

Parliament of the Commonwealth of Australia

**PARLIAMENTARY JOINT COMMITTEE
ON NATIVE TITLE AND THE
ABORIGINAL AND TORRES STRAIT
ISLANDER LAND ACCOUNT**

**Report on the operation of
Native Title Representative Bodies**

March 2006

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THE COMMITTEE

Members

Senator Nigel Scullion, **Chair**

Mr Bob McMullan MP, **Deputy Chair**

Senator Patricia Crossin

Senator Chris Evans

Senator David Johnston

Senator Rachel Siewert

Mr Daryl Melham MP

Mr Don Randall MP

The Hon Peter Slipper MP

Mr David Tollner MP

Secretariat

Mr Jonathan Curtis, Secretary

Ms Anne O'Connell, Principal Research Officer

Mr Peter Short, Principal Research Officer

Ms Jackie McConnell, Executive Assistant

Parliament House
CANBERRA

Telephone: (02) 6277 3419

Facsimile: (02) 6277 5866

Email: nativetitle.joint@aph.gov.au

Internet: www.aph.gov.au/native_title

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RECOMMENDATIONS

Recommendation 1

2.54 The Committee recommends that the OIPC develop comparative data, based on a range of key performance indicators, to assess the relative effectiveness of NTRBs in meeting their statutory obligations and that this data be published annually.

Recommendation 2

2.77 The Committee recommends that the Commonwealth establish an independent advisory panel to advise the Minister on the re-recognition of NTRBs once their recognition period has expired.

Recommendation 3

2.81 The Committee recommends that the Commonwealth provide further details of the proposed transitional arrangements that will apply when the recognition period for NTRBs expires in order to avoid uncertainty for claimants.

Recommendation 4

2.83 The Committee recommends that the Commonwealth address the issue of native title claims that overlap the boundaries of different representative bodies to avoid uncertainty for claimants.

Recommendation 5

3.74 The Committee recommends that the Commonwealth immediately review the adequacy of the level of funding provided by the OIPC to NTRBs for capacity building activities including management and staff development, and information technology.

Recommendation 6

3.75 The Committee recommends that the Commonwealth, in conjunction with industry groups, consider providing additional pooled funding for emergency and unforeseen situations, such as future act matters, litigation or court proceedings; and that the OIPC develop guidelines and procedures that will enable funding to be available in these situations in a timely fashion.

Recommendation 7

3.76 The Committee recommends that the Commonwealth ensures that the level of funding available to the Office of the Registrar of Aboriginal Corporations provides NTRBs with adequate training and support to meet the requirements of the introduction of the new corporate governance regime under the Corporations (Aboriginal and Torres Strait Islander) Bill 2005.

Recommendation 8

3.77 The Committee recommends that the Commonwealth immediately review the level of operational funding provided to NTRBs to ensure that they are adequately resourced and reasonably able to meet their performance standards and fulfil their statutory functions.

Recommendation 9

3.116 The Committee recommends that the OIPC, in close consultation with NTRBs, develop standardised criteria for use in the recruitment of representative body staff; and that these criteria be used nationally to provide consistency in standards of recruitment.

Recommendation 10

3.117 The Committee recommends that the Commonwealth investigate the feasibility of:

- the secondment of expert government staff to NTRBs;
- the establishment of a centre of excellence to develop the legal capacity of NTRB lawyers and from which NTRBs could draw expertise as required; and
- the provision of scholarships for post-graduate study to further enhance skills in areas of relevance to the work of NTRBs.

Recommendation 11

3.118 The Committee recommends that the Commonwealth implement a national recruitment strategy to address the professional staffing needs of NTRBs and that this strategy:

- promote the status and positive image of work in NTRBs;
- focus on promotion of careers in NTRBs to the professions;
- introduce an ongoing NTRB student placement program; and
- promote the employment of Indigenous people to positions in NTRBs.

Recommendation 12

3.119 The Committee recommends that representative bodies focus on the professional development needs of NTRB professionals and enhance the support structures and programs available to them, including:

- developing a formal induction training program for new recruits;
- establishing ongoing training programs to further enhance skills in particular areas;
- creating a mentoring system; and
- implementing performance evaluation systems to assist in the identification of professional development needs.

Recommendation 13

3.120 The Committee recommends that the OIPC continue to monitor the salary differentials provided to senior professional staff of NTRBs; and introduce a scale of salaries to provide consistency across the system if significant differentials continue to apply.

Recommendation 14

3.121 The Committee recommends that representative bodies investigate the feasibility of implementing a system of 'pooling' of professional staff in situations where an NTRB may lack a full complement of particular professional staff.

Recommendation 15

4.23 The Committee recommends that the OIPC continue to support NTRBs in improving the quality of their strategic planning processes and especially in integrating strategic plans, operational plans and performance based budgeting and reporting.

Recommendation 16

4.24 The Committee recommends that the OIPC, in consultation with representative bodies, review the current compliance and accountability requirements placed on NTRBs with a view to reducing unnecessary duplication of reporting and streamlining reporting procedures.

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.

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.

Chapter 1

Introduction

Terms of reference

1.1 On 15 September 2003, the Committee adopted the following terms of reference:

That, pursuant to paragraph 206(b) of the *Native Title Act 1993*, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund inquire into and report on the capacity of Native Title Representative Bodies to discharge their responsibilities under the Act with particular reference to:

- (1) the structure and role of the Native Title Representative Bodies;
- (2) resources available to Native Title Representative Bodies, including funding and staffing; and
- (3) the inter-relationships with other organisations, including the strategic planning and setting priorities, claimant applications pursued outside the Native Title Representative Body structure and non-claimant applications.

1.2 The Committee was re-appointed in November 2004, and re-adopted the above terms of reference.

Conduct of the inquiry

1.3 The Committee advertised the inquiry on the Internet as well as writing to a number of interested organisations and individuals.

1.4 Public hearings were held in Canberra on 12 May 2004, Alice Springs on 19 July 2004, Broome on 21 July 2004, Perth on 19 July 2005, Brisbane on 21 November 2005 and Canberra on 29 November 2005. The Committee received forty-two submissions to the inquiry.

1.5 The Committee wishes to record its appreciation to all those who took the time to prepare submissions and appear before the Committee. The Committee wishes to particularly thank officers of the Office of Indigenous Policy Coordination and the Attorney-General's Department for their responsiveness in providing additional information to assist the inquiry.

Reviews of representative bodies

1.6 Representative bodies have been subject to a number of reviews concerning their efficiency and effectiveness. A brief summary of the main reviews is discussed below.

Parker report

1.7 In November 1994, ATSIC commissioned Guy Parker to chair a review committee to examine the effectiveness of representative bodies addressing staffing issues, measures which maximise appropriate native title services to Indigenous people, and the appropriateness of financial and administrative arrangements then in place for NTRBs.

1.8 The review noted that representative bodies had become 'the workhorses of the native title regime' and recommended, *inter alia*, that representative bodies should be the first point of contact for all Indigenous people seeking to have their native title recognised, that explicit mandatory functions should be established, and that representative bodies should be adequately resourced.¹

Love-Rashid report

1.9 In 1998, a report was commissioned by ATSIC to review the relationship between funding levels and functions of representative bodies and to assess their future funding and resource requirements in the light of the *Native Title Amendment Act 1998*. The review concluded that:

- the workloads of representative bodies were significantly higher than allowed for by the level of funding provided;
- many representative bodies were unable to fulfil their core functions and also provide professional management and administrative systems;
- corporate governance within representative bodies was generally deficient; and
- the shortcomings of the representative bodies imposed considerable costs on the wider community.²

Miller report

1.10 In July 2002, ATSIC commissioned Bill Miller to conduct a review of the representative body system at the request of the Minister in order to satisfy the Minister that he was meeting his obligations under the Native Title Act (NTA) with respect to representative bodies and in particular, to investigate the quality of their strategic plans and the system for distributing funds to representative bodies. The report concluded that:

- all the Minister's responsibilities under the NTA had been met, with the exception of the requirement to table annual reports of representative bodies in both Houses of Parliament;

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

2 Senatore Brennan Rashid, *Review of Native Title Representative Bodies*, ATSIC, March 1999.

-
- the strategic plans of each NTRB met the requirements of the NTA but varied in quality, particularly in relation to information provided on objectives, strategies, performance and financial plans;
 - the strategic plans of NTRBs were predominantly general in nature and in the main did not contain output and outcome targets that enabled strategic workload planning;
 - neither the strategic plans, funding applications nor annual reports of NTRBs contained sufficient information to enable ATSIC to base its funding allocations on quantifiable outputs/outcomes; and
 - ATSIC funding to NTRBs addressed known native title funding needs but it raised concerns that such funding was not fairly distributed among NTRBs on the basis of relative need.

1.11 The Miller report also made a number of recommendations to improve the funding process for representative bodies. The recommendations contained a requirement for operational plans to be included in annual funding applications both to give effect to strategic plans and to provide much needed performance information.³

Other reviews

1.12 A number of other reports have addressed aspects of the operation of NTRBs.

PJC report on ILUAs

1.13 The PJC on Native Title published its report on Indigenous Land Use Agreements (ILUAs) in September 2001. The Committee found that NTRBs play a critical role in the negotiation of ILUAs, but that they are hampered by significant shortages of funds. As a result, they have been forced to rely on funding assistance from proponents as well as state and local governments. Accordingly, the Committee recommended an increase in funding to NTRBs. The Committee also noted difficulties that NTRBs have in securing qualified and experience staff to manage the processes for which the bodies are responsible.⁴

Prosser report

1.14 In August 2003, the House of Representatives Standing Committee on Industry and Resources tabled its report on resource exploration in Australia. The main findings of the report with respect to NTRBs were that current native title processes are leading to considerable delays, expense and uncertainty in determining

3 B Miller, *Review of Native Title Representative Body System at the Request of the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs*, October 2002.

4 PJC on Native Title, *Second Interim Report for the s.206(d) Inquiry: Indigenous Land Use Agreements*, September 2001, pp.95-99, 112.

mining applications; and a significant cause of these problems is competing and overlapping native title claims. Accordingly, the report recommended that NTRBs be provided with additional funding, and that it be targeted and limited to support activities that facilitate negotiation processes.⁵

PJC report on the effectiveness of the NNTT

1.15 The PJC on Native Title published its report on the effectiveness of the National Native Title Tribunal in December 2003. The Committee noted that NTRBs have central responsibility for the resolution of overlapping claims and intra-Indigenous disputes. In this context the Committee explored the issues of duplication in the roles of the NNTT and representative bodies, particularly in relation to the registration of claims and mediation. In relation to resourcing, the Committee recommended that a further inquiry be conducted into the work demands and funding of NTRBs.⁶

ATSI Social Justice Commissioner reports

1.16 Since 1994, the Aboriginal and Torres Strait Islander (ATSI) Social Justice Commissioner has published an annual report into the functioning of the native title system. The 2001 report examined the role and functioning of NTRBs in some detail, highlighting funding shortfalls in particular. In the 2003 Native Title Report, the Commissioner briefly examined the operation of NTRBs and identified under-funding as undermining the agreement-making process. In the 2004 Native Title Report, the Commissioner examined how native title can be utilised to improve the economic and social conditions of Indigenous people.

Reforms to native title

1.17 In September 2005, the Attorney General announced a package of proposed reforms to the native title system, the aim being to improve the performance of the native title system. The reforms focus on measures that encourage the resolution of native title issues through agreement making in preference to litigation.

1.18 The reform proposals include:

- measures to improve the effectiveness of NTRBs;
- amendments to the guidelines of the native title respondents' financial assistance program;

5 House of Representatives Standing Committee on Industry and Resources (Mr G Prosser MP, Chair), *Exploring: Australia's Future – Impediments to Increasing Investment in Minerals and Petroleum Exploration in Australia*, August 2003, pp.85-99.

6 PJC on Native Title, *Effectiveness of the National Native Title Tribunal*, December 2003, pp.27, 50-54.

- an examination of the current structures and processes of Prescribed Bodies Corporate;
- a review of the claims resolution processes to consider how the NNTT and the Federal court can work more effectively in managing and resolving native title claims;
- technical amendments to the Native Title Act to improve existing processes for native title litigation and negotiation; and
- increased consultation with state and territory governments to encourage more transparent practices in the resolution of native title issues.⁷

The above measures as they relate to representative bodies are discussed in the report.

7 Attorney-General, 'Native Title Reform', *Media Release*, 7 September 2005. See also Minister for Immigration and Multicultural and Indigenous Affairs, 'Delivering Better Outcomes in Native Title – Update on Government's Plan for Practical Reform', *Media Release*, 23 November 2005.

Chapter 2

Structure and Role of Representative Bodies

2.1 This chapter reviews the structure and role of representative bodies, including the governance structures of these bodies; their effectiveness in carrying out their statutory functions; and recent reforms announced by the Commonwealth affecting the functioning of these bodies.

2.2 There has been a significant shift in the expectations placed on representative bodies since the commencement of the *Native Title Act 1993* (NTA). Historically, the genesis of many recognised representative bodies was as community-based organisations – often local land councils or existing legal services. The original functions of the bodies, namely advocacy and community representation, have evolved towards an emphasis on roles requiring a high level of professional and administrative competence and a clear focus on native title objectives.

Background

2.3 Following the High Court's *Mabo* decision of 1992 that the common law recognised the native title of Indigenous peoples of Australia, the passage of the Native Title Act provided, *inter alia*, for establishing a new class of Indigenous organisation – 'representative Aboriginal and Torres Strait Islander bodies', to assist native title claimants to make applications for the determination of native title and for compensation; and assist in negotiations and proceedings concerning native title.¹

2.4 Native Title Representative Bodies (NTRBs) are representative Aboriginal and Torres Strait Islander bodies which are recognised under section 203AD of the NTA. The NTA sets out the requirements and process for the recognition of representative bodies as NTRBs. The Act provides that certain types of bodies are 'eligible bodies' that may apply for recognition as representative bodies by the Minister. Under section 203AD the Minister may recognise a body as a representative body for an area if he or she is satisfied that it will satisfactorily represent persons who hold or may hold native title in an area, and be able to consult effectively with Indigenous people in that area. The Minister must also be satisfied that the body would be able to satisfactorily perform the functions of a representative body. Where there is no NTRB for an area, the Office of Indigenous Policy Coordination (OIPC) may provide funding to a body to enable it to perform some or all of the functions of an NTRB.

1 Information in this section has been derived from *Submissions* 1, pp.2-4 (ATSIS); 1A, pp.9-14 (OIPC); and 16, pp.3-4 (Attorney General's Department).

2.5 The NTA was subject to extensive amendments in 1998, including provisions related to representative bodies. The amendments were designed to strengthen the representative body system by:

- setting mandatory functions, including a number of additional functions not contained in the original NTA;
- imposing nationally applicable standards of performance and accountability, based on models for other organisations funded by ATSIC;
- channelling assistance to claimants mainly through the representative body system, by way of ATSIC grants on application; and
- providing for only one representative body with responsibility for any particular area.

2.6 NTRBs are eligible for financial assistance from the Commonwealth. A variety of organisations have subsequently been recognised as representative bodies including:

- existing statutory land councils in the Northern Territory, NSW and South Australia;
- the Torres Strait Regional Authority (a statutory body replacing ATSIC in the Torres Strait);
- Aboriginal legal services in Victoria, Western Australia and South Australia; and
- a number of regional community-based organisations incorporated under the ACA Act which were originally established to advocate for land rights (for example, the Cape York and Kimberley Land Councils).

2.7 Currently, the following types of bodies operate as NTRBs or perform the functions of NTRBs:

- statutory bodies: these are NTRBs that are statutorily incorporated bodies with formal roles that are more extensive than the NTRB role and comprise the Northern Land Council, the Central Land Council and the Torres Strait Regional Authority (TSRA). The Northern Land Council and the Central Land Council are statutory authorities established under the *Aboriginal Land Rights (Northern Territory) Act 1976*. The TSRA is a statutory authority funded directly by the Commonwealth to enable it to perform its functions under the *Aboriginal and Torres Strait Islander Commission Act 1989*, including functions directly associated with the NTA. The TSRA was first appointed as an NTRB in 1995.
- non-statutory NTRBs: locally incorporated bodies whose principal role is as an NTRB but who may perform other functions – the majority of NTRBs.
- alternative service providers: bodies that are not formally recognised as NTRBs but are funded to perform the functions of an NTRB for a designated

area comprising NSW Native Title Services, Native Title Services Victoria and Queensland South Native Title Services.

