

# **Torres Strait Regional Authority**

## **THE CAPACITY OF NATIVE TITLE REPRESENTATIVE BODIES TO DISCHARGE THEIR RESPONSIBILITIES**

*Submission to the Joint Parliamentary Committee on Native Title and Aboriginal and Torres Strait Islander Land Fund.*

### **INTRODUCTION**

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 is inquiring into and reporting on the capacity of Native Title Representative Bodies to discharge their responsibilities under the Act with particular reference to:

- a) the structure and role of the Native Title Representative Bodies;
- b) resources available to Native Title Representative Bodies, including funding and staffing; and
- c) 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.

This submission:

- describes the activities of the Torres Strait Regional Authority as a representative body under the Native Title Act; and
- identifies specific capacity issues in relation to the performance of its native title functions.

Native Title Representative Bodies are fundamental to the native system. Native title negotiations are resource intensive, costly and often uncertain, even when an agreement may appear to have been reached.

Because of their range of functions and on-going involvement with the operations of prescribed bodies corporate they are under-funded for what they are required to achieve. Increased resources for representative bodies would have beneficial impacts on the native title system in general. The present need to set priorities in relation to native title applications means that there will always be delays and extended time frames in resolving native title issues. Inevitably any increase in resources may need to be found from savings in other parts of the system.

Both the TSRA and the Native Title Office which manages the TSRA's native title output benefit from current funding arrangements. Because it is a Commonwealth statutory authority, the TSRA is 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 Native Title Act. The certainty provided through the TSRA's three-year rolling program agreed with government is also a security for the Native Title Office.

While it might be argued that the TSRA itself has the flexibility to increase funding for its native title output, there are other pressing needs which must be met to improve the economic and social well-being of Torres Strait Islanders and Aboriginal people in the region. At the same time outcomes in relation to native title can impact positively on the situation of the traditional inhabitants. This, however, is not always the case, resulting from emerging and continuing uncertainties in achieving native title agreements and determinations.

## **SUMMARY OF CAPACITY ISSUES**

To assist the committee, the TSRA has identified a number of factors which impact on the capacity of the TSRA and the NTO to perform their native title functions. In summary these include:

- the complexity of the Native Title Act
- the range of functions to be performed by Native Title Representative bodies
- the particular circumstances and relative complexity of native title issues in the Torres Strait
- overall resourcing of the native title function, including both financial and human resources
- demands placed on Native Title Representative bodies in responding to the requirements of external stakeholders
- monitoring the outcomes of the nine consent determinations made under the *Native Title Act* recognising native title rights and interests over land in Torres Strait.
- the need to provide post native title determination assistance to prescribed bodies corporate (There are now nine registered native title bodies corporate in the Torres Strait, and there are likely to be at least another seven in the next 12 months.)
- the regional basis of native title activities in the Torres Strait and specifically the sea claim
- the prospective sea claim in relation to the Torres Strait and the high priority given by the traditional inhabitants to the sea and the exploitation of its resources
- the potential impact of native title on the management of Torres Strait fisheries
- the movement into new legal territory for the NTO associated particularly with the sea claim
- the lack of commercial activity from which PBC's might derive sustainable income to increase their own capacity

- the need to provide targeted training and education to PBCs and native title claimants to further their understanding of native title processes and to build their capacity to participate in those processes.
- difficulties in recruiting and retaining the necessary professional skills and technical resources in a remote area resulting in a lack of staff continuity in key positions and reduced capacity to engage and negotiate with proponents on behalf of native title holders or claimants about proposed developments.
- the need for effective and efficient management of the native title system within the resources allocated to native title representative bodies to speed up the process
- specific infrastructure issues associated with Deeds of Grant in Trust (DOGIT) and the position of the Queensland Government
- the capacity to respond to future acts
- an increasing emphasis towards mediation, negotiation and assistance in dealing with future acts as well as dispute resolution and agreement making
- inherent delays in resolving native title issues and reaching agreements
- the need to develop strategic and operational plans and determine policies, priorities and strategies as key management and decision-making tools
- implications of the Torres Strait Treaty in resolving native title issues.

