceedings affecting their interests'.<sup>42</sup>

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37 *Committee Hansard* 21 November 2005, p.47 (QIWG).

38 *Submission* 8, p.21 (NSWNTS).

39 *Committee Hansard* 21 November 2005, p.54 (QIWG). See also *Committee Hansard* 21 November 2005, p.47 (QIWG).

40 *Submissions* 12, p.5 (GLSC); 8, p.21 (NSWNTS).

41 *Committee Hansard* 19 July 2005, p.80 (GLSC).

42 *Submission* 27, p.3 (NSW Farmers' Association).

### ***Review of respondent guidelines***

5.51 In November 2005, the Attorney-General's Department released a consultation draft with proposed amendments to the guidelines to the native title respondents' financial assistance program.<sup>43</sup> The existing guidelines have been in place since 1998. The new guidelines are expected to come into effect in July 2006.

5.52 The draft guidelines provide that respondents will continue to receive assistance for litigation but in more limited circumstances. The draft guidelines also focus more strongly on agreement-making over litigation as a means of resolving native title disputes.

5.53 The Attorney-General's Department stated that one of the aims of the review is to encourage agreement-making rather than litigation. This is addressed in the draft guidelines in clauses 77 and 78 that provide that approval of a grant of financial assistance involves acceptance by the legal provider that the Attorney-General or his delegate instructs the provider as to the services to be provided. The Department explained that 'at the moment, that is not in the guidelines...[the revision] gives greater prominence to that and enables us to influence the behaviour of our grant recipients in native title matters'.<sup>44</sup>

5.54 An associated aim is to introduce greater clarity and precision about the interests that are sufficient to attract a grant of financial assistance. The Department explained that the new draft guidelines provide that 'it would not ordinarily be reasonable to grant financial assistance if the applicant's interest is of a particular kind' and thus will preclude some interests that have been granted assistance previously.<sup>45</sup>

5.55 The test of 'reasonableness' for assistance under the draft guidelines takes into account whether:

- the proceeding raises any new and significant question of law;
- the applicant's case has reasonable prospects of success;
- the applicant's participation in preliminary or interlocutory matters will enhance the prospect of a mediated outcome;
- mediation has failed for reasons beyond the applicant's control; or
- the court requires the applicant's participation (clause 19.11).

The current guidelines do not impose such a stringent set of conditions for eligibility for assistance.

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43 Attorney-General's Department, *Draft Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993*, November 2005.

44 *Committee Hansard* 29 November 2005, p.11 (AGs Department).

45 *Committee Hansard* 29 November 2005, p.12 (AGs Department).

5.56 The draft guidelines attempt to address the issue of the plethora of respondent parties currently eligible for assistance. The Department noted that the guidelines will provide a greater ability to require grouping of respondents.

Generally, if there is a grant of assistance – for example, in a particular claim – to a group representative which would be capable of representing the interests of a particular individual who later applies for financial assistance, we would decline to make a grant of assistance to the individual.<sup>46</sup>

5.57 The draft guidelines also address the problem of organisations with obscure interests being party to native title claims, and funded under the present guidelines. The guidelines provide that an application of assistance will be determined on the basis of a number of factors including the nature of the applicant's interest and the native title rights being claimed.<sup>47</sup>

5.58 Another aim of the review is to increase the Department's ability to build a capacity within the native title system such that the program enhances the effectiveness of the system as a whole.<sup>48</sup> The Department will thus be looking at the effectiveness of respondent funding arrangements in broader terms, especially focussing on outcomes, such as whether the program is leading to an increase in agreements and consent determinations.

### ***Conclusion***

5.59 The Committee believes that, while financial assistance by the Attorney-General under the NTA should continue to be available to respondent parties, assistance should be available in more limited circumstances than exist at present. The Committee is concerned that financial assistance is currently too widely available, and that often obscure or nuisance interests can be a party to native title claims. Given that the fundamentals of native title are settled, it is not necessary for non-claimant parties to litigate all stages of a legal matter where the law is not in dispute or their interests are already protected under the NTA.