2.8 The following NTRBs operate around Australia:

Torres Strait (Qld)	Torres Strait Regional Authority
Cooktown (Qld)	Cape York Land Council
Cairns (Qld)	North Queensland Land Council Aboriginal Corporation
Queensland North	Central Queensland Land Council Aboriginal Corporation
Queensland Central	Gurang Land Council Aboriginal Corporation
Queensland South	Queensland South Native Title Services Ltd
Queensland West	Carpentaria Land Council Aboriginal Corporation
New South Wales	No representative body: currently NSW Native Title Services Ltd
Victoria	No representative body: currently Native Title Services Victoria Ltd
Tasmania	No representative body
South Australia	Aboriginal Legal Rights Movement
Goldfields (WA)	Goldfields Land & Sea Council Aboriginal Corporation
South West (WA)	South West Aboriginal Land & Sea Council Aboriginal Corporation
Central Desert (WA)	Ngaanyatjarra Council Aboriginal Corporation
Pilbara (WA)	Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation*
Geraldton (WA)	Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation*
Kimberley (WA)	Kimberley Land Council Aboriginal Corporation
Northern area (NT)	Northern Land Council
Southern area (NT)	Central Land Council

*Yamatji Aboriginal Corporation represents two NTRB regions.

Function and role

2.9 NTRBs are created under Part 11 of the NTA, and have six primary functions:

- facilitation and assistance (s.203BB);
- certification (s.203BE);
- dispute resolution (s.203BF);
- notification (s.203BG);
- agreement making (s.203BH); and
- internal review (s.203BI).

As such, NTRBs are primarily service delivery agencies who are responsible for providing native title services.

2.10 The six roles set out in the Act are detailed below.

Facilitation and assistance functions

2.11 The facilitation and assistance functions of a representative body are to research and prepare native title applications, and to assist registered native title bodies corporate, native title holders and other holders of native title in consultations, mediations, negotiations and proceedings.

2.12 In performing its facilitation and assistance functions, a representative body must: consult with, and have regard to the interests of, native title holders or persons who are affected by the matter; and if the matter involves the representative body representing such bodies, be satisfied that they understand and consent to any general course of action that the representative body takes on their behalf in relation to the matter.

Certification functions

2.13 The certification functions of a representative body are to certify in writing, applications for determinations of native titles; and applications for registration of indigenous land use agreements (ILUAs).

Dispute resolution functions

2.14 The dispute resolution functions of a representative body are: to assist in promoting agreement between its constituents about the making of native title applications; to conduct proceedings about any matter relating to native title; and to mediate between its constituents.

Notification functions

2.15 The notification functions of a representative body are to ensure that notices that are given to the representative body and that relate to land or waters within the

area for which the body is a representative body are brought to the attention of any person who the representative body is aware holds or may hold native title in relation to land or waters; and to advise persons of the relevant time limits imposed under the Act.

Agreement making function

2.16 Under the agreement making function, a representative body is a party to ILUAs. ILUAs are voluntary, legally binding agreements covering the use and management of land or waters, made between one or more native title groups and others, such as miners, pastoralists or governments. In performing its agreement making function a representative body must, having regard to the matters proposed to be covered by the agreement, consult with, and have regard to the interests of, persons who hold or may hold native title in relation to land or waters in that area.

Internal review functions

2.17 The internal review functions of a representative body are to provide a process for registered native title bodies corporate, native title holders and persons who may hold native title, to seek review by the representative body of its decisions and actions, made or taken in the performance of its functions or the exercise of its powers, that affect them.

2.18 In addition, a representative body must as far as is practicable and necessary:

- identify persons who may hold native title in the area;
- take appropriate action to promote understanding, among Indigenous people living in the area, about matters relevant to the operation of the NTA;
- consult with Indigenous communities that might be affected by the matters with which the body is dealing; and
- co-operate with other representative bodies for the purpose of promoting the effective and efficient exercise of the functions and powers of representative bodies.

2.19 NTRBs provide some or all of the following services on behalf of their clients:

- the preparation and lodgement of claims;
- the preparation and lodgement of compensation cases;
- the preparation and lodgement of test cases;
- responding to non-claimant applications;
- responding to future act negotiations;
- native title education functions;
- heritage and site clearing tasks; and
- servicing of Prescribed Bodies Corporate.

2.20 Submissions from NTRBs noted that the primary function of representative bodies is the facilitation and assistance of native title determination applications.² For many Indigenous groups, their local NTRB is the principal source of advice and representation on native title matters. These groups may be native title holders or registered native title bodies corporate that represent native title holders.

2.21 An NTRB may represent people in mediation concerning claimant applications, and may be involved in future act negotiations (for example, in relation to the grant of mining interests) and the negotiation of ILUAs. Although NTRBs usually represent the applicant in native title determination proceedings, an NTRB may represent an Indigenous respondent party or an overlapping native title claim group or may be a party to native title proceedings in its own right.³

2.22 Submissions emphasised that the statutory functions of NTRBs are very broad, with NTRBs playing a crucial role in the processes established under the NTA. The services provided by NTRBs provide benefits not only to their Indigenous constituents but also a service to the public at large by establishing the means by which the various processes of the NTA are initiated.⁴ The ATSI Social Justice Commissioner, highlighting the importance of NTRBs in the native title system, noted that NTRBs represent or assist between 70-90 per cent of the native title claims before the Federal Court.⁵

2.23 Evidence to the inquiry emphasised the importance of NTRBs to the overall workability of the native title system. The Minerals Council of Australia noted that NTRBs 'are *the* fundamental component of the Native Title system'.⁶ The National Native Title Tribunal (NNTT) also noted that NTRBs are 'a fundamental component of the native title system and are vital in providing Indigenous people with a means to establish their substantive rights and to exercise their procedural rights under the Act'.⁷

Additional functions

2.24 A number of submissions argued that representative bodies should be given a broader role in promoting the economic and social development goals of native title holders, and in land management functions in particular.

2.25 The ATSI Social Justice Commissioner argued that there is a need to shift the focus of the native-title agreement-making process towards the economic and social development goals of the traditional owner group. The Commissioner noted that the

2 *Submissions* 8, p.5 (NSWNTS); 38, p.6 (Carpentaria Land Council).

3 *Submissions* 8, pp.4-8 (NSW Native Title Services); 4, pp.5-8 (QIWG); 23, pp.3-4 (NNTT).

4 *Submission* 4, p.6 (QIWG); 8, p.5 (NSWNTS);

5 *Submission* 15, p.3 (ATSI Social Justice Commissioner).

6 *Submission* 20, p.1 (Minerals Council of Australia).

7 *Submission* 23, p.3 (NNTT).

native title process is confined to addressing legal issues, either through litigation or through the negotiation of settlement agreements – 'consequently, much of the resources allocated to NTRBs is expended in this way. The capacity of NTRBs to negotiate more comprehensive agreements directed to the economic and social development goals of the group is severely limited'.⁸

2.26 In particular, the Social Justice Commissioner proposed that native title agreements should have a more deliberate focus on the group's goals for economic and social development; provide for the development of the group's capacity to set, implement and achieve their development goals; utilise the existing assets and capacities of the group; build relationships between stakeholders; and integrate activities at various levels to achieve the development goals of the group.⁹

2.27 Another submission argued that the NTA should be amended to confer land management functions on representative bodies.

...under the Native Title Act, representative bodies have virtually no role in relation to land-holding corporations, or prescribed bodies corporate nor in relation to land held as native title, once vested in the native title holders...Indeed, the Native Title Act is seriously deficient in the lack of attention it provides to land management functions generally.¹⁰

2.28 The Goldfields Land and Sea Council (GLSC) also supported an expanded role for NTRBs. The Council argued that representative bodies are the ideal agent for working, on behalf of Aboriginal people, with organisations such as the Indigenous Land Corporation and for negotiating with state governments on land acquisition and land management matters.¹¹

2.29 The Committee believes that the current functions of representative bodies are extensive and place considerable demands on NTRBs. The Committee notes that the first priority under the NTA is the facilitation and assistance of native title determination applications which is essentially servicing the legal process. While a few representative bodies may have the capacity to undertake further functions, the Committee considers that many representative bodies may not have the expertise to undertake additional responsibilities such as land management or other functions. Additional functions would also add significantly to the workloads of NTRBs. As discussed in later chapters, many representative bodies are experiencing difficulties in fulfilling their core functions and this issue needs to be addressed before the conferring of other functions on NTRBs.

8 *Submission 15*, p.14 (ATSI Social Justice Commissioner). See also ATSI Social Justice Commissioner, *Promoting Economic and Social Development through Native Title*, June 2004.

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

10 *Submission 11*, p.2 (Mr J Basten QC).

11 *Submission 12*, p.6 (GLSC). See also *Submissions 38*, pp.12-13 (Carpentaria Land Council); 40, pp.12-13 (AIATSIS).

Governance structures of representative bodies

2.30 Currently, the majority of representative bodies are incorporated under the *Aboriginal Councils and Associations Act 1976* (ACA Act). Whilst the details of the organisational structure of each representative body varies, the basis of the organisation is a governing committee, often termed a Board or Governing Council, elected by the membership – eligibility for membership usually entails being part of the Indigenous people of the area holding native title interests. This elected Board sets policy and establishes priorities. Each representative body also has an administrative arm, comprised of a CEO and professional and administrative staff. Professional staff includes lawyers, anthropologists and accountants.

2.31 The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 is intended to replace the *Aboriginal Councils and Associations Act* and to improve corporate governance in the Indigenous corporate sector. The Bill is aligned in many respects with the *Corporations Act 2001* to apply modern corporate governance standards and corporations law to Indigenous corporations. However it is also intended to operate as a special statute of incorporation for Indigenous peoples to take account of the special risks and requirements of the sector.

2.32 As noted above, alternative service providers, based on an alternative incorporation regime under the Corporations Act, operate in NSW, Victoria and Queensland. In NSW, the original representative body, the NSW Aboriginal Land Council, advised the Minister that it did not wish to continue as an NTRB, while the Victorian representative body, the Mirimbiak Nations Aboriginal Corporation, had its representative body status withdrawn in April 2003. In June 2005, recognition of the Queensland South Representative Body Aboriginal Corporation was withdrawn by the Minister, and the Corporation was also the subject of investigations in relation to financial mismanagement.¹²

2.33 The alternative service providers are companies limited by guarantee incorporated under the Corporations Act. They are not-for-profit organisations and the constitutions of both companies prohibit them from paying, transferring or distributing any income or property to any member of the company except as bona fide compensation for services. As a matter of practice, the OIPC requires the companies to meet the same obligations as representative bodies and they are funded by the OIPC to perform most the functions of a representative body. However, since they are not representative bodies for the purposes of the NTA, they cannot certify or enter agreements as representative bodies, nor do they have the right to receive Future Act notices under the NTA. Under reforms recently announced by the Minister for Immigration and Multicultural and Indigenous Affairs, eligibility for recognition as an

12 *Submission 1*, p.8 (ATSIS); ABC News Online, 'Indigenous corporation loses native title body status', 23 June 2005.

NTRB will be extended to organisations incorporated under the Corporations Act.¹³ This is discussed later in the chapter.

Effectiveness of representative bodies

2.34 The Committee received a variety of views regarding the relative effectiveness of NTRBs in performing their statutory functions. A number of reasons, including governance arrangements, funding levels and the relative size of NTRBs were advanced to account for the efficacy of representative bodies in performing these duties.

2.35 Representative bodies pointed to key achievements within their areas of operations, especially in relation to determinations of native title claims.¹⁴ The Carpentaria Land Council, reflecting the position of many NTRBs, commented that it 'is proud of its achievements to date and continues to strive to achieve real outcomes for its constituent traditional owner groups across its NTRB area'.¹⁵

2.36 Other evidence suggested, however, that NTRBs vary considerably in their overall effectiveness. The NNTT argued that it has observed 'apparent variations' in the capacity of NTRBs to perform their statutory functions in relation to matters involving the Tribunal, such as their involvement in the mediation of claimant applications and responses to proposed future acts.¹⁶

2.37 A representative of the WA government also commented on the effectiveness of NTRBs arguing that:

Do they all pursue their statutory tasks in an enthusiastic manner and in good faith? I believe they do. As governments across Australia would meet varying judgments as to how well they are doing their job, I guess the same would be said of rep bodies.¹⁷

2.38 While the OIPC conceded that some representative bodies are providing a professional level of service, 'other representative bodies fail to provide a consistently professional level of service delivery. In part, the problem stems from a changed operating environment where the current system of establishing and supporting representative bodies no longer suits all situations'. The OIPC stated that, overall, the

13 Under recent Ministerial changes the responsible Minister is now the Minister for Families, Community Services and Indigenous Affairs.

14 See, for example, *Submissions* 29, pp.10-18 (Yamatji Aboriginal Corporation); 38, pp.8-10 (Carpentaria Land Council).

15 *Submission* 38, p.8 (Carpentaria Land Council).

16 *Submission* 23, p.6 (NNTT).

17 *Committee Hansard* 19 July 2005, p.27 (WA Government).

NTRB regime 'is not delivering a sufficiently professional, reliable and effective service to Indigenous native title claimants and holders'.¹⁸

2.39 The OIPC added that in terms of administrative efficiency, NTRBs represent 'a sort of continuum from the highly problematic and really bad to the ones that are really good'. The OIPC drew attention to the need to appoint funding controllers to several NTRBs as an indicator of inefficiencies in the system.

It depends where you put the benchmark in that ... One objective measure is the fact that at the moment we have three or four of them with funding controllers in. That does not mean that the funding controller is there because of corruption; it can be there for a number of reasons. It does not even mean it is there because they have misused their money, but that is one indicator. The fact that a number of them failed to get re-recognition in 1998 and over the course of a number of years some of them have been involuntarily derecognised is another indicator. But I would be loath to say that seven out of 17 are good and 10 out of 17 are not. It is a complex world.¹⁹

2.40 Some evidence argued that governance arrangements impede effective service delivery. The OIPC stated that the current statutory scheme for NTRBs in the NTA, limiting eligibility to ACA Act organisations, 'may not provide the best basis for providing client focussed service delivery' and that consideration needs to be given to making the scheme more flexible and open to different options for service delivery.²⁰ The OIPC noted that in ACA Act bodies the membership controls the corporation through the annual general meeting.

In this sense corporate control is not at the board or governing committee level but through the membership. This inevitably makes governance in NTRBs difficult and unstable since, under the ACA Act, control by the membership forms an uneasy partnership with quasi-statutory responsibilities and directors' duties to the corporation.²¹

2.41 The OIPC pointed to the advantages of alternative arrangements noting the 'professional service delivery' provided by the alternative service providers in several States.²² The OIPC argued that these alternative providers have advantages over ACA Act representative bodies in terms of their ability to recruit expert directors and to minimise governance problems such as conflicts of interest and inadequate separation of powers.

18 *Submission 1A*, p.2 (OIPC).

19 *Committee Hansard 29 November 2005*, p.22 (OIPC).

20 *Submission 1A*, p.34 (OIPC).

21 *Submission 1A*, pp.18-19 (OIPC).

22 *Submission 1A*, pp.15-16 (OIPC).

2.42 One example of this is the NSW Native Title Services (NSWNTS) which has a small maximum membership of up to 25 members and, importantly, is not directly based on native title holders within the jurisdictional area of the organisation. This provision puts both the members, as well as those directors elected by and from the members, at arms length from their clientele. There are up to seven member directors elected by the members and up to three non-member directors appointed by the member-directors. The member-directors may only appoint a person a non-member director if they are satisfied that the person has professional or technical skills that would assist the board of directors to manage the company. This provision provides the possibility of inviting non-members with particular skills, experience or standing to join the board in a way not normally available for representative bodies incorporated under the ACA Act.²³

2.43 However, other representative bodies maintained that current governance arrangements do not impede effective delivery of service to clients. The Carpentaria Land Council noted that its governance arrangements provides for effective service delivery and, importantly, governance by representatives from the native title communities within its representative body area:

The CLCAC believes that this governance model provides for effective service delivery as it allows for decision making processes which reflect traditional law and custom within its area and thereby minimising the opportunity for conflict...It is also not the experience of the CLCAC that control by its membership, through its general meetings, makes governance difficult, or unstable, or that it forms an uneasy partnership with quasi-statutory responsibilities.²⁴

2.44 The Goldfields Land and Sea Council also pointed to achievements in the area of governance. The Council was a finalist in Reconciliation Australia's 2005 inaugural national Indigenous Governance Awards – awards that highlight Indigenous achievements in governance – and the only NTRB selected in the final selection group.²⁵

2.45 Other evidence suggested that statutory bodies rather than the non-statutory bodies have been more effective in fulfilling their role as NTRBs. The Indigenous Land Corporation (ILC) stated that NTRBs that are statutory bodies (namely the Northern Land Council, Central Land Council and the Torres Strait Regional Authority) with formal roles that are more extensive than the NTRB role 'have performed at the better end of the spectrum when it comes to performing NTRB functions'. The ILC noted that:

The statutory bodies are generally better resourced by virtue of performing non-NTRB functions and being appropriately resourced to do so. This

23 *Submission 1A*, p.16 (OIPC).

