

**SUBMISSION FROM NATIVE TITLE SERVICES VICTORIA
TO THE PARLIAMENTARY JOINT COMMITTEE ON
NATIVE TITLE IN REGARD TO THE CAPACITY OF NTRB's TO DISCHARGE
THEIR RESPONSIBILITIES UNDER THE ACT**

Pursuant to Section 206(b) of the *Native Title Act 1993*, The Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Fund is inquiring into and reporting on the capacity of Native title Representative Bodies to discharge their responsibilities under the Act with particular reference to the following three matters.

Background to the creation of Native Title Services Victoria:

On 17 April 2003, the then Minister for Immigration and Multicultural and Indigenous Affairs, withdrew the recognition of Mirimbiak Nations Aboriginal Corporation ("Mirimbiak") as the representative body for Victoria pursuant to section 203AH(2) of the *Native Title Act 1993* (Cth) ("NTA").

On 27 September 2003, ATSIIS made a grant of funding to NTSV to perform, to the extent that it is able to, all the functions of a representative body under the NTA. This grant of funding to NTSV was made by ATSIIS pursuant to its *2003-04 General Terms and Conditions of Grant to Bodies Not Recognised as Native Title Representative Bodies under the Native Title Act 1993* ("ATSIIS's Grant Terms and Conditions"). As the grant of money to NTSV was made by ATSIIS and not ATSIIC, it was not made pursuant to section 203FE of the NTA but rather pursuant to ATSIIS's Grant Terms and Conditions.

Under ATSIIS's Grant Terms and Conditions, NTSV is required to perform all the functions of a NTRB under Division 3 of Part 11 of the NTA, to the extent allowed by law, in accordance with NTSV's strategic plan, operational plan, approved budget and ATSIIS's Grant Terms and Conditions. As such NTSV is a body funded to carry out native title representative body functions within Victoria and hereby submits comment to the Parliamentary Committee in relation to its current enquiry.

(1) The structure and role of Native Title Representative Bodies:

In essence NTSV's submission is that its structure lends itself more effectively to the performance of the responsibility of a Native Title Representative Body (NTRB) as set out in the Act than does that of most other NTRBs in Australia.

In relation to the structure and role of NTRBs, Native Title Services Victoria is characterised by the following attributes that contribute to effective performance of statutory functions:

COMPETENT GOVERNANCE

One of NTSV's great advantages relative to other NTRBs around the country is that its Directors are all people with extensive experience in Corporate Governance and all are able to add value to NTSV governance.

NTSV has a small board of seven members who are appointed, rather than elected and whose selection was on the basis of specific selection criteria, these being:

1. Experience in Corporate Governance

2. A high standing in the indigenous community
3. Sound knowledge of native title
4. Traditional owners in Victoria.

It is our submission that too many NTRBs become hamstrung and debilitated by problems at the governance level. NTSV's Board members are company directors who are fully aware of their corporate responsibilities and who enjoy a high standing generally throughout the indigenous community of Victoria. This obviously places the organisation in a position to succeed in the discharge of its responsibilities under the Act.

CLEAR SEPARATION OF POWERS

NTSV's constitution was carefully constructed in order to avoid some of the problems that bedevil not only NTRBs but other indigenous organisations where the separation of the roles of Management and Governance is not properly delineated and maintained.

At NTSV the separation between the role of the Board in providing governance to the organisation and the role of management in taking full responsibility for day to day operations is clearly understood and set out in the constitution. The Board is fully responsible for governance which means that it makes all significant policy settings and sets the strategic direction for the organisation. Employed management – that is the CEO – is fully responsible for the performance of the staff in following the strategic direction and adhering to those policies. In this interface, the constructive working relationship between the Chairman of the Board and the CEO is critical and at NTSV that relationship is positive and constructive.

STATEWIDE COVERAGE

While there is not formally an NTRB in Victoria, NTSV provides professional services to native title claimant groups across the state and is the only body that does so. Given the fact that native title matters in Victoria are much more likely to be resolved through effective negotiation with the State Government rather than by litigation, the capacity of NTSV to engage with the Government is greatly enhanced by the fact that it is the only body in Victoria representing the interests of native title claimants.

