



Goldfields Land & Sea Council's submission to:

the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund's inquiry on the capacity of Native Title Representative Bodies to discharge their responsibilities under the *Native Title Act*.

The Goldfields Land and Sea Council's comments on the Inquiry's terms of reference follow. As the matters sought to be dealt with by the three terms of reference are inter-related, it is not always possible to discuss them separately and there will be some overlap between them. However, the submission attempts to deal with terms of reference 1 and 3 together; and then discusses term of reference 2.

Terms of Reference 1 & 3:

the structure and role of the native title representative bodies; and 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.

The Goldfields Land & Sea Council: roles and responsibilities

The Goldfields Land & Sea Council was set up in 1984. It is an association of Goldfields Aboriginal people and enjoys widespread support from communities, organisations and individuals in the region. Goldfields Aboriginal people see the GLSC as the regional 'voice' to represent their interests on a range of matters to do with land and waters, governance, social and economic development, heritage and other matters of justice.

As a native title representative body under the *Native Title Act*, the GLSC's representative body area covers a region in Western Australia that extends from just south of Wiluna in the north – the lands of the Tjupan people, to the lands of the Esperance Nyungar on the south coast, and east those of the Mirning people and the South Australian border. This land area is larger than Victoria. The GLSC area also covers the seas adjacent to this region, to the southern boundary of the exclusive economic zone.

The Goldfields landscape is diverse, as are the region's Aboriginal peoples who take their identity and culture from the land. While all belong to a group broadly identified as 'Western Desert People', there are differences in language and

custom within the region. In accordance with these cultural differences, the GLSC is managing 13 native title claims.

While gains from the native title claims process are yet to be realised (more on this below), the GLSC and Goldfields traditional owners have been able to make significant progress in the area of dealing with future acts and other native title matters.

Future acts & agreement-making in the Goldfields

The Goldfields region is highly prospective for minerals, particularly gold and nickel. Settlement came to the region in the 1890s when miners seeking their fortunes flocked to the eastern Goldfields in large numbers. The area remains one of the world's richest, most profitable gold-producing areas. The nickel boom of the 1970s was also centred on the Goldfields, and nickel exploration is again on the increase.

This activity translates into hundreds¹ of future act matters per year in the GLSC representative body area – 60 per cent of Western Australia's future acts. Mining and exploration take in large areas of land and impact greatly on the area's Aboriginal peoples. They present potential threats to land and culture but, if managed carefully, also present opportunities.

Traditional owners have shown that they can improve the economic situation of their people, including on a regional basis, by agreements resulting from future act negotiations, and by agreements that cover a set of issues raised by future acts. Some examples of the many agreements that have been reached include:

- the Goldfields Heritage Agreement between the GLSC, State of Western Australia and mining industry bodies, which has expedited the granting of prospecting and exploration applications and facilitated greater protection of Aboriginal heritage;
- a uniform heritage protection regime, providing a template that all individual mining companies are encouraged to sign up to;
- an agreement with the Amalgamated Prospectors and Leaseholders Association for the purpose of conducting site surveys under the *Aboriginal Heritage Act 1972*;
- the removal of blanket objections by Aboriginal traditional owners to prospecting and exploration tenement applications;

¹ In the 2002/2003 financial year the GLSC received 707 exploration and prospecting notices and 113 mining lease notices, pursuant to section 29 of the *Native Title Act*.

- transparent processes for the distribution of any future act monies to traditional owners;
- major mining lease agreements for specific traditional owner groups: for example with Sons of Gwalia, Granny Smith, PACMIN, AngloGold, Harmony, Herron Resources, Croesus, Western Mining Resources;
- an MOU with the State's conservation and land management department, to lay out the process for achieving joint management of Goldfields conservation reserves and national parks;
- joint management with Shire of Esperance of council lands within the Esperance Nyungar claim area;
- a Pastoral Access Protocol that has smoothed the way for access to traditional land and cultural sites;
- a memorandum of understanding with the State Department of Planning and Infrastructure for ensuring the land needs of Aboriginal people are properly considered when land is proposed to be taken for public and private use; and
- an MoU with State's Aboriginal Lands Trust for hastening hand-back of reserve lands held in trust to Goldfields Aboriginal people.

