

QUEENSLAND INDIGENOUS WORKING GROUP

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By facsimile: (07) 3012 8845

Dear Wayne,

RE: REVIEW OF NATIVE TITLE REPRESENTATIVE BODY SYSTEM

I refer to your letter to “all NTRB CEO’s” dated 6 February, 2003, enclosing a copy of the Miller Review (Review).

In the limited time available, the Native Title Representative Body (NTRBs) members of the Queensland Indigenous Working Group (QIWG) offer the following comments.

Executive Summary of Comments

It is recommended that ATSIC put aside the Review on the basis that:

- many of the Review’s key recommendations proceed from a wrong analysis of the Minister’s statutory obligation in relation to the supervision of representative bodies;
- the wrong analysis is the result of a demonstrable methodological flaw in the reviewer’s interpretation of the relevant provisions of the *Native Title Act 1993* (Cth); and
- the Review and its recommendations fail to take account of important features of the real environment in which NTRBs operate, including the Commonwealth Government’s failure to provide adequate resources to NTRBs and the unequal nature of the struggle for the recognition and protection of native title.

In light of the above, it is recommended that NTRBs and ATSIC elected leaders and staff now formulate measures that address the Aboriginal and Torres Strait Islander Commission’s (ATSIC) reasonable concerns about NTRBs’ performances and funding allocations, while having due regard to the environment in which NTRBs are required to operate.

NTRBs propose to enter into discussion with ATSIC elected leaders and staff to develop agreed means for ATSIC to measure more accurately and relevantly NTRBs' performances through enhanced strategic plans, reporting requirements and capacity building. The proposed discussions should also address issues of particular importance to NTRBs such as native title funding, special purpose grants and other issues.

For this purpose NTRBs are now settling a draft issues paper to form the basis of discussions with ATSIC leaders and staff. It is intended to present the issues paper to ATSIC on or before 28 March 2003.

Strategic Plans and the Minister's Responsibility

Many of the Review's key recommendations flow from a wrong conclusion as to the nature of the Minister's statutory obligations. That wrong conclusion arises because of a fundamental methodological flaw in the Review. The flaw is evident in the Findings concerning Term of Reference B (*Whether the current ATSIC system keeps the Minister informed to the standard required to meet his/her responsibilities under the Act*).

Relevantly, the *Native Title Act* provides that each NTRB must prepare a strategic plan in consultation with ATSIC for submission to and approval by the Minister (refer to s.203D). In making a grant of money to a NTRB, ATSIC must have regard to the matters set out in the NTRB's strategic plan and the conditions of the grant must be consistent with the strategic plan (s. 203CA). If ATSIC considers that an NTRB has committed, or is committing, serious breaches of the conditions of its grant or has repeatedly breached, or is repeatedly breaching conditions of its grant, ATSIC must give notice in writing to the Minister (s.203CA(5)).

The requirement for strategic plans was inserted in the 1998 amendments to the *Native Title Act*. S.203D(2) *Native Title Act* provides that a strategic plan must include:

- (a) a general financial plan;
- (b) a general statement of the objectives of the body in relation to the performance of its functions and the exercise of its powers;
- (c) a general statement of the strategies and policies proposed to achieve those objectives...[emphasis added]

The Explanatory Memorandum to the Native Title Amendment Bill 1997 ("Explanatory Memorandum") deals with strategic plans at chapter 34 under the heading "Accountability". Paragraph 34.105 of the Explanatory Memorandum reads as follows:

"What is the purpose of the strategic plan?"