## **THE TORRES STRAIT REGION**

The Torres Strait stretches 150 kilometres from the tip of Cape York Peninsula in North Queensland to the south-west coast of Papua New Guinea. Islands, reefs, and coral and sand cays are scattered throughout the region, the northern most island reaching to within five kilometres of the Papua New Guinea coastline.

Culturally unique, the Torres Strait is predominantly inhabited by Torres Strait Islander people who maintain strong seafaring and trading traditions, and who continue to possess strong connections to their land and sea through their culture, lifestyle and history. The maritime culture and history of Torres Strait Islanders has a strong influence on the strategies and objectives identified by the TSRA Native Title Office which include the regional sea claim.

This high level of continuity and connection has been recognised by the Australian Courts as well as by the State and Commonwealth Governments.

Following the historic *Mabo* decision, there have to date been a total of nine consent determinations made under the *Native Title Act 1993* recognising native title rights and interests over land in Torres Strait.

With the exception of the inner islands and Mer, the predominant form of tenure on the 18 island communities in the Torres Strait is the Deed of Grant in Trust (DOGIT) vested in the Island Councils. It has previously been determined that DOGITs co-exist with native title and that there are few other extinguishing acts on the outer islands.

Where possible and desirable native title issues in the Torres Strait are approached on a regional basis, taking into account the similarity in cultural background and values of the Islands. Every effort is made to cooperate with external stakeholders and other native title representative bodies.

## **ISSUES RELATED TO THE PRESENT INQUIRY**

### ***a) the structure and role of the Native Title Representative Bodies***

The Torres Strait Regional Authority (TSRA), which performs the functions of a native title representative body, was established on 1 July 1994, under the *Aboriginal and Torres Strait Islander Commission Act 1989*. The functions of the TSRA are broad and are set out at Section 142A of the ATSIC Act. The TSRA has a number of outputs, of which native title is one. The others are Economic Development; CDEP; Housing, Environment, Health and Infrastructure; Social, Cultural and Development; and Policy and Information.

The TSRA consists of an elected and administrative arm. The elected arm, which forms the TSRA Board, is comprised of 20 Torres Strait Islander and Aboriginal members. A General Manager is responsible for the TSRA's administration and staffing.

The TSRA was first appointed as a Native Title Representative Body under the *Native Title Act 1993* in 1995, and was re-recognised in 1998 by the Minister for Aboriginal and Torres Strait Islander Affairs as the Native Title Representative Body for the Torres Strait region.

The TSRA's representative body functions under the Native Title Act are performed through the Native Title Office (NTO).

Representative bodies are primarily responsible for servicing the needs of their constituents effectively and equitably. Those constituents are the persons who hold or may hold native title in their area. On that basis, one of the guiding principles for the operations of representative bodies is their responsibility to act in the best interests of their constituents.

The NTO is managed by the Principal Legal Officer who is accountable to the General Manager and ultimately, the TSRA Board. Under its current structure, the NTO has a component of six staff. These are the PLO, a legal officer, two anthropologists, and two administrative support staff

The NTO benefits from being situated within the TSRA.

This has resulted in the NTO being part of a well administered, accountable organisation with a Board representative of Island communities and linked to State structures.

There is formal recognition within the Authority of the roles and responsibilities of the elected members and the Administration. This recognition flows onto the operations of the NTO. In these circumstances, the management of the NTO is less prone to interference from the Board, and results in decisions being made in relation to native title claims where there might be a conflict of interest.

***b) resources available to Native Title Representative Bodies, including funding and staffing***

Because the TSRA is a Commonwealth statutory authority, the NTO benefits from being funded directly by the Commonwealth. This is different from all other representative bodies which until recently were funded through ATSIC and then ATSIIS.

The funding arrangements mean that the NTO has a secure grant of funds which is predictable for the life of the strategic plan, and makes planning easier and more efficient. The TSRA operates on a three-year funding cycle and budgets and sets priorities accordingly

Resources, however, remain a key problem. In particular the lack of resources inhibits the capacity of the NTO to provide post determination assistance to native title holding groups. This is a critical issue.