There are more agreements; and there are more under negotiation, including in the area of land acquisition and management.

Future act negotiations is one of many areas of native title representative body work where building relationships; setting up and supporting well-governed and legally-durable traditional-owner organisations² (such as prescribed bodies corporate, as required by the *Native Title Act*); and proper support and resources are crucial. It is an expanding area, with more future acts notified each year³, and is an area where much more work could be done. This work, necessarily undertaken by the GLSC, should be better supported, for the benefit of all.

The knowledge and expertise uniquely available in NTRBs will continue to be required, and will need to be augmented to maximise land-based benefits for Aboriginal people, both pre- and post-native title settlements (whether by litigation or negotiation) and as a result of future act and other negotiations. As

² It should be noted that native title representative bodies have a statutory role in relation to PBCs, and are the only regional organisation with the knowledge, expertise, links and relationships to manage their establishment and maintenance. In spite of their requirement under the *Native Title Act*, there is no funding to PBCs.

³ And, 55 per cent of the approximately 5000 mineral tenement applications that remain in the backlog – that is, are yet to be released by the WA Government – are in the Goldfields region.

well as having areas of specialist knowledge and expertise, NTRBs play a critical and central role as the link between Aboriginal concerns and aspirations and the means of responding to those concerns and aspirations. They map, navigate and negotiate the Aboriginal and non-Aboriginal systems for each other.

Within their regions, and more broadly from a policy-development perspective, native title representative bodies' roles and responsibilities will continue to expand, particularly as native title parameters are progressively better understood – for example, as the common law develops through native title court determinations, negotiations lead to more agreements, non-native title arrangements are developed and implemented, and governance arrangements including prescribed bodies corporate are put in place. This can only be done successfully by NTRBs, managing these processes on a regional basis.

The native title claim experience so far: “more frustration than exhilaration”⁴

There is much room for improvement in the native title claim process. A more constructive approach is required, as is a reorientation of resources away from litigated and towards negotiated native title settlements. The roles and responsibilities of NTRBs could also be better recognised and supported.

Despite State Government rhetoric about the advantages of negotiation over litigation, the State has not negotiated any claims in the Goldfields. As a result, one claim after another – that could be settled by quicker, less costly and more constructive agreement-making processes – ends up in court. The GLSC, with other land councils in Western Australia, has been calling for a negotiated-agreements approach to settling native title for many years, and will continue to do so.

The Wongatha claim, in the north-east Goldfields, has been fiercely contested by respondents including the State and Commonwealth Governments and has the sad distinction of having had the longest-running (and no doubt among the most expensive) native title hearings in Australia to date. The claim – covering an area of 183,800 km² and involving the rights and interests of 2000 Aboriginal people – has consumed much of the GLSC's energy and resources for the past four years.

Hearings began in February 2002 and continued into 2003. More than 80 Aboriginal witnesses and eight experts gave evidence during the hearings. Closing submissions are scheduled for July 2004. Whatever the outcome, the question will be posed again, as it has many times already by the GLSC, if a more sensible negotiated process could not have been followed.

Even though native title litigation is slow and extremely expensive, the huge financial costs of the process can be dwarfed by the social costs. The process

⁴ GLSC Chairman, Ian Tucker, in the GLSC *Annual Report 2002 – 2003*, page 6

places great and protracted stresses and demands on the often elderly Aboriginal people involved, particularly when their evidence is attacked in aggressive cross-examination.

An important part of the NTRB role in the litigation process is to explain Aboriginal law and culture (that is, what is not restricted), and Aboriginal ways of doing things, to the court and respondents to the claims. NTRBs must also explain the native title system and what is required under Western law to their Aboriginal constituents and members; take instructions from traditional owners and advise and assist them to prepare for the court process. In this sense, native title representative bodies are the linchpin for the entire native title process.