A strategic plan is to be prepared by each representative body [schedule 3, section 203D]. These plans are to be the key means for the Commonwealth Minister to supervise the overall management of the representative body programme and to ensure that the

representative bodies remain focussed on achieving the overall purpose of the representative body regime. In brief, that purpose is the provision of a nationally consistent standard of services in relation to native title matters in a timely, efficient, co-ordinated, responsible and accountable way to native title holders and Indigenous communities affected by native title issues. As explained in paragraph 34.96, the grant conditions imposed by ATSIC must be consistent with the strategic plan for the representative body concerned.” [emphasis added]

Paragraph 34.107 of the Explanatory Memorandum states,

“Matters to be included in strategic plan

While not limiting the contents of the plan, a strategic plan 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.*

The general nature of the matters to be covered reflects the fact that each plan has effect for at least three years, and it would be unrealistic to prepare highly detailed or specific strategic plans for this length of time, particularly in light of the relative novelty of many native title issues with which representative bodies will be faced.”

Paragraph 34.96 of the Explanatory Memorandum sets out some of the mandatory conditions attaching to ATSIC funding to representative bodies. Paragraph 34.97 of the Explanatory Memorandum reads as follows:

“Grant conditions must be consistent with strategic plan

ATSIC is required to have regard to the matters in a representative body’s strategic plan approved by the Minister ... The conditions which ATSIC imposes must be consistent with the strategic plan. This requirement provides a link between a strategic plan and the grant conditions. ATSIC monitors the compliance of representative bodies with the grant conditions so that linking those conditions to the strategic plan means that ATSIC also monitors the attainment of the plan’s objectives.” [emphasis added]

For present purposes s.203D(2) *Native Title Act* is clear and unambiguous in its terms. It requires that strategic plans include general information of the kind identified.

Applying s.15AB *Acts Interpretation Act 1901* (Cth) to the present case, resort to extrinsic materials such as the Explanatory Memorandum should be to confirm the ordinary meaning of s.203D(2) within the context of the *Native Title Act*. The ordinary meaning of s.203D(2) is confirmed by paragraphs 34.105 and 34.107 of the Explanatory Memorandum quoted above.

As mentioned at paragraph 34.105 of the Explanatory Memorandum, strategic plans containing information of the kind required by s.203D(2) are intended to be the key means for the Commonwealth Minister to supervise the overall management of the NTRB program.

Grant conditions imposed by ATSIC must be consistent with the strategic plan of the NTRB concerned.

Thus, the degree of intensity of the Minister's supervision of NTRBs is directly related to, and is commensurate with, the level of information that NTRBs are required to provide to the Minister in the strategic plan in accordance with s.203D(2) (upon which ATSIC is to set its grant conditions).

When the rules of statutory interpretation are applied properly to the relevant provisions of the *Native Title Act*, it is clear that the Minister's responsibility in relation to the ongoing supervision of NTRBs is general in nature. So much is confirmed by the terms of s.203D *Native Title Act* and the relevant paragraphs of the Explanatory Memorandum set out above, particularly paragraph 34.105 which specifically addresses s.203D.

Fundamental Methodological Flaw in Review

The reviewer has reached a different conclusion about the extent of the Minister's supervisory function and NTRBs' reporting obligations by adopting demonstrably wrong interpretive methodology.

The methodological flaw is located in the Review findings in relation to Terms of Reference B at page 19 of the Review.

Rather than rely upon the clear and plain provisions of the *Native Title Act* itself (as confirmed by the specific passages of the Explanatory Memorandum) the reviewer commences his assessment of the Minister's supervisory responsibility by reference to a general statement, not contained in the *Native Title Act*, nor even in the paragraphs of the Explanatory Memorandum dealing specifically with the relevant provisions of the *Native Title Act*, but in the Overview to the Explanatory Memorandum. The reviewer relies heavily upon a general statement in the Overview to the Explanatory Memorandum (at paragraph 1.8) that

... the Commonwealth Minister retains overall strategic control of representative body performance ...