24 *Submission 38*, p.12 (Carpentaria Land Council).

25 *Committee Hansard* 19 July 2005, p.62 (GLSC).

necessarily has some carry over effect into their ability to competently perform in the native title arena. Their statutory backing and formal statutory roles and responsibilities have also given the statutory bodies a great degree of stability.²⁶

2.46 The ILC noted that non-statutory NTRBs (the majority of NTRBs fall into this category) have a varied track record in performing NTRB functions. The ILC considered that a number of these NTRBs 'have fallen into the trap of spreading themselves too thinly in the services they provide in trying to be more generic land councils'. The ILC submitted that while it is a legitimate aspiration for such community bodies, 'regrettably they have not been appropriately resourced to undertake such a wider brief' which has meant that the more specific NTRB functions for which they are specifically funded have suffered.²⁷ The ILC further argued that:

These NTRBs, in attempting to fulfil a wider agenda, have often not shown an ability to perform their NTRB functions in an appropriately strategic and targeted manner. These NTRBs have often had a range of staff but some with limited or inappropriate skills or capacity, and the same observation could be made of governing committees. These deficiencies could be overcome ... by capacity building programs and by recruiting quality and appropriate staff.²⁸

2.47 The ILC also noted, however, that there are other models, for example, the Aboriginal Legal Rights Movement in South Australia, which is a non-statutory NTRB representing the whole State, with which the Corporation has had 'a pretty good experience' in its dealings over some time.²⁹

2.48 Other submissions argued that inadequate funding is a key factor limiting the ability of representative bodies to fulfil their statutory responsibilities. Rio Tinto commented that 'the NTRB structure is valid and workable' with the most significant constraint on the effective operation of the native title system being the inadequate resourcing of NTRBs.³⁰ Representative bodies also frequently commented during the inquiry that chronic underfunding limited their capacity to achieve more effective outcomes. The issue of funding of representative bodies is discussed further in chapter 3.

2.49 Finally, some evidence suggested that the relative size of representative bodies also affect their operational effectiveness. Some submissions argued that there may be a case for reducing the number of representative bodies, resulting in fewer but larger bodies. At present some States and the Northern Territory are serviced by one,

26 *Submission 21*, p.2 (ILC). See also *Committee Hansard* 21 November 2005, pp.2-3 (ILC).

27 *Submission 21*, p.3 (ILC).

28 *Submission 21*, p.3 (ILC). See also *Committee Hansard* 21 November 2005, p.3 (ILC).

29 *Committee Hansard* 21 November 2005, p.5 (ILC).

30 *Submission 18*, pp.3,5 (Rio Tinto).

or a relatively few, large NTRBs. Elsewhere, such as Queensland, there are a number of smaller, regionally based representative bodies. The OIPC argued that larger representative bodies potentially benefit from economies of scale, may be more able to attract and keep quality staff, and consequently provide a superior service to clients.³¹ On the other hand larger bodies can become detached from, and unresponsive to, their constituency.

Conclusion

2.50 The Committee received a range of evidence on the effectiveness of representative bodies during the inquiry. While the Committee acknowledges that representative bodies perform their statutory functions under difficult circumstances and many do so commendably, evidence indicates that the performance of some representative bodies needs to improve.

2.51 Based on the evidence received during the inquiry, the relative effectiveness of representative bodies appears to be dependent on a number of factors. Some evidence suggests that the current governance arrangements which limit eligibility to act as representative bodies to ACA Act organisations may not provide the best basis for providing client-focussed service delivery in all circumstances. Alternative service providers appear to offer some advantages in terms of effective service delivery, especially in their ability to recruit experienced directors and to minimise governance problems such as conflicts of interest and inadequate separation of powers. In this regard, the Committee notes that the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 is intended to replace the ACA Act and aims to improve corporate governance in the Indigenous corporate sector.

2.52 Evidence also suggests that NTRBs that are statutory bodies have been relatively more successful in fulfilling their NTRB roles. These bodies are generally better resourced than the non-statutory NTRBs by virtue of performing non-NTRB functions and have a degree of administrative expertise sometimes lacking in non-statutory NTRBs. Inadequate funding of NTRBs was also cited as a contributing factor in limiting the ability of NTRBs to perform their functions effectively and this issue is discussed further in chapter 3. The relative geographical size of representative bodies may also have an impact on how effective these bodies function, although other factors appear to play a more significant role in operational effectiveness than considerations of size.

2.53 The Committee notes that evidence to the inquiry on the relative performance of NTRBs was largely anecdotal with little detailed analysis available to provide a comprehensive picture of the overall efficacy of NTRBs. The Committee believes that more rigorous comparative data should be developed by the OIPC so that detailed information is available to assess the relative effectiveness of representative bodies and that this information should be publicly available. The Committee notes that the

31 *Submission 1A*, p.19 (OIPC).

OIPC collects a comprehensive range of information as part of the accountability requirements imposed on representative bodies and that this data should be used to build up a comprehensive picture of the overall effectiveness of NTRBs in fulfilling their statutory requirements. The Committee also notes that a number of NTRBs failed to get re-recognition in 1998 and some have since been involuntarily derecognised. The reasons leading to these developments should also provide valuable information for the OIPC in any analysis of the factors responsible for the relative performance of representative bodies.

Recommendation 1

2.54 The Committee recommends that the OIPC develop comparative data, based on a range of key performance indicators, to assess the relative effectiveness of NTRBs in meeting their statutory obligations and that this data be published annually.

Reforms to representative bodies

2.55 On 23 November 2005, the Minister for Immigration and Multicultural and Indigenous Affairs announced a series of changes to the functioning of NTRBs, involving amendments to the Native Title Act. The changes include measures to:

- enhance the quality of service by broadening the range of organisations that can undertake activities on behalf of claimants;
- impose a time limit on the recognised status of NTRBs to ensure a focus on outcomes; and
- streamline the process for withdrawing recognition from poorly performing NTRBs and appointing a replacement.³²

2.56 These issues are discussed below. Changes to funding arrangements were also announced and these are discussed in chapter 3.

Alternative service providers

2.57 Under the proposed reforms eligibility for recognition as an NTRB will be extended to organisations incorporated under the Corporations Act – that is, ordinary companies, rather than the current requirement that the organisation be incorporated exclusively under the Aboriginal Councils and Associations Act. The OIPC stated that this measure will address the problem of service providers in NSW, Victoria and Queensland that at present cannot be recognised as representative bodies because they are not incorporated under the ACA Act. The OIPC also stated that the change will allow more bodies similar to the above to be recognised as NTRBs.³³

32 Minister for Immigration and Multicultural and Indigenous Affairs, 'Delivering Better Outcomes in Native Title – Update on Government's Plan for Practical Reform', *Media Release*, 23 November 2005.

33 *Committee Hansard* 29 November 2005, pp.3-4 (OIPC).

2.58 Existing NTRBs can maintain their current incorporation arrangements, although they are not precluded from incorporating under the Corporations law if they wish. Future NTRBs can be incorporated either under the Corporations Act or under the Aboriginal and Torres Strait Islander Corporations law.³⁴

2.59 The efficacy of current alternative service providers was raised during the inquiry. The OIPC stated that the emergence of these service providers provides the opportunity for a wider range of organisations to provide native title services.³⁵ The OIPC stated that:

Essentially, the option of allowing Corporations Act organisations to be eligible to be recognised as representative bodies would open up an alternative basis for NTRB incorporation, providing for increased flexibility in native title service arrangements.³⁶

2.60 As noted previously, the OIPC argued that these alternative service providers have advantages over ACA Act representative bodies in terms of their ability to recruit expert directors and to minimise governance problems such as conflicts of interest and inadequate separation of powers.³⁷

2.61 The OIPC stated that, while there are some limitations on alternative service providers performing the full range of representative body functions at present, in practice such limitations 'are not judged to be significant and have not been a major bar to professional service delivery by the alternative service providers'.³⁸

2.62 The ILC also stated that, notwithstanding the limitations to their functions, the experience of alternative service providers in Victoria and NSW suggests that 'they can still perform a very considerable range of NTRB functions to useful effect'. The ILC added that:

These NTRBs have quickly developed a culture of targeted service delivery and have avoided the trap of trying to take on a wider brief. It is probably too early to comment on the success of these bodies as yet. But they provide an interesting contrast to non-statutory NTRBs that have spread themselves too thinly.³⁹

34 The Corporations (Aboriginal and Torres Strait Islander) Bill 2005 is intended to strengthen the legislative framework for corporations in the Indigenous corporate sector. It is therefore aligned in many respects with the Corporations Act to apply modern corporate governance standards and corporations law to Indigenous corporations.

35 *Submission 1A*, p.34 (OIPC).

36 *Submission 1A*, p.19 (OIPC).

37 *Submission 1A*, p.16 (OIPC).

38 *Submission 1A*, pp.15-16 (OIPC).

39 *Submission 21*, p.3 (ILC).

2.63 Notwithstanding the perceived advantages of alternative service providers, many representative bodies raised concerns with the service provider model, especially in relation to the need for such organisations to be accountable to their Indigenous constituency. Representative bodies argued that they are uniquely placed to deliver culturally and socially appropriate native title outcomes, and to develop and maintain effective, long lasting stakeholder relationships which are crucial to native title processes.⁴⁰

2.64 The Carpentaria Land Council argued that if all NTRBs were forced to adopt 'non-representative models of governance' there is potential for real conflict between directors, members and the NTRB's clients. This is particularly so where the membership of the organisation can include persons that are not the traditional owners of the land and waters within the NTRB's area. The OIPC noted, however, that the alternative service providers are elected bodies, with the majority of directors also being elected.⁴¹

2.65 The Carpentaria Land Council argued that it has demonstrated a satisfactory 'division of responsibility' between its elected and administrative arms and that it was not the experience of the Council that control by its membership, through its general meetings, makes governance difficult, or unstable, nor that it forms an uneasy partnership with its quasi-statutory responsibilities. The Council contended that its structure 'provides a model of Indigenous participation in decision-making which also allows for the exercise of the right to effective participation and the right to self determination'.⁴²

2.66 The OIPC acknowledged that in providing for a system of alternative service providers 'there are issues of accountability and Indigenous participation in decision-making to be taken into account...Close consultation with the Indigenous community will be necessary for such arrangements to be widely accepted and workable'.⁴³

2.67 The NNTT makes the important observation that the efficient delivery of services, rather than particular governance arrangements, should be the key consideration in assessing the efficacy of NTRBs:

The Tribunal makes no submission with respect to the preferable structure or form of governance of bodies to deliver relevant services under the Native Title Act. Rather, we say that, whatever legal form is considered desirable for representative bodies, the important thing is that each body is able to deliver and does deliver the range of services to native title claimants.⁴⁴

40 See, for example, *Submission 38*, p.3 (Carpentaria Land Council).

41 *Committee Hansard 29 November 2005*, p.8 (OIPC).

42 *Submission 38*, p.12 (Carpentaria Land Council).

43 *Submission 1A*, p.19 (OIPC).

44 *Committee Hansard 21 November 2005*, p.58 (NNTT).

2.68 The GLSC also stated that 'whilst flexibility [in service provision] can be condoned, that does not mean to say that good models that have been established need to be trashed and set aside'.⁴⁵

Conclusion

2.69 The Committee believes that effective and client-focussed service provision is fundamental to the operation of NTRBs. The Committee notes that the proposed changes to the incorporation regime will address the limitations on current alternative service providers in performing the full range of representative body functions and welcomes these changes.

2.70 While the emergence of alternative providers may make the representative body system more flexible and open to different options for service delivery, the Committee considers that the Commonwealth needs to closely monitor and evaluate the effectiveness of services provided by these providers – both those currently operating and those that may emerge in the future.

2.71 The Committee believes that, while it is important to put in place appropriate governance arrangements for NTRBs, it is equally important that representative bodies, whatever their governance arrangements, effectively fulfil their statutory obligations and are accountable to their Indigenous constituency. The Committee notes that the proposed reforms still provide for a range of governance arrangements to operate.

Fixed terms of recognition

2.72 The reforms also provide for NTRB recognition to be for a fixed term from one to six years. Currently, NTRBs, once recognised by the government, are recognised indefinitely.

2.73 In July 2007 all existing NTRBs will be automatically re-recognised for fixed terms of up to six years. To avoid system-wide disruption, the terms will vary between NTRBs to allow future recognition processes to be staggered. Recognition periods will be determined on the basis of need and performance. If, for example, most outstanding native title claims in a particular area are expected to be resolved in three years, a three year recognition period would be a sensible recognition period for that area's NTRB. If an NTRB is not performing to an appropriate standard, a shorter recognition period would apply. Any new NTRB would probably be given a short term initially to allow an assessment of performance. A high performing NTRB in an area with an extensive claims load could expect a maximum recognition period.⁴⁶

2.74 At the conclusion of their recognition period, the Minister will have the option of re-recognising the NTRB for a further period, although not necessarily the same

45 *Committee Hansard* 19 July 2005, p.62 (GLSC).

46 *Committee Hansard* 29 November 2005, p.5 (OIPC).

period as the original one. If the Minister decides not to offer an NTRB another term, applications for recognition for that area may be invited from another NTRB or from other organisations.

2.75 The Committee questioned the procedural fairness of leaving the decision of whether to extend the recognition period solely to the discretion of the Minister. The OIPC explained the process in the following terms:

That decision of the minister's would, of course, be subject to the normal constraints and the advice that she would get would be subject to the usual constraints on the system. But it would ultimately be the minister's decision about whether recognition would be extended for a further six years or more than that period. We would expect that the NTRB would have the opportunity to make its submission both to ourselves as the adviser to the minister and ultimately to the minister herself.⁴⁷

2.76 The Committee believes that input in the form of an independent advisory panel should be established to advise the Minister on decisions to re-recognise representative bodies. The establishment of an advisory panel would provide transparency to the process of re-recognition.

Recommendation 2

2.77 The Committee recommends that the Commonwealth establish an independent advisory panel to advise the Minister on the re-recognition of NTRBs once their recognition period has expired.

2.78 The Committee also raised the issue of the implications for a region in situations where an NTRB is not re-recognised and the necessity to avoid a period of hiatus.

2.79 The OIPC noted that it was expected that the Minister 'either give the organisation notice at the end of the period it was not going to be recognised or give it short-term recognition for six or nine months or whatever until a new rep body could be positioned'.⁴⁸

2.80 The Committee considers that the later option is particularly unsatisfactory and believes that transitional arrangements need to be more carefully developed by the OIPC.

Recommendation 3

2.81 The Committee recommends that the Commonwealth provide further details of the proposed transitional arrangements that will apply when the recognition period for NTRBs expires in order to avoid uncertainty for claimants.

47 *Committee Hansard* 29 November 2005, p.5 (OIPC).

48 *Committee Hansard* 29 November 2005, p.6 (OIPC).

2.82 The Committee also raised the issue of claims that are overlapping the boundaries of two different representative bodies. The OIPC conceded that this problem is not addressed by the current reforms.

It is not proposed to change the principle at the moment whereby the boundaries are specified. Those overlapping boundary problems or overlapping claimant problems as between the border of one rep body and another will not be solved by these legislative changes.⁴⁹

Recommendation 4

2.83 The Committee recommends that the Commonwealth address the issue of native title claims that overlap the boundaries of different representative bodies to avoid uncertainty for claimants.

Withdrawal of recognition of NTRBs

2.84 The reforms also provide for a simplified process to allow the Minister to withdraw recognition of an NTRB that is not performing its statutory functions, or has serious financial irregularities.

2.85 The OIPC argued that the current de-recognition process is difficult to administer 'largely because of the requirement that not only does the rep body have to be failing to perform its functions but it has to have no capacity...to reform itself. That is a very difficult criterion to satisfy because it deals with what might happen in the future'. The OIPC explained that it is intended to change the provisions for withdrawal of the recognition:

...so as to remove that requirement, so that the minister is able to deal with the past history and present situation of the body without having to make a judgement about its future capacity, and also to introduce the notion of significant financial irregularity as a criterion for derecognition.⁵⁰

2.86 The current 90 day mandatory timeframe for the Minister to give notice to an NTRB that withdrawal of recognition is being considered will be reduced to 60 days. The OIPC noted that the 90 day notice period was 'considered unnecessarily lengthy, particularly if you are dealing with a malfunctioning organisation in which there are third parties affected'.⁵¹

2.87 The Committee considers that the proposed changes to the withdrawal of recognition of representative bodies are justified given the need for the Commonwealth to respond within an adequate timeframe to organisations that are failing to fulfil their statutory functions.