It is unfortunate when this role is not recognised, and courts and others do not appear to be willing to accommodate cultural restrictions, including the sensitivity of gender issues. In recent Goldfields court proceedings cross-examination included gender-sensitive topics, where the cross-examination was conducted in such a way as to offend, and cause great embarrassment and distress to witnesses. Questioning has also been overly personal and intrusive causing further unnecessary offence.

Representative bodies are often left dealing with the fall-out. This has happened in the Goldfields when, after each day's hearings on country, the court and respondent parties had flown in their helicopters back to their hotels, further highlighting the disparity and unfairness in the system.

Another issue highlighting the unfairness in the system is that of third-party funding through the Attorney-General's Department. This scheme, which provides grants to respondent group to oppose native title applications, is more generous and its accountability and transparency requirements are less onerous than those required for native title representative body funding.

Once the court processes are complete, and a determination of native title is handed down, there is still the need for the Aboriginal people concerned and other groups to work out how they are going to live and work together in their local community. They still have to set up and sustain the legally-durable and accountable title-holding organisations, such as prescribed bodies corporate. Very little that happens in an adversarial court process helps to lay the foundations for the strong and productive regional relationships that need to be built so that everyone can 'get on with business' once the claim is determined.

An expanded role for NTRBs and alternative approaches

In spite of the length, costs, damage to relationships and injustice of the native title litigation process, there are no resources provided for finding alternative ways of satisfying land justice outside of this process. Similarly, there is no

funding for prescribed bodies corporate, or their governance and capacity needs, despite their requirement under the *Native Title Act*.

These are all matters of critical importance and must be addressed if government policies advocating a move from more traditional welfare approaches to economic self-sufficiency are to be realised. In the meantime, the GLSC will continue to call for a properly resourced, negotiated-agreements approach to native title and land justice for Aboriginal people.

As an Aboriginal organisation with a broad historical role, and an NTRB with statutory responsibilities, the GLSC must undertake, and be recognised and funded to undertake, these roles. In spite of the pressures of litigation, the GLSC has been able to build and maintain sound regional relationships, negotiate enduring agreements and advance a range of land justice matters, all of which contribute to regional economic development. This has happened both inside the native title process – through native title claims and in negotiating and managing future acts; and outside the process – by negotiating regional agreements to, for example, better protect heritage and manage land.

NTRBs continue to seek to work in partnership with governments, industry and others to promote land justice, sustainable regional development and Aboriginal social and economic development. They are the best placed to do this, as the link between Aboriginal peoples and governments and others; and they enjoy the legitimacy that their structure and operations, and these links, bring. There is no one else who can do it.

Governments should consider recognising and supporting a continuing and expanded role for NTRBs, particularly within their regions. This recognition and support should include both native title and non-native title matters: for example, NTRBs 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 management matters.

NTRBs should also be supported to add to and make the most effective use of their knowledge and expertise: for example in providing professional land-management services to traditional owners; and for expertise and advice to negotiate land-based commercial arrangements into the future with mining companies, tourism operators, primary producers and local governments, among others.

Term of reference 2:

resources available to native title representative bodies, including funding and staffing

While much has been, and continues to be, achieved by the Goldfields Land & Sea Council and by the traditional owners of the Goldfields-Esperance region,

these achievements have often been made in the face of falling real levels of funding and increasingly unsustainable workloads. Accountability requirements, while they are accepted and necessary, are becoming increasingly onerous and consuming more and more NTRB resources, relative to other NTRB statutory functions.

For NTRBs to continue to make the kinds of gains outlined above, and to build on them for the benefit of all concerned, more reasonable accountability and reporting requirements and far more realistic funding levels are required.