There are now nine registered native title bodies corporate in the Torres Strait, and there are likely to be at least another seven in the next 12 months.

These bodies require assistance in administering their native title, reaching agreements, and corporate governance.

The lack of funding for post determination assistance not only poses a significant strain on the TSRA, but also jeopardises the native title process as determinations become unworkable or ineffective on the ground due to a lack of resources, skills and assistance for prescribed bodies corporate (PBC's).

This is particularly acute in the Torres Strait where there is little commercial activity, such as mining, that could provide some revenue to the PBC's. This issue, if not addressed, may severely impact on the ability of local Councils and the State Government to provide services and perform statutory functions in the region.

The other 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 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.

As a result of difficulties in recruiting and retaining professional staff, the NTO has not operated at full capacity for some time. It is likely that the difficulty in attracting and retaining suitably qualified professional staff will impact on the ability of the NTO to perform its functions.

With developments in the native title system the TSRA is starting to experience significant changes in its principal functions. Mediation, negotiation and assistance in dealing with future acts as well as dispute resolution and agreement making are emerging as primary functions for the TSRA as communities and Prescribed Bodies Corporate grapple to cope with their responsibilities under the Native Title Act and associated regulations. The situation is exacerbated by the absence of any available funding for PBCs once they have been established.

In the Torres Strait at present there are 18 claimant applications, of which 17 are registered with the Native Title Tribunal. During 2003-2004 nine land use agreements were finalised, of which seven were registered, together with nine other agreements. There were five disputes relating to native title applications and four relating to ILUAs, rights of access and other matters. Sixteen prescribed bodies corporate were assisted.

#### *Outcome/output management*

Management of the operations of the Native Title Office is facilitated by compliance with the government's performance reporting requirements, involving the identifying of outcomes and outputs.

The TSRA had one outcome for which it is funded by the government:

*“to achieve a better quality of life and to develop an economic base for Torres Strait Islander and Aboriginal persons living in the Torres Strait”.*

Six outputs contribute to the achievement of the outcome:

1. economic development;
2. community development, employment and training,
3. native title;
4. housing, environment, health and infrastructure;
5. social, cultural and development; and
6. policy and information.

The operations of the Native Title Office fall under Output 3 – Native Title.

#### ***TSRA Output 3 – Native Title***

The objective of Output 3 is:

“To consult with and effectively represent Torres Strait Islanders in the performance of our functions under the *Native Title Act 1993 (Cwth)* and in particular, to secure legal recognition of native title to lands and waters in the Torres Strait”.

This component facilitates the securing of legal recognition of native title in Torres Strait and proper regard for native title rights in relation to all projects affecting Torres Strait land and seas.

In achieving their regional strategic objectives, Native Title Representative Bodies must fulfil specific functions under the Native Title Act. These include:

- to facilitate the researching, preparation and making of claims by groups of Aboriginal peoples or Torres Strait Islanders, for determinations of native title and for compensation for acts affecting their native title
- to assist in the resolution of disputes within groups about the making of such claims
- to assist groups by representing them, if requested to do so, in negotiations and proceedings relating to the doing of acts affecting native title, the provision of compensation in relation to such acts and any other matter relevant to the operation of the Act.

Broadly, the functions involve:

- facilitation and assistance
- certification
- dispute resolution
- notification
- agreement making
- internal review
- other functions conferred by the Act.

The NTO has developed strategic objectives in relation to each of its legislative functions to facilitate planning, the setting of priorities, and the delivery of its outputs.

The budget for the NTO to perform its functions and deliver its outputs for 2003-2004 was \$1,382,243. The most recent Commonwealth Budget has appropriated \$1,464,000 for native title in the Torres Strait.

Of the 2003-2004 allocation, it was anticipated that approximately \$330,000 would be available to meet project activity costs. This fell significantly short of the cost identified for meeting the project activity of the NTO in the Operational Plan.

This requires the NTO to engage in clear priority setting, and has resulted in a significant portion of the work being rolled forward into the 2004-2005 financial year. This has required the NTO to manage expectations of its constituents / clients frustrated by the time taken to progress some matters, such as the Torres Strait Regional Sea Claim.