49 *Committee Hansard* 29 November 2005, p.6 (OIPC). See also *Committee Hansard* 12 May 2004, pp.20-21 (ATSIS).

50 *Committee Hansard* 29 November 2005, p.4 (OIPC).

51 *Committee Hansard* 29 November 2005, p.4 (OIPC).

Reduction in numbers of NTRBs

2.88 Another reform canvassed during the inquiry (although not part of the reform package announced by the Minister), was the possible reduction in the numbers of representative bodies.

2.89 The OIPC stated that there may be a case for reducing the number of representative bodies, resulting in fewer but larger bodies. The OIPC argued that larger representative bodies potentially benefit from economies of scale, may be more able to attract and keep quality staff, and consequently provide a superior service to clients.⁵²

2.90 The NNTT argued however that the effectiveness of NTRBs depends on a variety of factors in addition to the size of the representative body, including the history of the particular body.

On the one hand, you might say bodies representing smaller regions may be more responsive to the needs of local communities than state-wide bodies. On the other hand, the Aboriginal Legal Rights Movement, for example, in South Australia has striven valiantly, and I think with a good deal of success, to incorporate traditional decision-making processes at various levels in its work.⁵³

2.91 The Carpentaria Land Council also argued that larger representative bodies may not be able to meet the logistical challenges of NTRBs in servicing remote areas. This may lead to a deterioration of service delivery and failure to acknowledge, and respond to, the specific cultural and social realities of remote communities.⁵⁴

2.92 The Committee believes that the effectiveness of representative bodies depends on a range of factors, with the size of the NTRB being only one consideration, and does not consider that there should be a reduction in the number of representative bodies on the grounds of size alone.

Conclusion

2.93 The Committee generally welcomes the recent reforms announced by the (then) Minister for Immigration and Multicultural and Indigenous Affairs to improve the functioning of NTRBs, and considers that they address several of the concerns raised during the inquiry related the operation of NTRBs.

2.94 As noted above, the Committee believes that the proposed changes to the incorporation regime will address the limitations on current alternative service

52 *Submission 1A*, p.19 (OIPC).

53 *Committee Hansard* 21 November 2005, p.64 (NNTT).

54 *Submission 38*, p.13 (Carpentaria Land Council).

providers in performing the full range of representative body functions and provide for a broadening in the range of organisations that can be recognised as NTRBs.

2.95 The Committee notes that while alternative providers may make the representative body system more flexible, a range of different options for service delivery needs to be available. As discussed previously, many representative bodies incorporated under the ACA Act operate effectively and provide client-focussed service delivery.

2.96 The Committee welcomes the proposed changes that seek to impose a time limit on the recognised status of NTRBs. The Committee believes that this will ensure a focus on outcomes. The Committee considers, however, that there should be input in the form of an advisory panel to provide independent advice to the Minister on decisions to extend the recognition period of representative bodies. The Commonwealth should also provide further details on the proposed transitional arrangements when the recognition period for NTRBs expires.

2.97 The Committee also welcomes the proposal to streamline the process for withdrawing recognition from poorly performing NTRBs. It considers that the Commonwealth needs to have the mechanisms in place to be able to respond quickly in situations where representative bodies are failing to fulfil their statutory functions.

2.98 The Committee believes that the Commonwealth should consider taking further measures to address the issue of native title claims that overlap the boundaries of different representative bodies in order to avoid uncertainty for claimants. The Committee notes that this issue is not addressed in the proposed reforms.

Chapter 3

Availability of Resources

3.1 A recurring issue in this inquiry, as in previous inquiries, was the need to ensure that NTRBs are adequately resourced – both in terms of financial and human resources – to be able to fulfil their statutory functions.

3.2 This chapter discusses the resource needs of representative bodies both in terms of funding and staffing. The chapter reviews the current funding arrangements for representative bodies; assesses the nature and extent of underfunding of NTRBs; and considers future funding options. In relation to staffing of NTRBs, the chapter assesses the professional staffing needs of representative bodies; and considers options to address those needs, especially the need to attract and retain professional and senior administrative staff.

Funding arrangements

3.3 Within the Department of Families, Community Services and Indigenous Affairs, the Office of Indigenous Policy Coordination (OIPC) provides financial resources to representative bodies from the appropriation of funds provided by the Commonwealth for this purpose. Funding is presently provided annually, except in exceptional circumstances where an NTRB may be under a grant controller or operating under possible withdrawal of recognition.

3.4 The bulk of this funding is committed from the start of the year, and funds held back for contingencies and emergencies make up only a small part of the program, approximately four per cent of the operational allocation. The OIPC funding conditions include mechanisms to ensure that OIPC receives regular information on grant expenditure and is able to take remedial measures to assist a representative body to address performance difficulties.¹

3.5 Funding for NTRBs is allocated for three broad areas, namely: operational plans; performance enhancement, such as staff training; and strategic claims, for example, contested litigation. These do not operate as separate programs but function as a 'pot' of total funding. While there is no set allocation set aside for emergency funding, such as future act matters, litigation or court matters, NTRBs may apply for additional funding in the case of unforeseen circumstances and funding is negotiated between the OIPC and the representative body.²

1 *Submission 1A*, p.21 (OIPC).

2 Advice from OIPC, 20 December 2005.

3.6 Recently the Minister for Immigration and Multicultural and Indigenous Affairs announced the intention of the Government to introduce multi-year funding of representative bodies, which will depend on the term of recognition of the NTRB. For example, a representative body with a six-year term would receive two triennial funding terms. The OIPC noted that:

The intention is that NTRBs would be funded for their core corporate costs – basically, their staff costs; the cost of keeping their doors open for that triennial period. Then, from year to year, we would review their plans in relation to the work they are doing on particular claims. That would give NTRBs and their staff a measure of certainty and security about continued funding.³

3.7 Details of funding for NTRBs since 2001-02 is provided in the table below.

Table 3.1: Funding for NTRBs: 2001-02 to 2005-06

Year	Operational funding (a) \$m	Additional funding \$m	Total funding \$m
2001-02	48	2.9 (b)	50.9
2002-03	47.8	4.7 (b)	52.5
2003-04	47.8	6.1 (b)	53.9
2004-05	48.8	3.7 (b)	52.5
2005-06	52.6	3.8 (c)	56.4
	245	21.2	266.2

(a) Figures include ATSIC and ATSSIS supplementation in 2001-02 to 2004-05.

(b) Additional funding provided through the Capacity Building Program and the Strategic Priority Claims Resolution Program in 2001-02 to 2004-05.

(c) Additional funding for capacity building and major litigation.

Source: Submission 16, p.7 (Attorney General's Department); Attorney General's Department, *Tabled Document*, 29 November 2005.

3.8 As the table indicates, in 2004-05 NTRBs received \$52.5 million, including \$3.7 million in additional funding under the Capacity Building Program (CBP) and the Strategic Priority Claims Resolution Program. In 2005-06, a total of \$56.4 million is allocated for NTRB funding, including \$3.8 million in additional funding.

3 *Committee Hansard* 29 November 2005, p.6 (OIPC).

3.9 As indicated above, additional funding was provided to NTRBs from 2001-02 to 2004-05 under the Capacity Building and the Strategic Priority Claims Resolution Programs. The aim of the CBP was to implement a comprehensive capacity building program for representative bodies nationally.⁴ The CBP encompassed a number of areas of capacity building, including corporate and cultural governance; management and staff development; information technology; technical training; collaborative relationships and research; applied capacity building and building effective relationships between NTRBs and the OIPC. A total of \$11.4 million was provided to NTRBs under the program over its four years of operation.

3.10 Funding under the Strategic Priority Claims Resolution Program has been used to resource nationally important native title applications that were likely to be of significant value in establishing legal precedents.⁵ A total of \$6 million was provided under the four year program. The 2004-05 allocation was the final year of the four year additional funding for these two programs.

3.11 In 2005-06, the Commonwealth committed additional funding of \$15.6 million over the next four years for NTRBs to enhance NTRB performance through capacity-building activities and also funding for major litigation.⁶

NTRB funding in context

3.12 It is also important to view the funding of the representative bodies in the context of the wider native title system. Details of overall Commonwealth funding for the native title system are provided in table 3.2.

4 *Submission 1A*, p.25 (OIPC).

5 *Submission 1A*, p.26 (OIPC).

6 This funding is part of additional funding of \$72.9 million over the next four years allocated to the native title system, including additional funding for the Federal Court and the NNTT.

Table 3.2: Total funding of the native title system – 2001-02 to 2005-06 (the 2005-06 figures are estimates only)

	2001-02		2002-03		2003-04		2004-05		2005-06		Total	
	\$m	%	\$m	%	\$m	%	\$m	%	\$m	%	\$m	%
AGs Policy advice	4.9	4.9	5.7	5.4	5.9	5.3	5.4	4.9	6.6	5.9	28.5	5.3
AGs Respondent funding	6.0	6.0	8.05	7.6	9.89	8.8	6.99	6.3	7.7	6.9	38.63	7.1
NTRBs**	50.9	50.8	52.5	49.3	53.9	48	52.5	47.8	56.4	50.2	266.2	49.2
Federal Court	9.9	9.9	10.6	9.9	10.55	9.4	11.4*	10.3	9.7	8.6	52.15	9.6
NNTT	28.4	28.4	29.6	27.8	32.0	28.5	33.8*	30.7	31.9	28.4	155.7	28.8
Total	100.1		106.45		112.24		110.09		112.3		541.18	

* 2004-05 figures for NNTT and Federal Court are estimates only.

** Figures include ATSIC and ATGIS supplementation in 2001-02 to 2004-05.

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

3.13 The table indicates that Commonwealth funding for the native title system was \$110 million in 2004-05 and is projected to be \$112 million in 2005-06. Representative bodies also receive the majority of the funding – averaging 49 per cent of total funding in the period 2001-02 to 2005-06.

3.14 Rio Tinto estimated that total Commonwealth, State and Territory expenditure on native title transactions between 1993 and 2004 was over \$926 million. However, the real cost to governments of the native title system is estimated at two to four times this amount, due to gaps in government expenditure data.⁷

Adequacy of NTRB funding

3.15 The adequacy of funding of representative bodies was commented on extensively during this inquiry, as in previous inquiries. Representative bodies emphasised that a lack of funding is a major factor limiting their ability to fulfil their statutory responsibilities. The Yamatji Aboriginal Corporation, reflecting much of the evidence, commented that:

Inadequate Commonwealth funding interferes with the ability of native title representative bodies to fulfil their statutory role...Insufficient funding also hinders NTRBs in the execution of their broader responsibilities of consultation, negotiation, and representation of native title interests (including non-claimant and future applications). NTRBs are the only bodies whose primary function is the protection of native title interests, and the work of NTRBs in protecting clients' and constituents' native title rights and interests is compromised by lack of funding. If NTRBs are restricted in

⁷ *Submission 18*, p.5 (Rio Tinto).

operation due to insufficient funding, the protection and recognition of native title interests is jeopardised.⁸

3.16 Other representative bodies also emphasised the importance of adequate funding for the effective operation of the native title system:

Adequate funding for NTRBs is essential to ensure that Indigenous people are able to fully enjoy their social, cultural, legal and political rights, and to ensure that the native title system operates effectively and efficiently for the benefit of all stakeholders. Inadequate funding directly influences the rate and success of native title agreements and mediation.⁹

3.17 Other key stakeholders including State Governments, industry groups, farmers' organisations, local government organisations and others commented on the underfunding of representative bodies and the effect this has on the functioning of the system.¹⁰ The Western Australian Government stated that:

... a lack of adequate funding for NTRBs is a fundamental factor affecting the capacity of NTRBs to fulfil their statutory responsibilities within WA. The continued under-resourcing of NTRBs negatively impacts all stakeholders in the native title process through delays and consequential costs to the process.¹¹

3.18 The Indigenous Land Corporation also argued that:

Anecdotally, we believe that [underfunding] is the case in a number of areas, particularly when there are many cases and caseloads regarding not only claims but also mining work and applications et cetera.¹²

3.19 Reports into the operation of representative bodies have also drawn attention to the importance of adequate funding of these bodies. The Parker report emphasised the need for NTRBs to be adequately resourced arguing that there are strong economic, efficiency, equity and social justice grounds for funding NTRBs to operate effectively.¹³ The Love-Rashid report recommended that NTRBs should be funded so that they have the capacity to fulfil their core functions, prioritise between competing service demands of their constituents and maintain appropriate standards of corporate governance.¹⁴

8 *Submission 29*, p.19 (Yamatji Aboriginal Corporation). See also *Submission 4*, p.16 (QIWG).

9 *Submission 38*, p.13 (Carpentaria Land Council).

10 See, for example, *Submissions 27*, p.2 (NSW Farmers' Association); *20*, p.1 (Minerals Council of Australia); *2*, p.1 (WA Local Government Association).

11 *Submission 22*, p.2 (WA Office of Native Title).

12 *Committee Hansard* 21 November 2005, p.3 (ILC).

13 G Parker *et al.*, *Review of Native Title Representative Bodies*, ATSIC, Canberra, 1995, pp.73-74.

14 Senatore Brennan Rashid, *Review of Native Title Representative Bodies*, ATSIC, March 1999, p.1.

3.20 Evidence to the inquiry indicated that NTRBs are central to the native title process and as such inadequate resourcing of these bodies can have a significant impact on the extent of progress being made in native title processes. Most importantly, insufficient resources prevent NTRBs being active players in the native title process, thereby creating backlogs and causing significant delays.

3.21 Submissions and other evidence noted that underfunding affects the capacity of NTRBs in a number of ways including:

- limiting their capacity to meet all demands placed on them in a timely manner;
- limiting their capacity to conduct both litigation and agreement-making simultaneously with the consequence that they must choose between these otherwise interrelated processes;
- limiting their capacity to undertake the process of resolving and reducing overlapping applications;
- hindering a proactive approach to native title claims;
- creating considerable pressures through onerous workloads;
- limiting the capacity to attract and retain capable and experienced staff and provide relevant training for staff; and
- limiting their capacity to act as effective project managers.¹⁵

3.22 The inquiry received many examples of the difficulties encountered by representative bodies due to underfunding. The Goldfields Land and Sea Council (GLSC) stated that its operational budget for 2003-04 was \$2.7 million. The Council applied for \$3.8 million. The Council stated that it has little more than two thirds of what it needs to conduct basic operations, a short fall of 28 per cent – 'these shortfalls increase as the system fails to recognise both the needs created by increasing workloads and increasing accountability requirements, and the basic causes of increased costs, such as inflation and general wage indexation'.¹⁶

3.23 NSW Native Title Services also noted the difficulties caused by underfunding:

Given the limited resources available to NSWNTS, at any time only a few claims can be funded for litigation and/or negotiation. Many meritorious native title claims are not prioritised because of lack of funds. Of the 55 native title claims current in NSW, only 12 (that is to say, 20%), are funded by NSWNTS at the present time.¹⁷

15 *Submissions* 15, pp.7-9 (ATSI Social Justice Commissioner); 29, pp.20-25 (Yamatji Aboriginal Corporation); pp.7-8 (Rio Tinto); 40, pp.13-15 (AIATSIS).

16 *Submission* 12, p.7 (GLSC). See also *Committee Hansard* 21 July 2004, pp.14-15 (KLC).

17 *Submission* 8, p.6 (NSWNTS).

3.24 Underfunding is also likely to be a potent source of political tensions among claimants, as NTRBs are forced to make potentially arbitrary decisions over which of many competing claims they progress.

3.25 Under-resourcing of representative bodies also affects industry, developers and others involved in the native title process. The Minerals Council of Australia stated that:

The experience of the minerals sector to date is that NTRBs are chronically under resourced, and in order to meet the requirements of the NT Act, minerals companies are obliged to meet the resourcing gap. Despite the best endeavours of individuals working within NTRBs, the lack of resourcing means that they are incapable of effectively carrying out their broad responsibilities.¹⁸

3.26 Rio Tinto also submitted that the funding constraints on NTRBs 'ultimately inhibit the effective operation of the native title system'.¹⁹

3.27 The Minerals Council stated the costs to minerals companies in meeting the funding gap to ensure that NTRBs can effectively perform their responsibilities can be significant. For example, the cost to one company in negotiating one agreement as part of the right-to-negotiate procedures under the NT Act over an 18 month period was \$2 million – the vast majority of which was provided to the NTRB so they could participate in the negotiations.²⁰

3.28 Underfunding of NTRBs also poses problems for State Governments. The Western Australian Government reported that it has experienced potential and actual delays when trying to progress native title due to the under-resourcing of NTRBs. An example was cited of an NTRB that had to withdraw its representation of a number of native title applications due to inadequate funding.²¹ Situations such as these lead to uncertainty and frustration for all native title stakeholders.