Funding

The GLSC is an important regional Aboriginal organisation that seeks to plan and work, both strategically and effectively, to high professional standards. This is especially critical given the resources and levels of expertise of those, including the mining industry, with whom we must negotiate on behalf of our constituents. To continue work successfully and professionally requires that on-going funding be allocated – in consultation with NTRBs and with their participation – to better align funding arrangements and levels with needs. These arguments have previously been made by the Commonwealth Grants Commission and by the Aboriginal and Torres Strait Islander Social Justice Commissioner⁵.

The GLSC's ATSIIS-approved operational budget this financial year (2003/04) is for \$2.7 million. The GLSC applied for \$3.8 million. The GLSC has little more than two-thirds of what it needs to conduct basic operations, a short-fall of 28 per cent. Funding for litigation is applied for and granted separately, on a case-by-case basis. During the Wongatha trial, funding shortfalls, combined with Federal Court timetables, left the GLSC with no choice but to incur a deficit in 2002/03. The operational funding shortfall for next year will increase to 30 per cent.

These shortfalls increase as the system fails to recognise both the needs created by increasing workloads and increasingly accountability requirements, and the basic causes of increased costs, such as inflation and general wage indexation.

The difficulties caused by the chronic and critical lack of funding – for both Goldfields Aboriginal peoples seeking to have their native title rights and interests recognised and miners, developers and others who seek to negotiate with them over land use – has been highlighted in many reviews, reports and public statements: by Commonwealth agencies, mining companies and State Governments, among others⁶. So far, all calls have gone unheeded.

⁵ For examples, see the Commonwealth Grants Commission's, *Report on Indigenous Funding 2001*; and the Aboriginal & Torres Strait Island Social Justice Commissioner's, *Native Title Report 2001*.

⁶ Examples of such calls include those by Rio Tinto in its October 2002 submission to the Parliamentary Joint Committee inquiry into the effectiveness of the NNTT; by NNTT Deputy President Fred Chaney in June 2002; by the WA Government in the 2001 Wand & Athanasiou review of the native title claim process in WA, and the WA 2003 Bowler Inquiry into improving the

There are four parts to the native title system at the Commonwealth level: the National Native Title Tribunal; the Federal Court; the Attorney General's Department, which provides grants to third-party respondents to native title claims; and native title representative bodies appointed under the *Native Title Act*. In terms of statutory responsibility, volume of work and increasing demands, the NTRBs are by far the most poorly funded part of the system.

It does not appear as if funding, of itself, is the main problem. Funding to the native title system as a whole has increased in recent years, but the native title representative body part of the system has received no real increase since 1994/95. Even when other parts of the native title system return surpluses, this money is not reallocated to where it is needed most, the NTRBs.

Increases in funding are required, and improved funding arrangements are necessary, for land councils to attract and keep staff, to expand and improve our expertise (as discussed above), and to maintain consistently high professional standards. This would more than pay off to the benefit all concerned.

Accountability and administration

We have already said that while funding shrinks relative to our workload, accountability and compliance requirements increase. This unsustainable situation is exacerbated by the uncertain, convoluted, often illogical and drawn-out administrative processes for release of grants and litigation funding from the Federal Government.

The current system causes many additional and unnecessary problems, and places enormous stress and pressure 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*.

As these pressures increase, the understanding among governments (Commonwealth and State), and therefore the community, of the role and functions of representative bodies seems to become narrower and more restrictive.

The GLSC recently received a highly-complex draft funding agreement. The funding conditions in this draft agreement are such that the independence of NTRB is greatly challenged. It is not as if these conditions are open to any reasonable process of negotiation. This challenge to NTRB independence, and

level of greenfields exploration; and in the Commonwealth commissioned LoveRashid report in March 1999 which said that NTRBs have about half of what they need to meet their core functions; and in the September 2003 Prosser (Federal MHR) report.

therefore our ability to effectively represent our constituents, is exacerbated by the Commonwealth seeking to exercise extraordinary controls over NTRBs while, at the same time, vigorously opposing Goldfields native title claims in the court.