5.60 The Committee is pleased that the draft guidelines attempt to address these issues by introducing greater clarity about the interests eligible for assistance under the scheme and focus on promoting agreement-making to respondents wherever possible rather than a litigation approach. The Committee believes that the amended guidelines should incorporate the proposed amendments in the draft guidelines. The

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46 *Committee Hansard* 29 November 2005, p.13 (AGs Department).

47 The other factors include whether the applicant's interest is a scheduled interest; if the applicant's interests do not extinguish native title as a matter of law, whether the applicant's interest are likely to be adversely affected in a real and significant way if the native title were to be recognised; and the number of claims which directly affect the applicant (clauses 19.2-19.4, 19.7).

48 *Committee Hansard* 29 November 2005, p.12 (AGs Department).

Committee also considers that eligibility for assistance under the scheme should be subject to means testing.

### **Recommendation 17**

**5.61 The Committee recommends that the amended *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* due to come into effect in June 2006 provide:**

- **provisions to encourage agreement-making rather than litigation to resolve native title disputes; and**
- **that eligibility for assistance be subject to means testing along similar lines to those applying for grants of legal aid.**

### **Prescribed Bodies Corporate**

5.62 The NTA provides for the establishment of Prescribed Bodies Corporate (PBCs) for each determination where native title exists. PBCs hold in trust or manage native title on behalf of the native title holders. PBCs are currently regulated by the NTA, the *Native Title (Prescribed Bodies Corporate) Regulations*, and the *Aboriginals Councils and Associations Act 1976* (the ACA Act).

5.63 The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 – while it applies broadly to Aboriginal corporations – will also impact on PBCs. The Attorney-General's Department noted that the Bill provides, in particular for PBCs, 'potentially a much simpler regime for governance in that they can opt out of a number of the current provisions that would apply, particularly where they are small bodies'.<sup>49</sup>

5.64 The Bill provides that the internal governance rules of PBCs must be consistent with the NTA. Many of the provisions in the Bill are intended to operate to ensure that a duty conferred upon a corporation or individual by the native title legislation does not put the corporation or individual at risk of breaching provisions in the Bill. Corporations will also be classified into small, medium and large entities for reporting purposes. Many PBCs will fall into the category of 'small' corporation and will therefore have fewer reporting requirements. PBCs will be required to use the term 'registered native title body corporate' to signal to third parties that the corporation holds or manages native title rights and interests.<sup>50</sup>

5.65 While there have been 52 determinations that native title exist, to date only 38 PBCs have been established. A major problem highlighted during the inquiry was the lack of adequate resourcing of PBCs by the Commonwealth. At present, funding provided by the Commonwealth to NTRBs can only be used in the initial

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49 *Committee Hansard* 29 November 2005, p.13 (AGs Department).

50 CATSI Bill 2005, *Explanatory Memorandum*, pp.6-11.

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establishment of PBCs. NTRBs must cease being involved with PBCs when PBCs hold their first annual General Meeting.<sup>51</sup>

5.66 The role of a PBC may be quite varied including administrative functions such as arranging meetings to ensure that it can act on behalf of its constituents. As it is mandatory that any PBC be an organisation under the ACA Act a PBC will have statutory duties and obligations imposed under that legislation as well. The ACA Act imposes obligations to keep records and accounts. Many Indigenous people who are the beneficiaries of determinations that native title exists are not appropriately skilled to manage these organisations and require some form of capacity building and ongoing resources to be effective. Failure to comply with the obligations in the ACA Act may result in an administrator being appointed to those organisations, which can have serious consequences for these communities.<sup>52</sup>

5.67 Submissions noted that there is no financial assistance provided by the Commonwealth to PBCs to fulfil these obligations.