3.29 In response to concerns regarding underfunding of representative bodies, the OIPC pointed to governance issues that need to be addressed by NTRBs before funding increases are contemplated:

...we are still noticing substantial degrees of misuse of resources and mismanagement of resources. We would find it difficult to justify putting more money into a number of these organisations until we have a statutory framework that allows us to deal with underperformance, mismanagement

18 *Submission 20*, p.1 (Minerals Council of Australia).

19 *Submission 18*, p.8 (Rio Tinto).

20 *Submission 20*, p.2 (Minerals Council of Australia). See also *Submissions 8*, pp.18-19 (NSW Native Title Services); 29, pp.25-26 (Yamatji Aboriginal Corporation).

21 *Submission 22*, p.3 (WA Office of Native Title).

and corruption in a more timely and effective way than has been possible in the past.²²

3.30 In addition, the OIPC argued that demands for extra funding often come from parties, such as State Governments and mining companies, with a vested interest in the issue of funding allocations. The OIPC also noted that there are always more demands on government resources than there are available resources.²³

3.31 The Committee notes the concerns expressed by representative bodies and other stakeholders that suggest that NTRBs are under-resourced. The Committee believes that some targeted increase in funding is needed to enable representative bodies to fulfil their functions, and this is discussed later in the chapter.

Future funding options

3.32 A number of options for rectifying the funding problems of representative bodies were canvassed during the inquiry. These included increases in operational funding, targeted funding in specific areas, funding for future act processes, emergency funding, multi-year funding and the redistribution of funding between the various components of the native title system and between NTRBs.

Operational funding

3.33 As noted above, many representative bodies and other stakeholders argued for an overall increase in operational funding for NTRBs. The Committee asked several witnesses what level of funding was required, however, generally witnesses did not specify a specific amount of additional funding that they felt was required for NTRBs to operate effectively. For instance, the Association of Mining and Exploration Companies (AMEC) argued that:

... we are saying that there should be some expansion in funding because what we are seeing appears to be an under-funded process. I realise that governments do not have open chequebooks and someone is always going to have to make a decision as to what is the appropriate level of funding.²⁴

3.34 Similarly, the WA Office of Native Title stated that while it did not have 'a figure' as to what constituted adequate resourcing – '...what we confront is the desire to progress matters and we find that the rep bodies do not have the resources to be able to achieve that'. The Office suggested that some growth levels should be incorporated into the funding formula.²⁵

22 *Committee Hansard* 29 November 2005, p.18 (OIPC).

23 *Committee Hansard* 29 November 2005, p.17 (OIPC).

24 *Committee Hansard* 19 July 2005, p.8 (AMEC).

25 *Committee Hansard* 19 July 2005, pp.26,30 (WA Office of Native Title).

3.35 The NNTT did, however, offer some views on the question of adequacy of resourcing. The Tribunal stated that 'relevant resources' for NTRBs can be categorised as sufficient finance to enable, for example, negotiation and authorisation meetings to occur, advice to be obtained, and the text of any agreement to be prepared; adequate expert advice and other assistance to each party and institution; and adequate time to negotiate an agreement.²⁶

3.36 The two reviews referred to above were, however, more prepared to put a dollar figure on suggested increases in funding. The Parker report recommended that representative bodies should be adequately resourced to effectively represent native title claims. The report developed a number of models for the calculation of resources required to provide core operational support for NTRBs.²⁷ The Love-Rashid report in 1999 recommended that the funding levels for NTRBs should be increased to \$80.7 million in 1999-00, \$81 million in 2000-01 and \$85 million in 2001-02 to enable representative bodies to discharge their statutory functions. The report noted that the funding allocation for NTRBs in 1997-98 was \$47 million, however the funding required for that financial year was estimated to be \$67.6 million.²⁸ By way of comparison the budget for NTRBs Australia-wide has been in excess of \$50 million over the last three years.

Targeted funding

3.37 An alternative to general increases in operational funding is to increase the amounts provided in targeted funding for specific purposes. Targeted funding has the potential to encourage more effective use of those resources, especially through the development of improved management and administrative arrangements. As noted above, targeted funding has been provided to NTRBs through the Capacity Building and Strategic Priority Claims Resolution programs. Total funding of \$17.4 million was provided over a four-year period from 2001-02 to 2004-05 for these programs.

3.38 The OIPC pointed to the achievements of the Capacity Building Program in providing improved outcomes in terms of professional delivery of high standards and cost effective native title services. The ATSI Social Justice Commissioner noted that the program provides 'for the improvement of NTRB capacity to meet statutory requirements' but does not contemplate the role of NTRBs in support of the broader economic and social development goals of claimant groups.²⁹ The GLSC commented on the benefits of the Council's involvement with this program.³⁰

26 *Submission 23* p.5 (NNTT).

27 Parker report, pp.73-76.

28 Love-Rashid report, pp.72-75.

29 *Submission 15*, pp.15-16 (ATSI Social Justice Commissioner).

30 *Committee Hansard* 19 July 2005, p.68 (GLSC).

3.39 Similarly, the OIPC stated that the targeted funding provided to the Strategic Priority Claims Program has been successful in contributing to bringing order and certainty to native title outcomes.³¹

3.40 While funding for both programs ceased in 2004-05, funding for similar activities has continued, although not as separate programs. Funding for capacity building activities has continued under the performance enhancement component of NTRB funding and priority claims are funded under the strategic claims component of the funding allocation for NTRBs. Approximately \$3.3 million will be expended in NTRBs' capacity-building initiatives in 2005-06.³²

3.41 The Committee believes that the Commonwealth should review the adequacy of the level of targeted funding for capacity building activities.

Funding for future act processes

3.42 Submissions and other evidence argued that NTRBs do not have sufficient resources to meet their statutory responsibilities in future act management.³³ Accordingly, one option for addressing funding problems is to provide specific funding for dealing with future act processes.

3.43 The involvement of NTRBs in future act activity is one particular area of the native title process that requires flexibility to meet the demands of difficult-to-predict workloads. The experience of the Kimberley Land Council provides an illustration of these difficulties:

Recently the KLC submitted a draft operational plan that included entries corresponding to each of our native title claims, stating that we would respond to future acts as necessary and appropriate between July 2004 and June 2005. We felt unable to be any more precise, given that we are obviously unable to indicate in advance what or how many future acts will arise...We were duly informed that this aspect of our draft plan was not specific enough to satisfy our funders and that we had to effectively crystal ball gaze. Such a situation obviously significantly reduces our capacity to respond with any degree of flexibility, or effectively, to future acts.³⁴

3.44 NTRBs are usually unable to predict their involvement in future act activities as these processes are only sporadic and are also wholly dependent on the activities of proponents. It is therefore difficult for NTRBs to estimate their future funding requirements. The result is that NTRBs often remain under-resourced to take part in

31 *Submission 1A*, p. 29 (OIPC).

32 Advice from OIPC, 20 December 2005; *Committee Hansard* 29 November 2005, p.20 (OIPC).

33 *Submission 22*, p.4 (WA Office of Native Title); *Committee Hansard* 21 July 2004, pp.3,7, 10-11 (KLC). 'Future acts' refer to proposed activities or developments that may affect native title.

34 *Committee Hansard* 21 July 2004, p.4 (KLC). See also *Committee Hansard* 19 July 2005, p.74 (GLSC).

future act activities, necessitating the commitment of external funding – generally from proponents – to make any progress. Alternatively, funding for future act activities is drawn from other NTRB funding targeted at meeting other equally important statutory responsibilities.

3.45 The Association of Mining and Exploration Companies (AMEC) argued that NTRB funding should be split so that a specific amount is allocated to future act processes, and which can only be used for that purpose. The allocation should be made on the basis of the particular workload of the NTRB. The AMEC noted that at present NTRBs are not required to allocate a proportion of their funding to conduct future act negotiations for their claimant groups. The result is that NTRBs use the majority of their allocations to progress native title claims. As discussed above, this means that proponents are being expected to provide funds required by NTRBs to conduct future act negotiations as well as funding their own involvement in the future act processes.³⁵

3.46 The key problem associated with future acts is that this activity will vary from year to year. The Committee suggested that a pool of funds provided by the Commonwealth and possibly industry groups (with a fee levied on these organisations) that could be accessed by NTRBs when a future act application is inaugurated may be an option. The AMEC stated it would be 'happy to genuinely examine and participate in and see if it could be workable'.³⁶

3.47 The WA Office of Native Title commented on the 'pooling' option, arguing that the efficacy of the proposal would depend on the mechanism by which representative bodies accessed the funding, noting that future acts are difficult to plan for with any certainty.

Different future acts have different priorities for the proponents. If it were a pool of funds where the mechanisms to access were commensurate with the time frames necessary to be able to progress it, then that would be a worthwhile mechanism to enable those unknowns to be funded along the way to ensure that the rep bodies have got the money.³⁷

3.48 The Committee does not favour the AMEC proposal that NTRB funding be split allocating a specific amount to future act activities given the variation in future act activity from year to year, but believes that there should be additional funding for future act processes as well as other emergency or unforeseen situations.

Emergency funding

3.49 As noted above, the Committee considers that additional funding should be available for emergency or unforeseen situations. Submissions noted that unforeseen

35 *Submission 6*, p.2 (AMEC); *Committee Hansard* 19 July 2005, pp. 2,8-9 (AMEC).

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

37 *Committee Hansard* 19 July 2005, pp.25-26 (WA Office of Native Title).

situations, such as future act matters, litigation or court matters occur not infrequently and need to be responded to in a timely way.

3.50 As noted previously, the OIPC does not have a set funding allocation for emergency funding. NTRBs may apply for additional funding in the case of unforeseen circumstances and funding is negotiated between the OIPC and the representative body. The Committee believes that the Commonwealth, in conjunction with industry groups, should provide an additional 'pool' of funding for emergency situations such as these.

3.51 Evidence indicated that the process by which NTRBs are able to apply for emergency funding from the Commonwealth requires review and streamlining. The Committee understands that the OIPC has no guidelines in dealing with these situations and that matters are dealt with in an 'ad hoc' way at present.

3.52 The WA Office of Native Title stated that currently the process for applying for funds is a long drawn out process. The Office argued that the OIPC needs to be able to respond to these situations in a more timely fashion. The Office indicated that the Western Australian Government has experienced delays when trying to progress native title due to the under-resourcing of NTRBs. The Commonwealth Government's delayed response to one NTRB's application for additional funding of senior counsel, during a trial, left the Federal Court in the position of almost having to adjourn the trial indefinitely.³⁸

3.53 The Committee believes that the OIPC should put in place administrative procedures, including published guidelines, to respond to these matters in a timely way.

Multi-year funding

3.54 Representative bodies have argued that multi-year funding – at least triennial – should be introduced. The Committee notes the recent announcement by the Minister of the Government's intention to introduce multi-year funding of representative bodies and welcomes this initiative.

3.55 NTRBs argued that multi-year funding would assist in the development of their strategic planning and assist in attracting and retaining staff as they would be able to offer of longer term contracts – which is not possible under the current one-year funding arrangements. Longer term funding also reduces the amount of resources that the organisations need to devote to administrative matters associated with annual funding applications.³⁹

38 *Submission 22*, p.3 (WA Office of Native Title); Advice from WA Office of Native Title, 10 January 2006.

39 *Committee Hansard* 21 November 2005, pp.26-17 (Carpentaria Land Council); p.44 (Gurang Land Council). See also *Committee Hansard* 21 November 2005, p.62 (NNTT).

3.56 The Torres Strait Regional Authority already operates on a three-year funding cycle and budgets and sets priorities accordingly. The Authority commented that this funding arrangement means that it has 'a secure grant of funds which is predictable for the life of the strategic plan, and makes planning easier and more efficient'.⁴⁰

Redistribution of funding between native title organisations

3.57 Submissions commented on the perceived inequity in funding between representative bodies and other components of the native title system and argued that there should be a redistribution of funding within the system.

3.58 The ATSI Social Justice Commissioner noted that increases in the native budget across various components of the system in the 2001-2005 period showed that the increase in funding received by the Federal Court and the NNTT 'meant that these organisations were in a much better position to meet their goals and objectives compared with NTRBs'. This means that the goals and objectives of these institutions tend to dominate the native title system and consequently the way in which NTRBs utilise their scarce resources.⁴¹ The Goldfields Land and Sea Council (GLSC) argued that in terms of statutory responsibilities, NTRBs 'are by far the most poorly funded part of the system'.⁴²

3.59 Rio Tinto also noted the imbalance of funding between the NNTT and representative bodies arguing that NTRBs have a more demanding role in the operation of the Native Title Act than other statutory bodies and therefore viewed the current funding allocations 'as, at best, problematic'.⁴³

3.60 The Committee notes, however that representative bodies receive considerable Commonwealth expenditures and that they continue to receive the largest overall proportion of funding in the native title system. The Committee also notes that the proportion of funding received by the NNTT and the Federal Court has not changed substantially in recent years and that both organisations continue to provide various types of assistance to the representative bodies. The Committee acknowledges that there will be continuing debate over the total allocation of funding between the different components of the native title system.

Redistribution of funding between NTRBs

3.61 Submissions also drew attention to the disparity of funding between States based on the number of representative bodies in the particular State or Territory.

40 *Submission 7*, p.5 (TSRA).

41 *Submission 15*, pp.9-10 (ATSI Social Justice Commissioner).

42 *Submission 12*, p.8 (GLSC). See also *Submission 13*, p.5 (ALRM).

43 *Submission 18*, p.7 (Rio Tinto).

3.62 NSW Native Title Services noted that it performs the functions of the representative body for the whole of NSW and the ACT yet it receives, based on the current funding formula, only one-fifth to one-sixth of the total funding available for the management of native title matters compared with, for example, the seven Queensland representative bodies.⁴⁴

3.63 The Committee acknowledges that allocation of funding between bodies is a complex issue but believes that apparent inequities suggest that the issue of the funding allocation between States should be reviewed.

Other funding options

3.64 The OIPC suggested that further options could be explored in order to widen the base of funding from an applications-driven grants model to a more flexible funding model. These options include:

- NTRBs receiving loans to fund negotiations, with such loans to be repaid from incomes generated by agreements, for example, income streams from mining agreements on Indigenous land; and
- amending the Native Title Act to allow for representative bodies to charge for certain services provided to non-native title parties, that is, a limited application of the 'user-pays' principle.⁴⁵

3.65 The Committee did not receive sufficient evidence during the inquiry on these suggestions but believes that the options could be further considered.

Funding conditions

3.66 Some submissions and other evidence argued that the terms and conditions of the current funding agreements are overly restrictive and limit the operational flexibility of representative bodies.⁴⁶ The Kimberley Land Council argued that the ability of representative bodies to function effectively 'is increasingly stymied by ever more controlling grant conditions placed upon them. NTRBs are fettered through grant conditions in what work they can do, how and when they can do the work and who they can employ to do the work'.⁴⁷

3.67 The ATSI Social Justice Commissioner noted that the grant conditions stipulate that the purpose of funding is to enable NTRBs to perform functions and

44 *Submission 8*, pp.3,17-18 (NSWNTS). Details of the funding formula were not provided in evidence to the inquiry.

45 *Submission 1A*, p.29 (OIPC).

46 See OIPC, *General Terms and Conditions for Funding Agreements Relating to Native Title*, May 2005.

47 *Committee Hansard* 21 July 2004, p.3 (KLC). See also *Committee Hansard* 19 July 2005, p.72 (GLSC).

exercise powers in accordance with the NTA and the NTRBs' strategic plans. The funding agreement prevent NTRBs from using funds to cover costs associated with economic development or land management activities from native title agreements. The Commissioner argued that limiting funding to native title outcomes 'restricts the capacity of NTRBs to utilise mechanisms outside of the NTA for this purpose'.⁴⁸

3.68 The Commissioner also argued that the funding is subject to a high level of discretion by the OIPC in relation to withdrawal of funding or termination of agreements. The Commissioner questioned whether it is appropriate for NTRB funding to exist entirely at the discretion of the OIPC, given that NTRBs have Commonwealth Ministerial recognition, duties under the NTA, and operate under Ministerially-approved strategic plans.⁴⁹

3.69 The Committee believes that NTRBs should be subject to funding conditions that ensure accountability for the considerable public outlays that they receive. The Committee considers that it is not unreasonable that funding for NTRBs is limited to native title outcomes in line with their statutory functions. As discussed in chapter 2, an extension of funding to economic development or land management activities as suggested by the Social Justice Commissioner would considerably extend the functions of representative bodies.