The reviewer then refers to the definition of the word "control" in both the Collins Dictionary and the Macquarie Dictionary. Finding that the meaning of the word "control" includes "to command, direct or rule, domination or command", the reviewer concludes that:

“The abovementioned quotes from the Native Title Amendment Bill 1997 Explanatory Memorandum and dictionary definitions lead the reviewer to believe that the Minister’s responsibility goes beyond the approval of strategic plans to also include a responsibility for monitoring/ checking/ verification of performance (outputs and outcomes) of representative bodies.” (Review, page 21) [emphasis added]

Notably absent from the reviewer’s reference list above are any provisions of the *Native Title Act* itself, from which the Minister’s powers and duties are derived. By focusing upon the single word “control” mentioned in the Overview to the Explanatory Memorandum and then expanding the meaning of the word by dictionary definitions, the reviewer creates a distorted and amplified image of the Minister’s supervisory obligation under the *Native Title Act*.

If it were the Parliament’s intention that the Minister (or ATSIC) “dominate, rule or command” representative bodies then the language of the *Native Title Act* would reflect that intention. The language of the *Native Title Act* is not in those terms.

The clear and plain language of s.203D(2) *Native Title Act* referred to above presents an obstacle to the reviewer’s erroneous conclusion about the extent of the Minister’s supervisory duty under the *Native Title Act*. The Executive Summary to the Review (page 6) includes the statement,

“Paragraph 203D(2) of the Act requires the strategic plan of a representative body to contain a general financial plan, a general statement of objectives and a general statement of strategies and policies. It is the view of the review that the inclusion of the word “general” is a major reason why the strategic plans vary in quality and lack detail on need and expected performance ...

Should the Minister require that strategic plans contain more specific information on objectives, strategies, policies, expected outcomes etc, he/she could propose an amendment to the Native Title Act 1993 to remove the words “general” from paragraph 203D(2) of the Act and to perhaps be more specific about what level of output/outcome information should be included in the strategic plans. Should the Minister not wish to proceed with amendments to the Act ATSIC could amend its funding submission process to include a requirement for representative bodies to submit detailed operational plans (containing objectives and detailed strategies for achieving them including outputs/outcomes expected to be achieved during the period of funding) as part of their application to ATSIC for grant funding.

Either of the possible actions outlined above would result in much needed performance information becoming available to the Minister and ATSIC. On balance, the review does not believe that legislative change is necessary but it is of the view that ATSIC should seek detailed operational plans from representative bodies as part of the grant application process.”

The error of the reviewer's interpretation of the Minister's statutory responsibility is readily apparent in the passage quoted above. The reviewer has arrived at an interpretation of the Minister's duty which, by the reviewer's own admission, would require statutory amendment to achieve. The concession that legislative amendment may be required to give the *Native Title Act* the meaning proposed in the Review should have rung alarm bells for the reviewer in relation to the error in his interpretative methodology.

A consequence of the reviewer's failure to observe the rules of statutory interpretation is that Review findings and recommendations are premised upon a wrong conclusions about the extent of the Minister's statutory responsibility in relation to the supervision of NTRBs, and consequently about NTRBs' reporting obligations.

There is no basis in law for the reading up of the Minister's supervisory obligation proposed in the Review.

Consequence of Methodological Flaw

When the relevant provisions of the *Native Title Act* are interpreted properly in accordance with the rules of statutory interpretation, a foundational finding of the Review is revealed to be wrong. If it were the intention of Parliament that the Minister "command", "direct" or "dominate" NTRBs (as the Review implies) then the *Native Title Act* would contain provision to that effect. In fact, the *Native Title Act* contains no such provision.

The consequence of the reviewer's methodological flaw considered above is that the majority of the other Review recommendations lose any substantial support or justification at law. According to the Review, NTRBs are reporting to ATSIC and to the Minister to the extent required by the provisions of the *Native Title Act* and in a way sufficient to enable the Minister to meet his statutory obligations. In addition, it is an express finding of the Review is that the Minister has met his statutory obligations.

