

SUBMISSION BY THE ABORIGINAL LEGAL RIGHTS MOVEMENT NATIVE
TITLE UNIT TO THE PARLIAMENTARY JOINT COMMITTEE ON NATIVE
TITLE AND THE LAND FUND

TERMS OF REFERENCE

That, pursuant the 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.

INTRODUCTION

The Aboriginal Legal Rights Movement (ALRM) is the Native Title Representative Body for the whole of South Australia, recognised by the Minister pursuant to Section 203AD of the *Native Title Act 1993* (the NTA). The Native Title Unit within the ALRM is responsible for the day to day administration of the ALRM's responsibilities under the NTA.

There are currently 27 active applications for the determination of native title in South Australia. Note however, that following a mediation of 9 claims recently convened by the National Native Title Tribunal (the NNTT), the amendment and withdrawal of claims is likely to reduce the number of active applications in South Australia to 21.

The De Rose Hill application is currently the subject of mediation, ordered by the Full Court following the hearing of the applicants' appeal in May 2003.

Of those active claims, all but 4 have been certified pursuant to section 203BE(1) of the NTA by the ALRM. No claims that the ALRM has certified have failed the registration test. Of those claims not certified by the ALRM, 2 are unregistered (Kokatha Munta and Ted Roberts) and 2 are registered (Kuyani and Mirning). Of those claims certified by the ALRM, 4 were made after the amendment of the NTA (although 1 one as a result of amalgamation of pre-amendment claims).

There are currently 5 Indigenous Land Use Agreements (ILUAs) signed in SA. 3 are registered and 2 are currently going through the NNTT registration test.

This submission focuses on the effect on the ALRM of the complex inter-relationships between NTRBs, the Federal Court and the NNTT that the NTA has created. No doubt the Committee will receive many submissions regarding resources. While this submission addresses resourcing in general terms, the significance of resourcing issues is addressed in light of the focus on structures.

1. The Structure and Role of NTRBs

The preamble to the NTA states:

“It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation.”

The structure and role of NTRBs have been the subject of two reviews previously – the Parker Report¹ and the Rashid Report². The Parker Report was undertaken in 1995, only a few years after the commencement of the NTA. The Rashid Report was undertaken in 1999, one year after the amendment of the NTA. In addition to these reviews, the Minister requested a review of NTRBs as they relate to the performance of the Minister’s responsibilities under the NTA (the Miller Report)³.

The Parker Report noted that the range of functions that NTRBs were being called upon to perform would become more apparent over time⁴, but that the roles and responsibilities would need to be formalised in statutory amendment at some stage.

a) The 1998 Amendments

The amendments to the NTA in 1998 were significant. Not only were the functions and responsibilities of NTRBs made more explicit and detailed (broadly consistent with the Parker Report recommendations), but the changes to structures and processes for application and determination of native title had a significant flow-on effect for the workload of NTRBs and their capacity to manage indigenous participation in the new litigation-based process that the amendments mandated. The current functions are:

- facilitation and assistance⁵;
- certification of applications and ILUAs⁶;
- dispute resolution⁷;
- notification⁸;

¹ Review of Native Title Representative Bodies, 1995, ATSIC (the Parker Report)

² Review of Native Title Representative Bodies, 1999, ATSIC (the Rashid Review)

³ Review of the Native Title Representative Body System at the request of the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs, 2003, ATSIC (the Miller Review)

⁴ Parker Report, page 7

⁵ NTA, s203BB

⁶ NTA, s203BE

⁷ NTA, s203BF

⁸ NTA, s203BG

- agreement making⁹; and
- internal review¹⁰.

The NTRB must perform these functions in a manner that maintains organisational and administrative processes that promote satisfactory representation of native title holders, promote effective consultation with Aboriginal and Torres Strait Islander peoples living in the NTRB area and ensure that structures and processes operate in a fair manner¹¹. Facilitation and assistance functions may only be performed upon request.

The clarity about role and function that the amendments provided assisted NTRBs and their constituents to better target their services, and provided a framework that allowed clear processes to be developed and implemented.

All of these functions are resource intensive and place significant responsibility on NTRBs. The effect on staff and financial resources has been canvassed extensively in both the Rashid Report¹² and has been the subject of detailed analysis in discussion in the Annual Reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner¹³.