Conclusion

3.70 The Committee notes the concerns expressed by NTRBs and other stakeholders arguing that underfunding of representative bodies is seriously limiting their ability to fulfil their statutory functions. The Committee believes that representative bodies need to be adequately funded to undertake their important responsibilities. The Committee notes that the Commonwealth provides in excess of \$50 million each year to NTRBs to provide services to native title claimants. Any under-resourcing of NTRBs will, however, negatively impact not only on representative bodies but also on other stakeholders in the native title process through delays and consequential costs to the process.

3.71 While it is difficult to establish what level of funding would constitute an 'adequate' amount for representative bodies, the Committee believes that some funding increases are necessary. In particular, the Committee supports the targeted application of additional resources for capacity building activities. The Committee notes the success of the former Capacity Building Program in providing improved outcomes in terms of professional and cost-effective delivery of services. The Committee is pleased to note that approximately \$3.3 million will be spent on capacity building initiatives this financial year but believes that the adequacy of this funding should be reviewed.

48 *Submission 15*, p.12 (ATSI Social Justice Commissioner).

49 *Submission 15*, p.13 (ATSI Social Justice Commissioner).

3.72 The Committee also considers that the Commonwealth, in conjunction with industry groups, should consider providing an additional 'pool' of funding for emergency situations, such as future act matters, litigation or court matters. The Committee further believes that the OIPC should put in place administrative procedures, including published guidelines, to respond to these matters in a timely way. The Committee also believes that the Commonwealth should ensure that funding provided to the Office of the Registrar of Aboriginal Corporations will provide NTRBs with adequate training and support that will be required as a result of the introduction of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005.

3.73 In addition, the Committee is of the view that the Commonwealth should review the level of operational funding provided to NTRBs to ensure that representative bodies are adequately resourced and able to fulfil their statutory obligations.

Recommendation 5

3.74 The Committee recommends that the Commonwealth immediately review the adequacy of the level of funding provided by the OIPC to NTRBs for capacity building activities including management and staff development, and information technology.

Recommendation 6

3.75 The Committee recommends that the Commonwealth, in conjunction with industry groups, consider providing additional pooled funding for emergency and unforeseen situations, such as future act matters, litigation or court proceedings; and that the OIPC develop guidelines and procedures that will enable funding to be available in these situations in a timely fashion.

Recommendation 7

3.76 The Committee recommends that the Commonwealth ensures that the level of funding available to the Office of the Registrar of Aboriginal Corporations provides NTRBs with adequate training and support to meet the requirements of the introduction of the new corporate governance regime under the Corporations (Aboriginal and Torres Strait Islander) Bill 2005.

Recommendation 8

3.77 The Committee recommends that the Commonwealth immediately review the level of operational funding provided to NTRBs to ensure that they are adequately resourced and reasonably able to meet their performance standards and fulfil their statutory functions.

Staffing of NTRBs

3.78 This section considers the staffing needs of representative bodies, especially the difficulties experienced by NTRBs in attracting and retaining professional staff. It also considers a number of options to address these staffing issues.

3.79 The basic structure of a representative body in terms of key staff was set out in the Parker report. The report noted that representative bodies need to establish a critical mass of core staff and management to operate effectively. While noting that there would be variations between representative bodies on the basis of workload and other factors, the review stated that a recommended minimum human resource base would include, for example, a manager or director, a financial administrator or accountant, an anthropologist, another research specialist, a legal officer, a research officer, a field officer and a secretarial position. The recommendation of the review in terms of staffing resources was that every representative body should be funded, at levels directly related to workloads, to establish a core critical mass of staff and management.⁵⁰

3.80 The OIPC estimates that nationally there are approximately 450 staff positions available in NTRBs, although not all positions are currently filled. This includes 76 lawyers and 45 positions for native title anthropologists (as at 2004). The OIPC noted that there necessarily remains a high reliance on external consultants, which despite the cost implications, enables people with experience and expertise to be available across the system. The OIPC noted that there are approximately 100 anthropological consultants engaged by NTRBs. Other consultants engaged by representative bodies include lawyers, mediators, historians and linguists.⁵¹

3.81 More than fifty per cent of all NTRB staff are Indigenous, including twelve of the 17 NTRB chief executives, representing 71 per cent of CEOs. While some 57 per cent of non-legal staff are Indigenous, only seven per cent of lawyers working in NTRBs are Indigenous (as at December 2004).⁵²

3.82 Evidence indicated that NTRBs have considerable difficulty in recruiting and retaining professional and senior administrative staff. There are a number of reasons for this including: remoteness and the often harsh conditions in many locations; professional isolation; stress from lack of resources compared to the tasks at hand; and oppositional and confrontational strategies at times from other stakeholders. Relatively inexperienced staff have often found themselves in complex and difficult areas of litigation and negotiation which can impose added pressures and lead to staff 'burn-out'.⁵³ Management problems and other pressures can also affect staff morale.

50 Parker report, pp.66-67.

51 *Submission 1A*, pp.26-27 (OIPC). See also *Submission 32*, p.33 (NTRB Lawyer Professional Development Project); Anthropos Consulting, *Capacity of Anthropologists in Native Title Practice*, April 2004, p 4.

52 *Submission 32*, pp. 37,197 (NTRB Lawyer Project).

53 *Submissions 1A*, p.27 (OIPC); 23, p.7 (NNTT); 18, p.9 (Rio Tinto). See also *Committee Hansard* 19 July 2005, p. 28 (WA Office of Native Title); pp.35-36,43 (Yamatji Aboriginal Corporation).

3.83 The Indigenous Land Corporation noted that:

...underfunding is not the whole problem. It may be from not having a proper management regime. It may be the political pressure. It may be the elected body to the NTRB not having the capacity and then putting pressure on the PLO and then on the CEO of the organisation without understanding that things cannot happen automatically...That would produce burn-out as much as being heavily underfunded would.⁵⁴

3.84 Representative bodies also often lack the resources to provide the necessary support and training to new staff.

3.85 One submission noted that NTRBs will take years to develop critical levels of administrative competence, not merely to perform their functions adequately 'but to provide a work environment in which trained professionals will feel comfortable and will remain without unduly high levels of turnover. It is doubtful whether many bodies outside the Northern Territory have yet achieved those basic goals'.⁵⁵

3.86 The problem of attracting and retaining staff is illustrated in the experience of the Torres Strait Regional Authority.

[A] real resource issue relates to the attraction and retention of qualified professional staff. This office has operated with inadequate staffing levels for over two years as a result of the [Native Title Office] NTO's inability to recruit appropriately qualified staff. Staff also tend to remain no longer than 2-3 years, primarily due to the remoteness and the often difficult issues associated with native title. This obviously significantly impairs the NTO's ability to perform its functions.⁵⁶

3.87 Submissions and other evidence also noted that a consequence of inadequate funding is that NTRBs have limited capacity to compete in the marketplace to recruit skilled and experienced staff.⁵⁷ The Queensland Indigenous Working Group (QIWG) stated that:

When we do advertise for people, we are fighting against each other to get the people who are available. That is the way it is. If we were to pay lawyers and anthropologists a decent wage, they would find working with us more attractive. At the moment, most of them get more money out of going out as consultants.⁵⁸

54 *Committee Hansard* 21 November 2005, p.5 (ILC).

55 *Submission* 11, p.5 (Mr J Basten QC).

56 *Submission* 7, p.5 (TSRA).

57 *Submission* 18, p.9 (Rio Tinto). See also *Committee Hansard* 21 November 2005, p.31 (Carpentaria Land Council).

58 *Committee Hansard* 21 November 2005, p.51 (QIWG).

Lawyers

3.88 A recent report by Richard Potok in conjunction with the Castan Centre for Human Rights Law at Monash University into the professional development needs of NTRB lawyers highlighted the difficulties in the recruitment of in-house lawyers and the retention of those lawyers.⁵⁹

Profile of NTRB lawyers

3.89 The report provides a snapshot of current NTRB lawyers (as at December 2004) and illustrates a number of recruitment and retention issues. The report found that:

- Numbers – there were 76 lawyers working in the NTRB system (40 were males and 36 were female). During the period of the study a total of 89 lawyers worked in the NTRB system – 13 of these lawyers had left by 31 December 2004; and since 1 January 2005, a further 13 have left the system.
- Indigenous lawyers – there were five Indigenous lawyers (representing 7 per cent of NTRB lawyers nationwide).
- Age – the age of NTRB lawyers ranged from 24 to 64 years, with the average age being just under 38 years.
- Length of experience – the national average length of time the current NTRB lawyers had been practising in the system was 3.6 years. In addition:
 - the average length of experience varied considerably from State to State, with a low of 2.4 years in NSW to a high of 5.8 years in the Northern Territory;
 - 16 NTRB lawyers, or around 20 per cent, had worked at more than one NTRB; and
 - nationally, the average length of time that lawyers had been working at their current NTRB is 2.8 years.⁶⁰

3.90 The report found that usually very few qualified law applicants apply for positions with NTRBs and a considerable proportion that do apply for positions are exiting lawyers at other NTRBs. Recruitment is a particularly serious issue in smaller towns and cities, where more than half of the current lawyers are located. The report highlighted the substantial financial costs incurred where NTRBs are unable to recruit sufficiently qualified lawyers to fill vacant positions. In addition to the financial costs and reduced capacity generally, consequences of recruitment delays include interruption to claims and negotiation processes as well as adverse effects on relationships with clients.

⁵⁹ *Submission 32*, pp.1-6 (NTRB Lawyer Project).

⁶⁰ *Submission 32*, pp.33-43 (NTRB Lawyer Project).

3.91 Retention of lawyers is also a problem. There is a high turnover of NTRB lawyers – in the six months from October 2004 to March 2005, around one in four lawyers left the system. The consequences of such high turnover include significant financial costs and other consequences including loss of corporate knowledge and history, employment of inexperienced lawyers, delays in progressing matters, and impaired relationships with clients and other parties. The report found that retention rates of NTRB layers are affected by factors including lack of career paths, disillusionment with outcomes, onerous workloads, remote workplace locations and dissatisfaction with the level of access to resources.⁶¹

3.92 The research project found that there is a need within the NTRB system, in relation to lawyers, for proactive recruitment strategies, professional development opportunities and improved support structures. NTRB lawyers indicated that high turnover of legal staff and lack of coordinated systems for sharing information inhibit the delivery of legal services by NTRBs. Valuable corporate knowledge is lost or not utilised, and many lawyers are left feeling overwhelmed and dissatisfied.

3.93 The report noted that at present, recruitment typically occurs on a reactive basis – vacant positions are advertised after NTRB staff have given notice. Moreover, there is no structured system for developing expertise and only informal methods for facilitating communication among NTRB lawyers. Individual lawyers develop their own networks of contacts and mentors and their own systems of sharing information. The research found that the consequences of high turnover, recruitment difficulties (due to, among other things, a shrinking pool of experienced native title lawyers) and lack of structured support mechanisms are delays, duplication of work, less than optimum outcomes for all parties and undue stress for individual lawyers (which itself leads to further high turnover and recruitment difficulties).

Anthropologists

3.94 Commissioned research for the National Native Title Tribunal (NNTT) on the availability of anthropologists for native title work indicates that in 2004:

- anthropologists working within NTRBs are younger and less experienced than for the profession as a whole – the majority (58 per cent) of NTRB anthropologists were under 40 years of age, and the younger NTRB anthropologists (under 30 years of age) were overwhelmingly female. Less than 30 per cent of NTRB anthropologists had more than five years experience in native title work, and a quarter had less than one year's experience.
- these anthropologists are often required to perform tasks outside the scope of their professional role.

61 *Submission 32*, pp.2-4 (NTRB Lawyer Project).

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- anthropologists working within NTRBs are less likely to have higher degrees – less than 30 per cent of NTRB anthropologists had higher degrees.⁶²

3.95 The research found that only thirty per cent of NTRB anthropologists saw native title work as enhancing their careers in anthropology, while forty per cent of consultant anthropologists were of the view that native title work actually limited their anthropological careers.

3.96 The research indicated that there was a shortage of suitably qualified and experienced anthropologists in NTRBs, which was borne out by the preponderance of younger, relatively inexperienced anthropologists in those organisations. Some NTRBs have difficulty in attracting and retaining qualified staff, and a number of positions are not filled. As noted above, the report found 45 positions exist around Australia for anthropologists, although not all positions were filled (as at 2004). The report noted that the widespread knowledge within the profession regarding the difficulties in working in these environments, and the fact that relatively few current practitioners see native title as an attractive career option impacts further on the choices of those who are looking for work as anthropologists within NTRBs. The report stated that similar issues are likely to impact on the availability of consultant anthropologists, with many NTRBs finding it difficult to attract these anthropologists.⁶³

3.97 The difficulty in attracting anthropologists was borne out in evidence to the inquiry. A representative of the QIWG stated that 'there is a limited pool of experienced anthropologists available for this kind of work in Australia, but it was also my experience that we did not have adequate funding to be able to employ those anthropologists as much as we needed.'⁶⁴ The NNTT, reflecting on the commissioned research referred to above, also stated that:

...there does seem to be a very limited number of suitably qualified and experienced people to do the work – that, for the most part, the better qualified and more experienced people are older males towards the end of their careers...At the other end of the spectrum younger, much less experienced and less qualified females were, for the most part, working for representative bodies.⁶⁵

3.98 The OIPC stated that the shortage of anthropologists in native title work has created difficulties for NTRBs in meeting time limits imposed by the Federal Court, and may also affect the quality of work performed.⁶⁶

62 Anthropos report, pp.1-2.

63 Anthropos report, pp.4-5.

64 *Committee Hansard* 21 November 2005, p.55 (QIWG).

65 *Committee Hansard* 21 November 2005, p.61 (NNTT).

66 *Submission* 1A, p.28 (OIPC).

Addressing staffing issues

3.99 Evidence to the inquiry pointed to a number of options to address the professional staffing needs of NTRBs. The OIPC suggested that for smaller NTRBs, one response may be the development of strategies for pooling resources, creating economies of scale and experience through mechanisms such as sharing staff where neighbouring NTRBs lack a full complement of particular professional staff. The Carpentaria Land Council suggested that pooling of resources has several advantages and should be further explored.

We have done it with a couple of them [rep bodies], sharing a couple of positions and technology...If the other office has it, we get to use it. But that has not really been formalised or fully explored with all rep bodies the way it could be.⁶⁷

3.100 Another option suggested by the OIPC to achieve needed economies would be the amalgamation of the existing number of NTRBs in some States. As discussed in chapter 2, pooling resources may be a step towards amalgamation. The OIPC argued that the development of fewer but larger representative bodies may provide the 'critical mass' and professional work environment to attract and retain high calibre staff.⁶⁸

3.101 Native Title Services Victoria, drawing on its own experience, stated that:

NTSV has also sought to establish a critical mass that creates a dynamic of in-house team work and mutual support. It is our observation that other small NTRBs around the country often fail to achieve this and become excessively reliant on one or two key staff whose eventual departure for whatever reason, results in serious organisational instability.⁶⁹

3.102 Rio Tinto also suggested the possible secondment of expert government staff to NTRBs or the establishment of a government-sponsored centre of excellence from which NTRBs could draw expertise as required. The centre of excellence could be established as part of a law department of a university and would aim to develop the legal capacity of NTRB lawyers and provide for career development for lawyers working in the native title area.⁷⁰

3.103 Submissions also noted that the development of standardised criteria for use, on a national basis, in the recruitment of representative body staff could provide consistency of standards in recruitment and also assist in developing nationally consistent approaches to the professional roles of staff.⁷¹ The OIPC has recently

67 *Committee Hansard* 21 November 2005, p.31 (Carpentaria Land Council).

68 *Submission* 1A, p.28 (OIPC).

69 *Submission* 5, p.4 (NTSV).

70 *Submission* 18, p.9 (Rio Tinto); Advice from Rio Tinto, 9 January 2006.