Whilst the Operational Plan identifies that planned activity levels for the next 12 months should be achievable given the funding allocation for 2004-2005, this does not take into account the availability of suitable staff resources or priorities and deadlines set by external stakeholders e.g. the Federal Court. It also does not allow any funding for assistance to PBCs, which has been identified as a real need by the TSRA NTO.

At the same time the NTO is required to be responsive to broader developments within the native title system and the broader objectives of its constituents.

### *Infrastructure issues*

In a significant blow to native title in Torres Strait, seven consent determinations that were scheduled for hearing in November 2002 were cancelled only three weeks before the scheduled hearing dates following an unexpected change of position by the Queensland Government.

The State Government reversed its previous position that community infrastructure built on DOGIT lands could co-exist with native title, and has now asserted that they are public works which extinguish all native title.

This question was referred to the Full Court of the Federal Court in the matter of *Darnley Island v Queensland* ([2003] FCAFC 2227). Unfortunately, this decision has been of little utility in resolving the issues between the native title parties and the State of Queensland which prevented the determinations from proceeding by consent. Negotiations with the State are ongoing, and the resolution of this issue, and the finalisation of the outstanding land claims, will be a key priority.

This dispute has had significant ramifications for the TSRA and the region. The delays in resolving long standing native title claims, and the Full Federal Court litigation, have put considerable financial and resource strains on the NTO, and have meant progress on other priority matters, and in particular the Torres Strait Regional Sea Claim, has been delayed.

At a regional level, the dispute with the Queensland Government over infrastructure development has had significant implications in terms of future act matters, and has highlighted that a number of infrastructure works constructed over the last 6-8 years may have been constructed invalidly.

A significant challenge for the NTO will be to ensure that processes are put in place so that future infrastructure works can be validly constructed without extinguishing native title.

With Commonwealth and State funding likely for stage 3 of the Major Infrastructure Program, as well as ongoing development by Island Councils of housing and other community infrastructure, it is anticipated that this and similar issues will continue to require a substantial commitment of resources.

### ***Other resource issues***

With nine Registered Native Title Bodies Corporate, and a further seven anticipated to be registered during the life of this strategic plan, mediation, negotiation and assistance in dealing with future acts, as well as dispute resolution and agreement making, are emerging as primary functions for the NTO as communities and PBCs grapple to cope with their responsibilities under the NTA and associated regulations. With a lack of funding for PBCs, providing resources and assistance to these bodies will be a significant challenge for the NTO.

The filing of the Torres Strait Regional Sea Claim in 2001, which incorporates the sea estates of 14 more or less discrete groups of native title holders into the one regional claim, has also marked a move into new legal territory for the NTO. The NTO is consistently instructed that the sea and the exploitation of its resources is of the highest importance to Torres Strait Islanders.

In light of the High Court decisions in *Ward* and *Yorta Yorta* significant further legal, anthropological and other research needs to be done in the preparation of this claim. It is anticipated that significant resources will be required during the life of this strategic plan to progress the research work, to enable meaningful mediation to occur, and if necessary to prepare this matter for trial. Increasing case management by the Federal Court will place pressure on the NTO to comply with timeframes for the progress of this claim which in turn will influence the allocation of resources.

Tenure issues in the Torres Strait are also likely to impact on the functions of the NTO, with the State Government actively promoting the transfer of DOGIT and reserve land under the *Torres Strait Islander Land Act 1991*.

- c) ***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***

To guide it in its operations the TSRA and the Native Title Office have determined a set of policies, strategic objectives, and priorities to ensure the efficient and effective utilisation of available resources. These set the framework for inter-relationships with other organisations and are a fundamental part of the NTO's strategic planning process.

## **CONCLUSION**

The Native Title Office performs an important role in the Torres Strait, assisting the Torres Strait Regional Office in its role as a Native Title Representative Body. Resource issues remain paramount. Planning and reporting requirements are placing increasing responsibilities on the Unit. At the same time, the resolution of native title issues is becoming more resource intensive. This is likely to continue, given the situation in relation to infrastructure in the Torres Strait and the position taken by the Queensland Government.