Significantly however, a critical issue identified in the Parker Report, which had clearly come to fruition by the time the amendments were made, was not taken up by legislators. That is, there is still an avenue for individuals and groups to participate in the native title process outside of the NTRB system.

b) The capacity of NTRBs to ‘cover the field’

In analysing the statutory roles and responsibilities of NTRBs, the Parker Report noted that the legislative functions were not mandatory and acknowledged the deliberate nature of the ‘flexibility and open-endedness’ of the roles. The Report noted further that this situation was ‘partly because there was little clarity about the potentialities of these bodies, but also because of government, resource developer and even indigenous concerns at the possible creation of a statutory and monopolistic land councils regime through Australia’. It concluded however that ‘such a development is eventually inevitable and will facilitate a strategically responsible approach to native title issues across the continent’.¹⁴

In 1998, the NTA was amended to preclude the Attorney-General from providing financial assistance to native title claimants pursuant to s183 of NTA. ATSIC also reviewed its processes, and ceased funding individual claimant groups and

⁹ NTA, 203BH

¹⁰ NTA, s203BI

¹¹ NTA, s203BA(2)

¹² Rashid Report, Chapter 3

¹³ Annual Report, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 2001, Chapter 2 and Annual Report, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 2003, Chapter 2

¹⁴ Parker Report, page 6

organisations representing them. In theory, indigenous people wishing to make an application would need to seek funding from the NTRB, thereby giving the NTRB some strategic control over native title management through the provision or denial of funding. In fact, other sources of funding and non-financial assistance have been made available to some parties to progress their claims (either through negotiated agreements or other funding arrangements). In addition, the many claims made prior to the amendment were extant after the amendments.

Claimant applications outside of the NTRB processes are an expensive distraction. In general, the reason that some individuals make application for determination of native title outside of the system of assistance that an NTRB can offer is because they don't have the proper authorisation and know that the NTRB would not and could not certify a claim.

It is not surprising that most of the claims of this type made after the amendments were not registered. Rather than risk an adverse determination that affects the rights and customs of other claimants, where claimants pursue futile and ill-conceived litigation, the NTRB has been left to spend limited resources striking out these applications, in order to preserve native title rights and interests for a broader native title group.

In South Australia, the persistent dispute between certain groups and individuals and the lodgement of claims by applicants with little or no authority has been made possible by income streams and non-financial assistance from other sources. Not only has the ALRM been hamstrung in its capacity to effectively assist those native title parties that have undertaken the appropriate community consultations required for proper authorisation, it has been required to divert significant resources into intra-indigenous dispute resolution and away from progressing resolution of the broader issues. Until now, the ALRM has sought to support people to resolve their differences away from the glare of non-indigenous parties and has been extremely tolerant in its approach. It is however, now contemplating following the lead taken by other NTRBs, and will shortly commence proceedings to strike out a handful of claims in South Australia. For an organisation that is required to protect native title with limited funding, the political and financial justification of expenditure on applications to strike out claims is a difficult one.

NTRBs are the organisations in the system that carry the legislative responsibility to make sure that claims are orderly, but have no power to prevent the kind of renegade claims that make negotiations with properly authorised claim groups impossible to facilitate. In addition, non-indigenous interests, particularly those opposed to native title (including some state governments) are more than happy for the broader community to remain misinformed about the powers of NTRBs to control the progress and pattern of native title claims and so continue to take the blame for the crisis of uncertainty for other land users.

In effect, NTRBs are being made responsible for solving a significant problem in the resolution of native title issues without the power or resources to carry out that responsibility effectively.

c) The change from mediation to litigation

The most significant of the amendments was the change from a mediation-based process to a litigation-based process. It is important to note that the vast majority of native title applicants commenced their claims prior to the amendment of the NTA and therefore arguably, did not intend to commence legal proceedings. Rather, applicants intended to commence a dialogue about their interests in land with other land users and managers and agreement on joint use and management.