71 *Submissions* 5, pp.4-5 (NTSV); 1A, p.28 (OIPC).

engaged a consultancy to assist representative bodies in developing improved staffing and recruitment practices.⁷²

3.104 The issue of the salary differentials paid to senior staff of NTRBs was raised in evidence.⁷³ The OIPC stated that it commissioned a consultant to undertake a survey to provide baseline data on salary levels across NTRBs. The OIPC noted that the survey 'showed that there was significant variation in salaries and they could not all just be explained by the difference between remote locality NTRBs and city based NTRBs'. The OIPC pointed out that the option of establishing a scale of salaries, similar to that determined by the Remuneration Tribunal, to establish some consistency across the spectrum has been discussed with CEOs of NTRBs who indicated 'no enthusiasm' for the idea.⁷⁴

3.105 The OIPC indicated that the Office continues to monitor the situation in relation to salary levels and stated that the financial reporting system for representative bodies now provides greater transparency in this regard with information on salaries paid to different types of professionals required to be provided – 'so it will be evident if there are significant variations'. The funding agreement with each NTRB also requires that if they propose to fill the senior positions of Chief Executive Officer, Principal Legal Officer and Chief Finance Officer the representative body needs to consult with, and provide details of, the terms and conditions pertaining to the positions to the OIPC.⁷⁵

3.106 In relation to the recruitment and retention of NTRB lawyers, the Potok report proposed a number of recommendations to address this issue.⁷⁶ With regard to recruitment, the report argued that steps should be taken to increase the number of applicants for NTRB legal positions by promoting opportunities to work in the NTRB system. The following strategies were proposed:

- introduce an NTRB student placement program, to raise awareness among law students of opportunities to work in the NTRB field;
- focus on promotion of careers in NTRBs to practising lawyers, to raise awareness of opportunities for work in the system;
- engage a dedicated NTRB human resources manager, hosted by an independent university-based centre or commercial enterprise, to coordinate recruitment and retention strategies across the NTRB system; and
- promote native title work to barristers and consultant legal practitioners, to expand the pool of external counsel in native title matters.

72 Advice from OIPC, 20 December 2005.

73 *Committee Hansard* 21 November 2005, pp.38-39 (Gurang Land Council).

74 *Committee Hansard* 29 November 2005, p.10 (OIPC).

75 *Committee Hansard* 29 November 2005, p.11 (OIPC).

76 *Submission* 32, pp.3-5 (NTRB Lawyer Project).

3.107 In relation to retention, the report argued that steps should be taken focusing on the professional development of NTRB lawyers and enhancing support structures and programs available to them. A number of strategies were proposed including to:

- develop an induction manual and induction training program to be undertaken by new recruits within their first six months, on issues such as client communities, cross-cultural and multi-client matters;
- establish an ongoing training program to expand the areas of expertise of NTRB lawyers in legal, cultural and commercial contexts;
- offer scholarships for post-graduate study to further enhance skills in particular areas, such as mining law and practice, mediation and negotiation, and environmental law and advocacy;
- arrange secondments to commercial law firms, to provide opportunities for the development of commercial practice skills;
- provide management training for senior NTRB lawyers; and
- implement performance evaluation systems, to assist in the identification of NTRB lawyers' professional development needs.

3.108 The report also proposes that a number of strategies should be introduced to improve the work environment of NTRB lawyers through the development of support structures, including:

- establishing a dedicated NTRB information service, to facilitate greater communication among NTRB lawyers, provide access to a precedents database and circulate relevant advice to all NTRB lawyers;
- building relationships with law firms, to enhance the professional support available to NTRBs;
- creating an NTRB mentoring and alumni network;
- providing training opportunities for NTRB non-legal managers, to enhance management and leadership skills generally; and
- providing professional development opportunities to NTRB field officers, to improve communications between NTRB lawyers and their clients.

3.109 A number of initiatives are already being undertaken to address staffing issues. The National Native Title Tribunal is involved in a number of training and other projects to assist NTRBs staff. The Tribunal is engaged in an Indigenous Facilitation and Mediation research project. This is a collaborative project with AIATSIS to undertake research into Alternative Dispute Resolution (ADR) systems in Indigenous communities. The aim is to determine the needs of those communities and their NTRBs for specialised training in ADR and to meet the need for Indigenous

mediators in native title dealings. The program will train NTRB staff and others in mediation and facilitation skills to deal in particular with intra-Indigenous issues.⁷⁷

3.110 The Tribunal is also jointly funding a Mentoring Anthropologists project with the OIPC. The mentoring project brings together five senior anthropologists with five junior anthropologists employed by NTRBs to provide mentoring assistance. A report on the project identified the need for mentoring and professional development of NTRB anthropologists to overcome issues such as lack of experience and skills, professional isolation, and lack of meaningful career paths. The report also found that mentoring cannot operate effectively on a stand-alone basis and must complement staff development programs and wider programs of NTRB capacity building and institutional reform more generally.⁷⁸

3.111 The Potok report noted that a pilot NTRB student placement program was undertaken over the 2004-05 summer break with 18 students from various east coast universities placed at nine NTRBs around the country. The report stated that feedback from both the students and the supervisors was 'overwhelmingly positive', with many NTRBs eager that the program be replicated.⁷⁹

3.112 In 2005, the University of Western Australia's School of Social and Cultural Studies commenced a graduate program in native title and cultural heritage. The course aims to equip graduates with theoretical, analytical and practical skills in the fields of native title and cultural heritage anthropology. The WA Office of Native Title has provided financial assistance towards the establishment of the course. It also offers scholarships to people working in the native title field to participate in the course.⁸⁰ An initial start has also been made in providing scholarships for post-graduate study with two NTRB lawyers currently undertaking post-graduate studies under a newly-created Rio Tinto-NTRB scholarship program.⁸¹

Conclusion

3.113 Evidence to the inquiry indicated that NTRBs have considerable difficulty in attracting and retaining professional and senior administrative staff. It was emphasised in evidence that unless representative bodies are able to attract and hold high calibre staff in these professional areas, they will have great difficulty in effectively performing their statutory functions and servicing native title clients.

77 *Submissions* 23, pp.7-8 (NNTT); 40, pp.6-7 (AIATSIS).

78 Anthropos Consulting, *Pilot Mentoring Project for Junior NTRB Anthropologists*, June 2004, pp.1-4.

79 *Submission* 32, pp.3,53 (NTRB Lawyer Project).

80 *Submission* 37, p.5 (WA Office of Native Title). See also *Committee Hansard* 19 July 2005, pp.28,43 (WA Office of Native Title/Yamatji Aboriginal Corporation).

81 *Submission* 32, p.4 (NTRB Lawyer Project).

3.114 The Committee believes that there needs to be a concerted effort by the Commonwealth and representative bodies in the recruitment and retention of professional staff. A number of initiatives have been undertaken in these areas and the Committee welcomes these developments. The Committee considers, however, that a number of further initiatives should be undertaken including the development of standardised criteria for use nationally in the recruitment of representative body staff. Other initiatives that should be implemented include the development of a national recruitment strategy to address issues relating to the professional staffing needs of NTRBs, including the promotion of more Indigenous peoples to positions within NTRBs. The Committee notes that the development of a national recruitment strategy would also provide benefits to other Indigenous organisations facing similar difficulties to that of NTRBs in recruiting and retaining staff.

3.115 The Committee further believes that more attention needs to be paid by representative bodies to the professional development needs of their staff and a greater emphasis needs to be given to the 'pooling' of staff resources across NTRBs. The Committee also considers that the salary differentials of senior staff in NTRBs needs to be closely monitored by the OIPC and that regulation in this area should be considered if significant differentials continue to be a feature of salary packages.

Recommendation 9

3.116 The Committee recommends that the OIPC, in close consultation with NTRBs, develop standardised criteria for use in the recruitment of representative body staff; and that these criteria be used nationally to provide consistency in standards of recruitment.

Recommendation 10

3.117 The Committee recommends that the Commonwealth investigate the feasibility of:

- **the secondment of expert government staff to NTRBs;**
- **the establishment of a centre of excellence to develop the legal capacity of NTRB lawyers and from which NTRBs could draw expertise as required; and**
- **the provision of scholarships for post-graduate study to further enhance skills in areas of relevance to the work of NTRBs.**

Recommendation 11

3.118 The Committee recommends that the Commonwealth implement a national recruitment strategy to address the professional staffing needs of NTRBs and that this strategy:

- **promote the status and positive image of work in NTRBs;**
- **focus on promotion of careers in NTRBs to the professions;**
- **introduce an ongoing NTRB student placement program; and**

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- **promote the employment of Indigenous people to positions in NTRBs.**

Recommendation 12

3.119 The Committee recommends that representative bodies focus on the professional development needs of NTRB professionals and enhance the support structures and programs available to them, including:

- **developing a formal induction training program for new recruits;**
- **establishing ongoing training programs to further enhance skills in particular areas;**
- **creating a mentoring system; and**
- **implementing performance evaluation systems to assist in the identification of professional development needs.**

Recommendation 13

3.120 The Committee recommends that the OIPC continue to monitor the salary differentials provided to senior professional staff of NTRBs; and introduce a scale of salaries to provide consistency across the system if significant differentials continue to apply.

Recommendation 14

3.121 The Committee recommends that representative bodies investigate the feasibility of implementing a system of 'pooling' of professional staff in situations where an NTRB may lack a full complement of particular professional staff.

Chapter 4

Accountability Requirements

4.1 This chapter discusses the accountability requirements of representative bodies in fulfilling their statutory functions. The chapter also reviews the progress made by NTRBs in developing their performance reporting and strategic planning processes. In addition, the chapter reviews the level of accountability and compliance required of representative bodies.

4.2 The *Native Title Act 1993* (NTA) requires NTRBs to be accountable to the Minister and to the persons they represent in a number of ways. These accountability requirements include the following features:

- a representative body must prepare a strategic plan;
- a representative body must maintain accounting records prescribed by the NTA;
- payments that are made by a representative body out of its monies must be correctly made and properly authorised;
- a representative body must prepare an annual report by 15 October each year (which is tabled in the Parliament); and
- ancillary provisions provide for the inspection and audit or investigation of a representative body.¹

Strategic plans/performance reporting

4.3 The OIPC stated that strategic plans are central to the prioritising, planning and reporting of activities of representative bodies. Each representative body is required by the NTA to prepare a strategic plan (s.203D). Strategic plans must cover a minimum of three years, and, without limiting the content of the plans, must include:

- a general financial plan;
- a general statement of the objectives of the body in relation to its representative body activities; and
- a general statement of the strategies and policies it proposes to adopt to achieve those objectives.²

1 *Submissions* 1A, pp.30-31 (OIPC); 1, pp.4-6 (ATSIS); 16, pp.4-5 (AGs Department).

2 *Submission* 1A, pp.30-31 (OIPC).

4.4 Strategic plans must be prepared in consultation with the OIPC and are subject to approval by the Minister. These plans are the key means for the Minister to supervise the overall management of the representative body program and to ensure that representative bodies remain focussed on achieving the general purposes of the representative body regime.

4.5 The OIPC stated that strategic plans enable NTRBs to be proactive in the way they provide services to their constituents by maximising the use of funding and human resources and by establishing and documenting criteria by which funding allocations will be prioritised.

The objective sought is a culture of performance budgeting and reporting, based on the strategic planning process, and embedded in the allocation of funds on a transparent and objective basis relative to performance and requirements.³

4.6 Representative bodies indicated their support for the concept of strategic plans. The Carpentaria Land Council stated that strategic plans play a vital role in the prioritising, planning and reporting of its activities and welcomes the support provided by the OIPC in improving the quality of its strategic planning processes.⁴ The ATSI Social Justice Commissioner also noted that the strategic planning process encourages the participation of Indigenous people in the native title process particularly as strategic plans must include a statement on the particular NTRBs' policies for consultation with Indigenous people about the NTA's operation.⁵

4.7 The first strategic plans developed under the amended NTA covered the period to the end of the 2003-04 financial year. All NTRBs have subsequently developed new plans for the period 2004-07 and these have been presented to the Minister.

4.8 The OIPC stated that it has worked closely with representative bodies to assist their planning processes, including developing templates to guide NTRBs in plan preparation. Workshops were held in 2003 by ATSIC and ATSI with NTRB managers and accountants to define the output and outcomes reporting framework, the theory of outputs/outcomes budgeting and linkages between operational and strategic plans and reporting requirements. To achieve consistency NTRBs were asked to prepare their 2004-05 operational plans and their 2004-07 strategic plans using the same outputs and outcomes framework. ATSI provided bodies with strategic and operational planning templates. The OIPC stated that representative bodies should continue to be supported in improving their strategic planning processes and

3 *Submission 1A*, p.31 (OIPC).

4 *Submission 38*, p.14 (Carpentaria Land Council).

5 *Submission 15*, p.12 (ATSI Social Justice Commissioner).

integrating strategic plans, operational plans and performance based budgeting and reporting.⁶

4.9 The Miller report made a number of recommendations to improve the funding process for representative bodies including requiring operational plans to be included in annual funding applications both to give effect to strategic plans and to provide much needed performance information. The report also recommended a continuation of the work done by ATSIC in developing an outputs/outcomes budgeting framework for representative bodies, and that the Capacity Building Program be used to assist in the implementation of the recommendations.⁷

4.10 OIPC stated that it has implemented a number of processes to meet the recommendations of the Miller report including:

- the development of representative body operational planning guidelines and template;
- the requirement that representative bodies prepare and submit an operational plan (this requirement commenced with 2003-04 funding applications);
- the requirement that representative bodies provide six-monthly performance reports (in addition to their existing annual reporting obligations); and
- the requirement that such operational plans and performance reports be based on an outputs/outcomes framework.⁸

4.11 While all NTRBs adopted the new reporting frameworks for 2003-04, the OIPC stated the task is only partly completed.

There is a considerable way to go before it is possible to be confident that the information from representative bodies concerning workloads, outputs and outcomes is sufficiently accurate and reliable to provide sound advice for certainty about the allocation of funds. OIPC wants to continue to move to output based funding.⁹

Annual reports

4.12 As noted above, NTRBs are also required to submit annual reports which are tabled in the Parliament. ATSI commented that the annual reports are generally of a high standard, although it was conceded that the production of these reports is a resource-intensive exercise for many representative bodies.

...every rep body has tabled an annual report....it has been late in some cases, but when you think that we are dealing here with community based

6 *Submission 1A*, p.32 (OIPC).

7 B Miller, *Review of Native Title Representative Body System at the Request of the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs*, October 2002, pp.30-35.

8 *Submission 1A*, p.24 (OIPC).

9 *Submission 1A*, pp.24-25 (OIPC).

organisations that, in many cases, do not have long histories and are operating in remote parts of Australia, to ultimately produce annual reports that meet the same standards that a government department does is a pretty good job.¹⁰

Level of accountability

4.13 Evidence from representative bodies acknowledged that they, that like all recipients of public moneys, should be accountable for the way they spend funds provided by the Commonwealth. Several submissions from representative bodies and other evidence complained, however, about the level and extent of accountability requirements expected of NTRBs.

4.14 The ATSI Social Justice Commissioner argued that NTRB funding is more highly regulated and controlled than other areas of government funding: 'the NTA contains a range of other provisions in relation to what NTRBs must do, both in their substantive work and in their procedures'. The Commissioner also argued that the degree of accountability required of NTRBs should be the same as that required of other parties in the native title system in receipt of public funds.¹¹

4.15 The Goldfields Land and Sea Council (GLSC) also noted that 'while funding shrinks relative to our workload, accountability and compliance requirements increase'. The Council added:

The current system causes many additional and unnecessary problems, and places enormous stress and pressures on NTRBs. Much improvement could be achieved to improve the arrangements without cost to government. It is probable that more reasonable, consistent, streamlined and predictable arrangements would result in savings that could be reallocated to assist NTRBs better satisfy the requirements of the *Native Title Act*.¹²

4.16 The GLSC described the amount of 'red tape' required as "'meta-work": work about work, rather than work about getting out and trying to win claims...it takes up considerable resources and energy, and can be quite distressing'. The Council enumerated in some detail the various compliance requirements imposed on representative bodies:

We have faced the considerable and increasingly rigorous requirements of the Commonwealth...There are considerable requirements on rep bodies in terms of governance. There is the annual report, which we have tendered and which we have to file in parliament. There is a strategic plan under the act. That is approved by the minister. Now there is a thing called an "operational plan" that, under the grants agreement, needs to be approved

10 *Committee Hansard* 12 May 2004, p.23 (ATSI).

11 *Submission* 15, p.14 (ATSI Social Justice Commissioner).