5.68 The dire situation of many PBCs due to lack of resources was highlighted during the inquiry. The Jidi Jidi Aboriginal Corporation (a PBC) stated that 'because our Corporation has no staff, no resources and no income, we cannot protect the native title that we fought so hard for'.<sup>53</sup> The Kimberley Land Council also commented that particularly in remote communities, PBCs without any funding base 'struggle to put in place even basic facilities such as a telephone or a fax machine, let alone being able to develop the specialist skills required for effective and ongoing land management. As the chairman of one Kimberley PBC put it, "I may be the chairman, but we can't afford a chair".<sup>54</sup>

5.69 The Attorney-General's Department noted however that there are a number of different funding sources available for PBCs but that PBCs are generally not availing themselves of this funding. The Department noted that the Indigenous Land Corporation (ILC) has indicated that it 'would be prepared to provide capacity building' to PBCs, but that PBCs 'have not been interested...in taking up that offer'.<sup>55</sup>

5.70 The ILC indicated that it has had recent dealings with several PBCs. The Corporation is currently in discussions with Lhere Artepe Aboriginal Corporation (LAAC) relating to land acquisition options to assist the PBC to establish a permanent office in Alice Springs. The Corporation, in collaboration with the Kimberley Land

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51 *Submission 22*, p.5 (WA Office of Native Title).

52 *Submissions 8*, p.26 (NSWNTS); 4, p.32 (QIWG).

53 *Submission 33*, p.2 (Jidi Jidi Aboriginal Corporation). See also *Submission 7*, p.9 (TSRA).

54 *Committee Hansard* 21 July 2004, p.2 (KLC). See also *Committee Hansard* 19 July 2005 (Yamatji Aboriginal Corporation), p.39.

55 *Committee Hansard* 29 November 2005, p.14 (AGs Department).

Council (KLC), has also offered several PBCs (including Tjurabalan and Karajarri) assistance to develop their capacity, especially in governance issues.<sup>56</sup>

5.71 The Attorney-General's Department also indicated there are also sources of funding available to PBCs from Commonwealth, State and Territory Governments that can assist with land management obligations. The Department noted that:

If you are a PBC and you have got exclusive rights to land, in addition to your native title rights and obligations you are going to have general rights and obligations with respect to land management. It may be that you can get an income stream coming from state government environmental land management programs.<sup>57</sup>

5.72 The Northern Territory Government stated that as it is likely that the number of PBCs will increase issues of governance and capacity development need to be considered by all levels of government. The consideration should include examination of the different categories and support required by PBCs, the current and future relationships between PBCs and NTRBs, the current and future role of governments in supporting PBCs and the potential for PBCs to become self sustaining.<sup>58</sup>

5.73 The Committee notes that the Northern Territory Government has provided funding to the Lhere Artepe Aboriginal Corporation by way of a special purpose grant of \$50 000 to cover office equipment and expenses and a one-off establishment grant of \$200 000 in 2004-05 for the employment of a co-ordinator and clerk's position for 12 months.<sup>59</sup>

5.74 The issue of how best to direct funding to PBCs was raised in evidence. Some submissions and other evidence argued that funding for PBCs should be directed to these organisations through NTRBs. The WA Office of Native Title argued that they are in the best position to offer this assistance if they have access to adequate funding for this purpose.<sup>60</sup>

5.75 The Committee questioned witnesses as to whether there may be a conflict of interest in channelling funds to PBCs via NTRBs. The KLC suggested that this was not the case arguing that 'not only are rep bodies repositories of an enormous amount of information about the communities that PBCs are representing but they are also repositories of extremely specialist knowledge about native title future act provisions...they are an obvious example of where that sort of assistance could be provided, at least in the first instance'.<sup>61</sup>

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56 *Submission 21A* pp.1,3 (ILC). See also *Committee Hansard* 21 November 2005, pp.6-7 (ILC).

57 *Committee Hansard* 29 November 2005, p.14 (AGs Department).

58 *Submission 25*, p.vi (NT Government). See also *Submission 6*, p.3 (AMEC).

59 *Submission 25*, p.vi (NT Government).

60 *Submission 22*, p.5 (WA Office of Native Title). See also *Submission 40*, p.15 (AIATSIS).

61 *Committee Hansard* 21 July 2004, p.7 (KLC).