2. Resources available

Other NTRBs will no doubt make submissions on this issue. The funding of NTRBs is manifestly inadequate. In implementing the recommendations of the Rashid Report, ATSIC created significantly more administrative and financial reporting requirements in addition to the new statutory obligations created by the amendments, but did not provide adequate additional funding. The budget for NTRBs Australia wide has been approximately \$45m - \$50m the past three years. The Rashid Report recommended that funding to NTRBs be increased to \$80m - \$85m per year (and would need to be maintained at that level for at least 5 years), in light of the mandatory statutory functions that NTRBs would have to discharge following the 1998 amendments¹⁵.

The government agreed to provide additional funding to the native title system and in 2000, an additional \$86m was allocated over four years. Note however that less than one fifth (\$17.4m out of \$86m total) of this funding was allocated to NTRBs. The balance of that money was provided to other agencies with responsibility for the management of native title – the Federal Court and the NNTT – and to provide funding for other parties through the Attorney General’s Department pursuant to s183 of the NTA. The effect of this distribution was that funding was made available across the board for the various mediation and other activities generated in native title matters. NTRBs were then required to respond to an increased workload with a worse relative funding imbalance¹⁶.

a) Scrutiny of Funding

It is noteworthy that the relevant branch of the Commonwealth Attorney-General’s Department that provides funding for non-indigenous parties in native title matters has never been the subject of any formal review or audit. Nor has there been any review or audit of the cost of Commonwealth intervention in native title matters.

In addition to the 3 reviews already referred to, the relevant section of ATSI that administer funding for NTRBs has been the subject of 2 audits by the Office of Evaluation and Audit. The Australian National Audit Office is likely to audit the program again.

¹⁵ Rashid Report, page 72

¹⁶ Annual Report, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 2001, Page 57

The scrutiny of the funding of indigenous parties compared with non-indigenous parties raises some serious questions about the administration of the NTA by the Commonwealth, and exposes a significant inconsistency in the treatment of indigenous as compared with non-indigenous parties.

In short, the government increased the responsibilities of NTRBs, subjected them to considerably more accountability processes, changed the system from a mediation based to a litigation based system and then didn't provide additional funding, or stronger statutory powers to properly manage the resolution of native title issues.

3. Inter-relationships with other Organisations

The requirement to commence proceedings in the Federal Court and the Court's participation in the overall management has added another layer of complexity and expense to native title matters. There are three main areas where this is apparent:

- Various case management mechanisms to 'aid' speedy resolution;
- Administrative requirements of the Commonwealth for reporting and strategic planning; and
- Assumption of overall control of the direction and progress of claims

While the ALRM respects the role of the Court and the honourable intentions of individual judges, there have been adverse effects on the capacity of NTRBs to assist claimants and to discharge their statutory responsibilities as a result of the actions and decisions of the Federal Court.

a) Case Management

The Federal Court of Australia convenes a Users' Group roughly annually to provide a forum to discuss issues of common concern amongst native title parties. It is generally attended by NTRBs, government officials and representatives of 'peak bodies'. Each State and Territory registry also holds similar forums. The aim of the Users Group at national and state level is to discuss broad issues of management in a more informal setting than is afforded in court proceedings.

The ALRM acknowledges the value of exchanging information and discussing issues in a more informal setting and appreciates the significant efforts by the Federal Court to make its jurisdiction more effective. Our experience however, is that there is never enough time to comprehensively discuss issues. Only one day is allocated for the national User Group meeting. In addition, the presence of all parties inevitably makes contributions positional and therefore, of limited value in enhancing co-operation.

We acknowledge that it is difficult if not impossible for the Court to engage in comprehensive discussions with NTRBs alone. The neutrality and formality of the Federal Court combine to form a significant barrier to constructive and 'without prejudice' communication about resources, the political dynamics of groups of claims and the extent to which the NTRB's strategic priorities can be achieved.

b) Administrative Requirements

The ALRM is required by s203D of the NTA to prepare a Strategic Plan relating to its functions. The Strategic Plan must be prepared in consultation with ATSIC and must be approved by the Minister. The Strategic Plan must include a general financial plan, a general statement of objectives and a strategy by which to achieve those objectives including consultation processes, decision making procedures and setting priorities for the performance of its functions.

The first Strategic Plan, from 2001-2004 is almost at an end. The new Strategic Plan, for 2004-2007 is currently with ATSI for review and subsequent forwarding to the Minister for approval.