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

This is obviously in contrast to other states where there may be several NTRBs all seeking to engage in agreement making with the relevant State Government.

THE ROLE OF NATIVE TITLE SERVICES VICTORIA

The role of NTSV is quite clear. It is to perform almost all of the functions of a NTRB as set out in the Act and it receives funding from relevant Commonwealth agencies to perform that role and carry out those functions. The only two rep. body functions that NTSV is not able to undertake are certification under section 203BD and being a party to an agreement pursuant to section 203BH.

NTSV's constitution states that:

1 Objects

1.1 The objects of the company are:-

- (a) to relieve poverty, sickness, suffering, distress, misfortune, destitution and helplessness amongst the Aboriginal people of Victoria; and
- (b) recognising that such poverty, sickness, suffering, distress, misfortune, destitution and helplessness result from such Aboriginal people having been progressively dispossessed of their lands and/or waters, without compensation, as a consequence of which they have become socially, spiritually and economically dis-empowered, and are now the most disadvantaged section of Victorian society, to:-
 - (i) assist such Aboriginal people to regain recognition of their rights and interests in lands and/or waters arising from their traditional laws and customs;
 - (ii) assist such Aboriginal people to regain access to their traditional lands and/or waters;
 - (iii) assist such Aboriginal people to have a voice in relation to the future use and exploitation of their traditional lands and/or waters;
 - (iv) assist such Aboriginal people to obtain compensation in relation to their dispossession from their traditional lands and/or waters; and in relation to the future use and exploitation of such traditional lands and/or waters.

2 Functions

2.1 The company shall strive to obtain its objects by doing all things within its powers necessary and desirable for the attainment of the objects described in clause 3.1, including:-

- (a) providing legal, research and other professional services to Aboriginal people and groups;
- (b) performing the functions of a representative body under Part 11 of the *Native Title Act 1993* (Cth) for the State of Victoria; and
- (c) doing all things incidental to the above.

2.2 The company shall not pursue its objects by engaging in political lobbying activity in its own name.

NTSV's role is therefore to represent native title groups in relation to a range of land related matters that go beyond a narrow definition of native title functions. For example, in Victoria cultural heritage protection is subject to a different statutory regime that does not provide for control of these matters to be exercised by traditional owners (that is by native title holders). Given that across Australia control of cultural heritage protection is regarded by native title groups as a fundamental native title right, NTSV would be remiss if it did not perform a role that included representing the interest of native title groups in relation to cultural heritage control, notwithstanding that the alternative statutory regime would seem to remove the issue from the ambit of matters to be addressed through the performance of the functions set out in the Act.

We believe that NTRBs need to be able to develop creative solutions to the complex legal and political problems that face native title groups in seeking to exercise their rights under the Act. This is particularly the case in settled Australia where there has

been massive extinguishment of native title by other forms of tenure and where decisions of the High Court in such matters as the Yorta Yorta matter have meant that the recognition of native title through the courts is best achieved by the good will of governments, Commonwealth and State.

(2) Resources available to Native Title representative Bodies, including funding and staffing:

EMPHASIS ON PROFESSIONAL SERVICE

NTSV has been established specifically for the purpose for providing professional service delivery to native title claimant groups. While there will be some matters in relation to which the NTSV Board will seek to engage with the State Government on behalf of clients, the clear emphasis of NTSV's activities will always be on professional service delivery rather than political lobbying or activities of a political nature.

We believe that too often over the past decade NTRBs have sought to engage in political activity where sound professional services may well have been required to achieve the ends sought.

NTSV has, since its registration as a Company Limited by Guarantee in August 2003 sought to adopt best practice in all its activities and to build a team of competent professional staff to give native title claimant groups the best possible chance of benefiting from the rights and interests available to them under the Act.

It is our view that other NTRBs have at times relied on expensive external consultants for the performance of certain core functions that ought wherever possible to be performed by in-house professionals employed directly by the rep. body. Whilst the use of external lawyers and anthropologists, along with other disciplines, will sometimes be necessary, NTSV has sought to engage competent Managerial, Legal and Research professionals in order to create strong in-house capacity that is both more accountable and more cost effective than a heavy reliance on external consultants.