5.76 Other submissions argued that funds should be provided directly to PBCs. The Association of Mining and Exploration Companies (AMEC) argued that most groups of Aboriginal people who have had their native title recognised do not want to be represented by an NTRB but strive to set up their own organisational structures to deal with the management of their native title land.<sup>62</sup> The LAAC in supporting this position stated that:

The rep body should not apply for that money; the registered PBC should be applying for that money to set up their office... They could be monitored by the rep body, but the rep body should not be totally responsible for the PBC once the PBC is registered, because it takes away the responsibility that the person, organisation or group needs to have. Once people are made to be responsible, things do happen.<sup>63</sup>

5.77 Witnesses indicated that PBCs should ideally be funded for one to two years after their establishment and assisted with the costs of establishing an office, employing office staff, training in governance and accessing legal advice.<sup>64</sup> The KLC identified the needs of PBCs in the following terms:

They want a very modest office...with fax and computer facilities, chairs, somewhere small to have meetings. They want some form of governance training to be able to administer properly their obligations under the Corporations Act and they would probably need some ability to access legal advice generally in relation to the third-party acts that happen over their land.<sup>65</sup>

5.78 Witnesses noted that, in the longer term, PBCs will generate income from their land and resources.<sup>66</sup>

5.79 One witness suggested a continuing and major oversight role for NTRBs in relation to PBCs. The witness expressed some doubts as to whether PBCs would ever be effective 'in the sense that there are a lot of them and they are all located outside capital cities where it is very difficult to get basic access to even basic secretariat assistance, let alone professional advice...the optimum way forward is something along the lines of a Northern Territory model, where you give representative bodies a central, ongoing role in relation to representing native title holders'.<sup>67</sup>

5.80 The Attorney-General recently announced a review of the current structures and processes of PBCs to encourage their effective functioning. It will also assess the

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62 *Submission 6*, p.3 (AMEC).

63 *Committee Hansard*, 19 July 2004, p.3 (LAAC).

64 *Committee Hansard* 19 July 2004, p.3 (LAAC).

65 *Committee Hansard* 21 July 2004, pp.26-27 (KLC). See also *Committee Hansard* 19 July 2005, p.18 (AMEC).

66 *Committee Hansard* 19 July 2005, p.18 (AMEC).

67 *Committee Hansard* 19 July 2005, p.39 (Mr D Ritter).

appropriateness of the current governance model for PBCs. This will take into account the effect of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005. The review will include consultation with relevant stakeholders including existing PBCs, NTRBs, State and Territory Governments and industry bodies.<sup>68</sup>

### **Conclusion**

5.81 The Committee believes that PBCs are a vital element of the native title system, and need to operate effectively so that native title holders are able to utilise their native title rights and to discharge their land management obligations. As the number of native title determinations increases, the role of PBCs in managing native title rights and interests is likely to become increasingly important to the operation of the native title system as a whole. The Committee welcomes the recent announcement by the Attorney-General of a review into the operations of PBCs, with a view to improving the functioning of these organisations.

5.82 The Committee considers that PBCs need to be adequately funded and resourced so that they can fulfil their important role in the native title system. Currently, many PBCs are unable to function effectively because of a lack of financial assistance from the Commonwealth. The Committee believes that the Commonwealth should examine appropriate ways of resourcing the core functions of PBCs. The Committee does not have a view as to whether this assistance should be provided directly to the PBC or via NTRBs.

5.83 The Committee also believes that information on the availability of different funding sources that PBCs could potentially utilise at the Commonwealth, State and Territory levels needs to be widely publicised.

### **Recommendation 18**

**5.84 The Committee recommends that the Commonwealth examine appropriate means for resourcing the core responsibilities of Prescribed Bodies Corporate.**

### **Recommendation 19**

**5.85 The Committee recommends that the Commonwealth, State and Territory Governments widely publicise the availability to Prescribed Bodies Corporate of different funding sources, particularly in relation to the PBCs' land management functions.**

**Senator Nigel Scullion**

Committee Chair

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68 Attorney-General, 'Native Title Reform', *Media Release*, 7 September 2005.