Significantly, the Strategic Plan requires the setting of priorities, consistent with the power in s203B(4) of the NTA to determine priorities and allocate resources accordingly. This section implicitly recognises that NTRBs will never be funded sufficiently to simultaneously fulfil every request for facilitation and assistance and so must prioritise limited resources.

In contrast to this statutory requirement for NTRBs, the Federal Court and the National Native Title Tribunal develop Strategic Plans in response to the administrative requirements of the Commonwealth. The ALRM acknowledges the powerful persuasion that the Commonwealth can bring to bear on agencies. The NTRB however, risks acting inconsistently with its Strategic Plan (and therefore its funding conditions) if the Court makes orders that require the NTRB to expend resources on a claim that it has otherwise not prioritised, or if the NNTT pursues active mediation in particular claims.

The ALRM has recently been required to provide funding to a claimant who was the subject of an order for preservation of evidence. The ALRM consistently opposed the order and argued for a number of alternatives to the course of action the Court proposed. Ultimately, the quantum of funding was not large enough to risk our generally positive and co-operative relationship with the Court and ALRM did agree to provide funding. The claimant, as the ALRM foreshadowed, has agreed to withdraw the claim following mediation. It does however, illustrate the difficulties that NTRBs face when pressured by the Court to agree to provide facilitation and assistance when it has already assessed the matter as having a low priority.

Again, the ALRM is not intending to criticise the Court and the NNTT, and acknowledges that the Commonwealth has imposed policy requirements on other agencies with a role in the management of native title.

c) Control of Progress

The ALRM now participates in regular 'callovers' whereby all native title parties must report on progress to the Court. This system is one of the methods of case management implemented by the Federal Court. While these proceedings do provide a somewhat useful vehicle for communication about progress and strategic direction, it is resource intensive and does provide an opportunity for individuals to 'grandstand' and invite the court to make orders formalising their ill-conceived objections. The

ALRM has then needed to apply resources to respond to the legal proceedings that result. Perhaps the most difficult effect of these spectacles is that these intra-indigenous, often very personal disputes are conducted in public and in the presence of parties that oppose native title. The credibility of NTRBs as stable and reasonable negotiators is adversely affected, as is the validity of assertion of native title in general. Parties are arguably entitled to wonder how an assertion of native title can be taken seriously when the indigenous parties cannot even agree on the fundamentals of a claim.

Three callovers have been held since mid-2003. The Federal Court now requests, and ALRM provides, information about financial resources and strategic priorities. It has been difficult to find a balance between providing sufficient information to the Court so that it can make well-informed orders and decisions and not 'showing our hand' to parties opposed to the making of the claim. The risk to the confidentiality or otherwise privileged nature of some of the information is very real. The ALRM has provided this information in an effort to ensure that the Court does not inadvertently cut across the priorities of the ALRM.

The ALRM has, since 2000, identified as a priority resolution of native title claims through the Statewide ILUA Process. This process operates outside of the parameters of the NTA. The Statewide ILUA Process brings together the State government, the ALRM and peak industry bodies (the South Australian Chamber of Mines and Energy, the South Australian Farmers' Federation, the South Australia Local Government Association and the commercial fishing industry bodies) on a voluntary and without prejudice basis to develop template ILUAs for the various industry sectors. The Federal Court has acknowledged the value of this process and has 'given it a berth' in the overall scheme of management. At the same time however, the Court has referred matters to mediation and has indicated that it will refer a matter for trial at the next callover in July 2004.

The ALRM has not prioritised litigation in its current or new Strategic Plan, apart from finalising the De Rose hill litigation. Based on the experience of the claimant witnesses in the de Rose Hill matter and consistent with the experience of claimant witnesses in other parts of Australia, the ALRM has taken the view that the financial costs, time and ill-will that litigation creates makes is the least favourable option for resolution. Yet, the ALRM will very soon be faced with the possibility of a matter being listed for trial that is not properly prepared for trial, not funded and not consistent with the Strategic Plan. The ALRM risks exposing a native title claim group to an unfavourable determination as well as risking its generally positive relationship with the Court. Such an outcome is inimical to the ALRM's statutory responsibility to preserve and protect native title.

It is these inter-relationships that clearly show the structural inadequacies of the NTA.