Other Comments on Review Recommendations

The Review does not take account of the major challenges now confronting NTRBs. Among those challenges are:

- the well-documented failure of the Commonwealth to provide adequate resources to enable NTRBs to perform their functions and duties to constituents; and
- the unequal nature of the struggle for recognition and protection of native title in Australia.

Lack of Adequate Resources

The Commonwealth Government's failure to provide funding necessary to enable NTRBs to perform their statutory functions and duties is a matter of record.

The Love-Rashid Report commissioned by ATSIC in 1999 identified a substantial shortfall in Commonwealth Government funding for NTRBs' purposes. The Commonwealth has not taken significant steps to address that shortfall.

The Federal Court has recently amended its native title claims management policy to take account of the Commonwealth's failure to fund adequately the native title recognition process. In December 2002 the Federal Court's Native Title Coordination Committee resolved,

That the three-year time goal for disposition of native title matters be treated as a desirable objective for the time elapsed between substantive allocation and final determination subject to factors beyond the control of the Court, including resource limitations of the parties, and related to that, the need to establish regional priorities for mediation and litigation of applications. [emphasis added]

As recently as February 2003, Rio Tinto Limited made submissions to the Parliamentary Joint Committee on Native Title etc. to the effect that the biggest impediment to native title is the lack of adequate resources available for NTRBs. Rio Tinto expressed concern (also raised by ATSIC) that NTRBs have not seen additional Commonwealth funding since 1996. Rio Tinto called on the Commonwealth Government to address the imbalance of funding between the National Native Title Tribunal which spent \$25 million in 2001, and the country's 18 NTRBs.

The Review's recommendation to link ATSIC funding to achievement of outcomes on a 6 monthly basis should take into account that lack of adequate funding is already a major impediment to NTRBs achieving outcomes.

Apart from any other consideration, the additional reporting burden upon NTRBs which would arise from the implementation of the Review's recommendations is likely to limit further the capacity of NTRBs to perform their statutory functions and duties for the benefit of native title holders and claimants.

Uneven Playing Field

In the High Court's decision *State of Western Australia v Ben Ward & Ors* [2002] HCA 28, Justice McHugh observed (at [561]),

The deck is stacked against native title-holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict.

Justice McHugh's observation applies equally to many native title-related issues. Native title holders and claimants, and their NTRBs, face an unequal struggle in the recognition and protection of native title.

Proposals to link ATSIC funding more closely with NTRBs' "achievement of outputs and outcomes" in the current environment ought to take account of the hostile environment in

which NTRBs operate, where the “deck is stacked against native title holders” and where achievement of outcomes is actively opposed by many powerful interests, including in some cases the Commonwealth Government itself.

The environment in which NTRBs operate is also fluid. Circumstances can be altered radically by a single Court decision, leading to necessary changes to NTRB strategies and policies.

These factors need to be taken into account in the formulation of ATSIC policy concerning NTRBs.

Conclusion

ATSIC is urged to put the Review aside.

The Review proceeds from a wrong interpretation of the law, and from a narrow view of the real environment in which NTRBs operate. The Review’s recommendations will not, in the current form, assist in resolving the real problems confronting NTRBs and their constituents.

It is recommended that NTRBs and ATSIC elected leaders and staff now formulate measures which address ATSIC’s reasonable concerns, while having due regard to the environment in which NTRBs are required to operate.

The NTRBs propose to enter into discussion with ATSIC elected leaders and staff to develop agreed means for ATSIC to measure more accurately and relevantly NTRBs’ performances through enhanced strategic plans, reporting requirements and capacity building. The proposed discussions should also address issues of particular importance to NTRBs such as native title funding, special purpose grants and other issues.

The NTRB members of QIWG are now settling a draft issues paper to form the basis of discussions with ATSIC leaders and staff. It is intended to present the issues paper to ATSIC on or before 28 March 2003.

Please let me know if you would like to discuss any of the issues mentioned above.

Yours sincerely

Trevor Robinson
Coordinator
Queensland Indigenous Working Group