12 *Submission* 12, p.8 (GLSC).

by OIPC. That is the minutiae of operational matters of the workings of the land council, which are, after all, statutory functions.¹³

4.17 One submission noted that there are, however, compelling reasons for stringent oversight of representative bodies, although the level of oversight was questioned:

Because they [NTRBs] are, to a large extent, bodies comprised of (or including) existing and potential claimants, there is a real potential for conflicts of interest and corrupt practices. No doubt because of these dangers, the *Native Title Act* (and other legislation) subjects representative bodies to high (even extraordinary) levels of oversight and regulation.¹⁴

4.18 The submission further noted, however, that every dollar of public money spent on oversight and regulation 'is money which might otherwise provide a direct benefit to Aboriginal Australians'.¹⁵

4.19 A similar argument was made by the ATSI Social Justice Commissioner who argued that the need for accountability should be balanced against the objectives of representative bodies in providing services to their client base.

This submission is not advocating that NTRB funding be free of conditions or government scrutiny. In the situation of limited funding, clearly some systems need to be put in place to ensure equitable use of those funds between NTRBs around the country. But in applying these conditions funding bodies need to ensure the conditions are not impeding the very purposes for which funding is provided.¹⁶

Conclusion

4.20 The Committee welcomes the continuing development of performance reporting by representative bodies through the implementation of strategic plans and other performance-based operational plans. Further, the Committee supports the continued efforts of the OIPC to improve representative bodies' strategic planning processes.

4.21 The Committee believes that rigorous accountability mechanisms need to be in place to ensure that the considerable public moneys expended on NTRBs is spent appropriately. Both the Indigenous constituency of representative bodies and the public in general must have confidence in the accountability and compliance processes.

13 *Committee Hansard* 19 July 2005, p.73 (GLSC).

14 *Submission* 11, p.5 (Mr J Basten QC).

15 *Submission* 11, p.5 (Mr J Basten QC).

16 *Submission* 15, p.14 (ATSI Social Justice Commissioner).

4.22 Evidence to the inquiry indicates, however, that the administrative demands in connection with compliance activities pose a considerable burden on representative bodies. Time spent complying with excessive documentation can significantly affect the time spent on the representative bodies' core activities relating to native title applications – the very purposes for which the funding is provided. The Committee believes that the OIPC, in conjunction with representative bodies, should review the current accountability requirements with the aim of streamlining the requirements where possible without compromising the essential accountability requirements of representative bodies.

Recommendation 15

4.23 The Committee recommends that the OIPC continue to support NTRBs in improving the quality of their strategic planning processes and especially in integrating strategic plans, operational plans and performance based budgeting and reporting.

Recommendation 16

4.24 The Committee recommends that the OIPC, in consultation with representative bodies, review the current compliance and accountability requirements placed on NTRBs with a view to reducing unnecessary duplication of reporting and streamlining reporting procedures.

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.¹

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'.²

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.

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.³

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'.⁴ The National Native Title Tribunal (NNTT) in its submission cited several examples of collaborative relationships that it has established with NTRBs around Australia.⁵

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.⁶

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

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).

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.⁷

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.⁸

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.⁹

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.¹⁰

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.¹¹

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.¹² 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'.¹³ 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.¹⁴ The OIPC

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).

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

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.¹⁶

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'.¹⁷

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.

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.¹⁸

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.¹⁹

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.²⁰

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

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.²¹

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.²²

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.²³

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.²⁴

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.²⁵

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.²⁶

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.²⁷

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

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.²⁸

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

Table 5.1: Financial assistance for respondents

Year	Respondent financial assistance – spending	Native title system funding	% of total funding
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.²⁹

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.³⁰ 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.³¹

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'.³²

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*.³³ 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.³⁴

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.³⁵

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.³⁶

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'.³⁷

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.³⁸ 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.³⁹

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.⁴⁰

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".⁴¹

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'.⁴²

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.⁴³ 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'.⁴⁴

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.⁴⁵

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.

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.⁴⁶

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.⁴⁷

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.⁴⁸ 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

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'.⁴⁹

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.⁵⁰

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

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

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

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

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.⁵²

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'.⁵³ 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"⁵⁴.

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'.⁵⁵

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

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.⁵⁶

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.⁵⁷

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.⁵⁸

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.⁵⁹

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.⁶⁰

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'.⁶¹

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.⁶² 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.⁶³

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.⁶⁴ 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.⁶⁵

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

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'.⁶⁷

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

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.⁶⁸

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

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

Dissenting Report - Opposition Senators and Members of Parliament

1. Summary of Dissenting Report

The Opposition acknowledges that the Committee Chair went to some effort to achieve consensus, and strongly endorses a majority of the recommendations. However the Opposition seeks to address some fundamental weaknesses in the Report, which significantly compromise its impact and constructive value.

First, it is concluded in the Chair's Report that the agreement-making functions of Native Title Representative Bodies (NTRBs) strictly relate to land and water management, and do not encompass the pursuit of broader social and economic outcomes. This interpretation is clearly incongruent with the established scope of Indigenous Land Use Agreements, which have been used to achieve social and economic objectives.

The Opposition submits that a broader interpretation of the agreement-making function should form the basis of any review of NTRB funding levels.

In addition, despite the prolific evidence of the impact of underfunding on the efficacy of NTRBs and more broadly on the native title system, the Chair's Report stops short of recognising the full action that is needed.

The Opposition submits that the recommendations in relation to the adequacy of operational funding and corporate governance training should be strengthened to reflect the full force of the evidence.

2. Discussion and Recommendations

2.1 Agreement Making Functions

Agreement making through the mechanism of Indigenous Land Use Agreements (ILUAs) is a core statutory function of NTRBs under the *Native Title Act 1993 (Cth)*.

The National Native Title Tribunal explains that ILUAs "allow people to negotiate flexible, pragmatic agreements to suit their particular circumstances."

For example, the "Argyle Diamond Mine" ILUA signed in September 2004 provided support for current and future mining corporations, and directed significant company resources towards economic and community development.

In October 2005, the 200th ILUA was signed in the Northern Territory, between mining and exploration company Newmont Ltd and the Central Land Council on

behalf of the Gurindji people. This agreement secured employment and training opportunities for Gurindji people, protection of sacred sites and rehabilitation programs for mining sites and exploration.

In the *Native Title Report 2005*, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma noted a number of ILUAs that had achieved social and economic outcomes for Indigenous communities. However, it was also noted that the use of ILUAs as an economic development tool was significantly constrained by under-resourcing to NTRBs.

The decision of this Government to deny NTRBs the resources needed for the effective and full discharge of their agreement-making duties defies common-sense. It obstructs both Indigenous community development and industrial development. It also contradicts the more recent rhetorical shift embodied in the objectives of the Native Title Review announced by the Attorney-General in September 2005. The Opposition welcomes the Attorney-General's apparent emphasis shift from the litigious culture cultivated by the Government over the past ten years to agreement making. However the gap between rhetoric and action is startling, and merits a distinct, specific and strong recommendation from this Committee.

The Opposition recommends that the Commonwealth immediately review the level of funding for NTRBs to effectively and fully execute its statutory agreement-making functions. In particular, resources should be increased to enable:

- a. The development of skills to negotiate regional economic and social outcomes through Indigenous Land Use Agreements;
- b. More effective consultation with communities and negotiations with corporate parties;
- c. Research of social and economic opportunities in the region; and
- d. The monitoring of progress and where necessary, enforcing Indigenous land use agreements entered into with corporate third parties.

2.2 Adequacy of funding levels for day-to-day operations

The Opposition acknowledges the recommendation by the Chair that the Commonwealth immediately review the level of operational funding to NTRBs, but submits it is not enough.

The evidence submitted to the Committee on the impact of chronic NTRB underfunding was prolific, forceful and emanated from a variety of stakeholders – including the minerals sector. The Minerals Council of Australia noted that while reporting requirements had increased significantly in the past few years, there had been no real increase in operational funds since 1995. This meant that NTRBs had less

money to carry out its functions on the ground. The Council also commented that the workload of NTRBs had risen steadily as the number of native title claims and mining applications proliferated.

The Chair's Report canvasses a wide range of these concerns, noting the impact of under-resourcing on the minerals sector, the native title system and community development in Indigenous communities. But this acknowledgement did not translate into a recommendation for an immediate increase in funding.

The weight of the evidence presented to the inquiry warrants a recommendation that the level of funding be increased immediately, and then reviewed.

2.3 Adequacy of funding levels for corporate governance training

Current funding available to the Office of the Registrar of Aboriginal Corporations (ORAC) for corporate governance training will not be enough to meet the demand generated by the commencement of the *Corporations (Aboriginal and Torres Strait Islander)* legislation. Submissions received by the Inquiry into the CATSI Bill reflected widespread concern amongst NTRBs about the size and complexity of the new legislation, including the compliance requirements.

Training and support on a much wider, systematic scale is required to assist with meeting the new requirements, and to minimise the impact of this new regulatory regime on the native title system. It was submitted in the CATSI Bill Inquiry that the introduction of the registration renewal scheme for NTRBs brought the system almost to a stand still for two years while NTRBs struggled to adjust. The Opposition cautions the Government from repeating the same mistake with the CATSI Bill.

It is not enough to recommend that the Commonwealth ensure funding levels are adequate. The Opposition recommends an immediate increase in ORAC training funds to prepare NTRBs for the upcoming changes in corporate governance regulation.

3. Conclusion

There is considerable evidence to support the claim that the inability of NTRBs to fulfil their responsibilities represents the primary bottleneck in the native title system. The Office of Indigenous Policy Co-ordination (OIPC) has attributed this inability to the inefficient use of resources, at times compounded by mismanagement and corruption. These claims are disputed by NTRBs, which claim the OIPC is more interested in eliminating their advocacy role and micro-managing their work than promoting efficiency.

The Opposition accepts that there is an enormous need for capacity building, skills development, and management/corporate governance training. But fulfilling this need should not be done at the expense of the day-to-day functions of NTRBs, of Indigenous economic and community development, of an efficient native title system, and industrial progress. Until the chronic under-resourcing of NTRBs is addressed, particularly for statutory functions like agreement making, improvements to the native title system will be only peripheral and minimal. The Opposition urges the Government to give this issue its urgent attention for the sake of all stakeholders.

Mr Bob McMullan MP, Deputy Chair

Senator Patricia Crossin

Senator Chris Evans

Mr Daryl Melham MP

Minority Report by Senator Rachel Siewert, Australian Greens

Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, Report on the Operation of Native Title Representative Bodies.

I strongly support the intent of Recommendation 18 on Prescribed Bodies Corporate but believe that the current recommendation does not go far enough. As pointed out in the report ... "the dire situation of many PBCs due to lack of resources was highlighted during the inquiry" (para 5.68).

I believe that the Commonwealth should be funding Prescribed Bodies Corporate to ensure that they are able to meet their responsibilities. I also believe that resources should be made available immediately to assist PBCs meet their short-term needs while the Commonwealth examines as a matter of urgency sustainable funding options for the longer term operation of PBCs.

Senator Rachel Siewert

APPENDIX 1

List of submissions

1. Aboriginal and Torres Strait Islander Services (ACT)
- 1A Office of Indigenous Policy Coordination (ACT)
- 2 Western Australian Local Government Association (WA)
- 3 Garrak-Jarru Regional Council (NT)
- 4 Queensland Indigenous Working Group (Qld)
- 5 Native Title Services Victoria Ltd (VIC)
- 6 Association of Mining and Exploration Companies Inc (WA)
- 7 Torres Strait Regional Authority (Qld)
- 8 NSW Native Title Services Ltd (NSW)
- 9 ACT Government (ACT)
- 10 Aboriginal Legal Rights Movement Inc (SA)
- 11 Mr John Basten QC (NSW)
- 12 Goldfields Land and Sea Council (WA)
- 13 Aboriginal Legal Rights Movement Inc – Native Title Unit (SA)
- 14 Ngaanyatjarra Council (WA)
- 15 ATSI Social Justice Commissioner (NSW)
- 16 Commonwealth Attorney-General's Department (ACT)
- 17 Pitjantjatjara Council Inc (NT)
- 18 Rio Tinto Ltd (VIC)
- 19 South West Aboriginal Land and Sea Council (WA)
- 20 Minerals Council of Australia (ACT)
- 21 Indigenous Land Corporation (ACT)

- 21A Indigenous Land Corporation (ACT)
- 22 WA Office of Native Title (WA)
- 23 National Native Title Tribunal (WA)
- 24 New South Wales Government (NSW)
- 25 Northern Territory Government (NT)
- 26 No submission
- 27 NSW Farmers' Association (NSW)
- 28 Mr David Allie (Qld)
- 29 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (WA)
- 30 Walman Yawuru Aboriginal Corporation (WA)
- 31 South Australian Government (SA)
- 32 NTRB Lawyer Professional Development Project (VIC)
- 33 Jidi Jidi Aboriginal Corporation Inc (WA)
- 34 Association of Mining and Exploration Companies Inc (WA)
- 35 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (WA)
- 36 No submission
- 37 WA Office of Native Title (WA)
- 38 Carpentaria Land Council Aboriginal Corporation (Qld)
- 39 MacDonnells Solicitors (Qld)
- 40 Australian Institute of Aboriginal and Torres Strait Islander Studies (ACT)
- 41 Kimberley Land Council (WA)
- 42 Cape York Land Council (Qld)

APPENDIX 2

Witnesses who appeared before the Committee

Canberra, Wednesday, 12 May 2004

Aboriginal and Torres Strait Islander Services

Mr Brian Stacey, Group Manager

Mr Alistair Sherwin, Branch Manager

Alice Springs, Monday, 19 July 2004

Lhere Artepe Aboriginal Corporation

Mrs Betty Pearce, Deputy Chair

Mr Des Rogers, Chairperson, Alice Springs ATSIC Regional Council

Anangu Pitjantjatjara Council Inc

Mr Gary Lewis, Chairperson

Ms Julie Ann White, Finance & Administration Manager

Mr Robert Turner, Finance Manager

Tangentyere Council Inc

Mr William Tilmouth, Executive Director

Mr Patrick McDonald, Finance Manager

Ms Rochelle Fielding, Assistant to Social Services Manager

Broome, Wednesday 21 July 2004

Kimberley Land Council

Ms Krysti Guest, Senior Legal Officer

Mr Ian Irving, Principal Legal Officer

Mr James Segedin, Finance Manager

Broome Shire Council

Mr Ian Bodill, Chief Executive Officer

ATSIC Kullarri Regional Council

Mr Kevin George, Chairperson

Mr Frederick Murphy, Councillor

Mr Martin Sibosado, Councillor

The Aboriginal Communities of Ardyaloon and Bidyadanga

Mr Andrew Carter, President, Ardyaloon Inc.

Mr James Yanawana, Chairperson, Bidyadanga Community

Mr Walter Nardi, Councillor, Bidyadanga Community

Perth, Tuesday 19 July 2005

Association of Mining and Exploration Companies

Mr Alan Layton, Research and Policy Officer

Mr John Clarke, Committee Member

Office of Native Title, Western Australia

Mr Gary Hamley, Executive Director

Western Australian Government

Mr Michael Megaw, Chief of Staff to Deputy Premier & Minister Responsible for Native Title

Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation

Mr Anthony Dann, Chairperson

Mr Simon Hawkins, Executive Director

Mr David Ritter, Principal Legal Officer

Goldfields Land and Sea Council

Mr Brian Wyatt, Executive Director

Mr Philip Vincent, Principal Retained Counsel

Mr Michael Meegan, Solicitor

Brisbane, Monday 21 November 2005

Indigenous Land Corporation

Mr David Galvin, General Manager

Carpentaria Land Council Aboriginal Corporation

Ms Justine Yanner, Chief Executive Officer

Mr Murradoo Yanner, native title claimant

Ms Marnie Parkinson, Principal Legal Officer

Gurang Land Council Aboriginal Corporation

Mr Tony Johnson, Chief Executive Officer

Queensland Indigenous Working Group (QIWG)

Mr Trevor Robinson, Executive Officer, QIWG

Mr Martin Dore, Principal Legal Officer, North Queensland Land Council

Mr Russell Bellear, Executive Officer, Central Queensland Land Council

Mr Peter Whalley, Research Officer, QIWG

National Native Title Tribunal

Mr Graeme Neate, President

Mr Charles Budby, **member of the Thanakwithi clan group**

Canberra, Tuesday 29 November 2005

Office of Indigenous Policy Coordination

Mr Peter Vaughan, Group Manager, Lands and Resources

Mr Greg Roche, Assistant Secretary, Land Rights Services Branch

Attorney-General's Department

Mr Iain Anderson, First Assistant Secretary, Legal Services and Native Title Division

Mr Steven Marshall, Assistant Secretary, Native Title Unit, Legal Services and Native Title Division

Mr Paul Griffiths, Assistant Secretary, Legal Assistance Branch