NTRBs are more than merely process factories for the interests of others; a means of removing the 'impediment' of native title. The constituents of NTRBs view them as organisations representing the rights and interests of Indigenous people – working for the “recognition and protection of native title” (the first-listed object of the *Native Title Act*). NTRBs are often the best placed organisations in their regions to facilitate, support and/or manage land-based Aboriginal economic and social development.

The Indigenous voice in shaping policy

Apart from the consequences of the pressures caused by inadequate funding, increasing workloads and increasingly onerous accountability and compliance requirements, on the ability of NTRBs and their constituents to effectively participate in the native title system there is a broader consequence.

There are many government (in all spheres) inquiries and policy reviews that have great importance for the people we represent. The policies and debates associated with these inquiries and reviews form much of the context for our work. But, however relevant the issues, and however well-placed in terms of constituency and mandate we are as an organisation, we often cannot respond because we lack the capacity to do so.

This leaves us out of many of the debates and unable to participate in shaping the policies that affect, often profoundly, the people we represent. It also leads to poor policy development which assists no-one. Indigenous people seeking and working to have their native title rights and interests recognised at Australian law bring great skills and experience to the 'table'. They have much to offer the Australian culture, economy and society, but a lack of appreciation for this fact often results in there being little support or opportunity for Indigenous people to make a full contribution.

Any democracy that fails to hear from such an important group of its citizens is destined to repeat past mistakes where they are concerned. Those mistakes may look different in appearance, and seem to occupy different (more modern) circumstances, but at their heart they are the same. And they have the same consequences.

Additional cautionary note

Another issue that governments may wish to consider, when considering funding levels and the rights and interests of native title applicants, is that any loss of native title rights will bring about a vacuum that neither the State nor the

Commonwealth will be able to fill. It is therefore critical to secure the post-native title position of Aboriginal people, regardless of the outcomes of determination proceedings.

What this means is that any benefits negotiated with and on behalf of traditional owners, as a result of their status as registered native title applicants, could be lost if the court rules that native title has not survived. Mining companies (for example) are not benevolent institutions, and any more benefits after an adverse finding are not likely to be able to be negotiated. This would do away with a significant means of achieving independent regional and local economic development opportunities for Aboriginal people. Governments, to date, have not shown an ability to provide the kinds of benefits that Aboriginal people and their organisations have been able to negotiate for themselves, using the lever provided by native title.

The GLSC stands ready to work in partnership with governments to constructively address these issues.

In conclusion

Native title representative bodies operate as regional organisations representing Indigenous people on a range of land, governance, and associated justice and economic development issues. They are not narrow native title process organisations for the benefit of other parties. A holistic partnership approach to regional Indigenous development is required; a fact that is well-recognised in recent Federal Government Indigenous affairs policy statements.

NTRBs require increased and adequate funding to continue to provide high-quality professional service to their constituents, to assist native title holders to secure and exercise their rights at law, and to respond to others who seek to make use of and share the benefits of Aboriginal land. The native title system requires fair and proportionate funding across that system if it is to work effectively. Native title parties will be better able to respond and the benefits to all will include improved regional economic development.

This submission has called for the recognition and support of an expanded role for NTRBs, to allow NTRBs to work with the people they represent for enduring land justice solutions, with appropriate governance structures and processes, both inside and outside the native title process. This merely reflects reality and necessity.

Once native title is determined in the 13 claims, there will be a variety of land held by Aboriginal people in the Goldfields – including that recognised through the native title process, ALT reserve transfers, ILC and other acquisitions, jointly-managed conservation lands – and prescribed bodies corporate set up to hold and manage these lands. Future NTRB roles, and funding and staffing

requirements need to be recognised so as to capitalise on what is achieved through the *Native Title Act*, and through ILC and other initiatives.

The GLSC and its constituents will continue to favour and, where possible, work for economic self-sufficiency over more traditional welfare approaches. We call for recognition and support for our increasing role, realistic funding and improved arrangements, and a more just partnership approach.