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.

STAFF COMPETENCE

Whilst the commitment to professional service delivery has already been mentioned, we would stress further the need for NTRBs to be staffed with competent people.

Native title work complex and demanding. The Act is a cumbersome piece of legislation requiring a high level of competence, legal and managerial, if its processes are to be effectively used to achieve real outcomes for native title claimants.

It is our view that there ought to be some sort of accepted standards of Managerial, Legal and Research competence applied nationally to the recruitment of all NTRB staff. In the absence of such national standards local politics and deficient

recruitment and assessment procedures can too easily lead to NTRBs relying on staff who do not possess the relevant skills and experience.

FUNDING:

The Committee is no doubt aware that the funding to NTRBs has not effectively been increased since approximately 2000. During that period, the cost of living increases have had to be passed on in staff salaries as well as the costs of engaging external consultants when required. The budgets must be increased to at least cover those increases.

Moreover, NTRB functions require the capacity to assist in resolving sometimes difficult disputes within and between native title holding groups. These disputes can have the effect of holding up native title claims in litigation, and in agreement making with State governments and other respondents. Overlap issues between areas under claim can also involve the use of considerable resources in resolving the issues. It is essential that NTRBs are adequately funded to be able to carry out their functions under the Act.

(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

STRATEGIC PLANNING

NTSV has invested a good deal of effort in devising a Strategic Plan for the 3 year period 2004-2007 that accurately identifies the objectives that it seeks to pursue and the ultimate outcomes that it seeks to achieve.

NTSV's Board and senior staff met a full day workshop in March 2004, facilitated by Dr Mick Dodson, and established the key strategic directions for the next three years. Arising out of that workshop a draft Strategic Plan has been prepared and submitted to the relevant funding body for initial assessment prior to finalization and final submission by the end of May 2004.

SUMMARY OF PROJECTED OUTCOMES

In relation to NTRB planning functions, NTSV believes that annual operational planning should include a brief document setting out the specific outcomes that the NTRB seeks to achieve in the given financial year. We have found that that document, which we refer to as the Summary of Project Outcomes, is the key document in forming our activities in that it can be regularly reviewed both by the Board and the Management group of senior staff to assess organisation performance against projected outcomes. In this way organisational activity remains focused on outcomes rather than on bogging down in issues of process that can so easily occur given the complexity of native title.

We believe that the setting of priorities is fundamentally important in relation to annual planning therefore vitally linked to the operational planning process. Again in our case it is the Summary of Projected Outcomes that must be prioritised and this is undertaken by the Management group making recommendations to the Board with regard to the setting of priorities, with the Board then either endorsing or amending them recommendations and thereby finalising priorities.

Given the dynamic and ever changing external environment in which NTSV operates, that is subject to constant revision to ensure that it is updated regularly to take account of external factors including court timetabling orders, significant future act activity and changing client needs.

KEY RELATIONSHIPS WITH OTHERS

As set out above in the Statewide Coverage section, NTSV has developed good working relationships with the State government. There are many state government agencies involved in native title issues in Victoria. While the managers of those agencies tend to be based in Melbourne and are now well known to NTSV, gradually relationships are being developed at the regional and local level particularly in areas under claim. NTSV also has developed good working relationships with the Federal Court in Victoria and with the Native Title Tribunal members and staff working on claims in Victoria. The most common non-State respondents in Victoria are usually represented by the same firms of solicitors with whom we are developing relationships in the resolution of the Wotjobaluk application and are now meeting with them in the mediation of the Gournditch-Mara Application in the south-west of the state.

It must of course be borne in mind that there are factors in the external environment that are beyond the control of NTSV. These may include the approach of particular developers, the court, the State or other parties to proceedings. NTSV must work within the constraints placed by these factors which may result in occasions on which work priorities set by NTSV have to be adjusted to accommodate this.

Please don't hesitate to contact me should you wish to discuss any aspect of this submission further.

Yours faithfully

Chris Marshall
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