

28 June 2004

The Secretary
Parliamentary Joint Committee on Native Title
Suite S1 107
Parliament House
Canberra ACT 2600

Dear Secretary

INQUIRY INTO THE CAPACITY OF NATIVE TITLE REPRESENTATIVE BODIES

Please find enclosed a submission for the Committee's consideration. Rather than try to develop a lengthy and comprehensive review, Ngaanyatjarra Council would like to draw the Committee's attention to some pressing issues. I note that within the area for which Ngaanyatjarra Council is responsible as Native Title Representative Body (NTRB), there are already four determinations of exclusive possession native title covering a vast area, with the likelihood of more significant areas coming under native title within the next twelve months. For this reason, the Council is very concerned with the operation of prescribed bodies corporate, and the role of NTRBs post determination, as well as the difficulties of establishing native title.

I would be happy to appear before the Committee and provide further information or comment if desired.

Yours sincerely

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Ngaanyatjarra Council

INQUIRY INTO THE CAPACITY OF NATIVE TITLE REPRESENTATIVE BODIES

For several years there has been a view expressed by many Native Title Representative Bodies (NTRBs) that they are under funded and under resourced for the responsibilities they have and the tasks they must accomplish. From time to time other stakeholders, including the Government of Western Australia, relying as they do on the efficient functioning of NTRBs for future act processes have publicly agreed with that view.

The functioning of NTRBs is affected by many variables, only one of which is resourcing. The question of whether resourcing is adequate is best considered in the light of the other factors, rather than in isolation.

This paper will briefly consider the roles of NTRBs as they derive from the Native Title Act. It will discuss the practical realities of discharging those duties and indicate where those practices give rise to further needs and service obligations which must be met in order to produce a functional native title system, but where those other needs are not contemplated by the legislation or current ATSI policy.

This paper will briefly examine the operating environment and the forces which aid or hinder the NTRBs in the achievement of their objectives.

Finally, the paper will comment on the structure and adequacy of NTRBs within the system.

ROLES OF NTRBS

The roles of NTRBs are set out in the Native Title Act 1993. They can be summarised as the following functions;

- Facilitation and Assistance
- Certification
- Dispute Resolution
- Agreement Making
- Notification
- Internal Review
- Other Functions

The relative proportion of effort devoted to each of these functions varies across regions due to geography and demographics. It also varies over time as the native title process develops and matures within a region.

Within the Central Desert NTRB area for which Ngaanyatjarra Council is responsible, the vast majority of time and effort is currently devoted to the Facilitation and Assistance

function. This function incorporates a range of activities concerned with researching applications and representing applications in determination and future act processes. It also incorporates the development of prescribed bodies corporate which act as trustee or agent for the native title holders post determination. The development of prescribed bodies corporate was largely neglected in the development of native title law, legislation and policy for the first ten years of the operation of the NTA. Within the area for which Ngaanyatjarra Council is responsible, there are currently 4 operating PBCs with a strong prospect of a further 4-6 coming into existence in the next 3 years. The relationship of NTRBs to these PBCs as a service provider is a major and pressing question for Ngaanyatjarra Council in an operating environment where there is no coherent plan by either State or Federal Government for enabling these bodies corporate to function sustainably and to discharge their substantial responsibilities.

The approach to these functions taken by Ngaanyatjarra Council is reflected in the 2004-2007 Strategic Plan, which is appended to this document. The strategic plan does not provide any information about the level of effort or resources required. This information is better gleaned from the operational plan.

WORKLOAD AND RESOURCING

The workload of NTRBs is determined in part by the goals and timeframes set by its own planning processes. Increasingly, however, the nature of work and the priorities are set by external factors. There may be the need to respond to future acts, or the timetables and directions set by the Federal Court or the National Native Title Tribunal (NNTT). NTRBs have very little control over these matters. In Western Australia, the mining industry has enormous influence flowing from its role as a driving force in the economy. The past two years have seen a major push by the State and industry to reorganise the native title process to assist exploration. This in turn led to a massively resource-intensive program of negotiation to arrive a regional arrangements for dealing with land access issues.

The funding needs of an NTRB are usually in a direct relationship to the ambition of its goals, the demands of its constituents, and the level of opposition, political and legal, it must overcome in order to achieve those goals. The circumstances of NTRBs vary enormously across the country. Even within Western Australia, the differences in the political, legal, and geographic, and social operating conditions are vastly different, between for example the desert communities and the coast, or the goldfields. Within the Central Desert NTRB Area, costs and timeframes are also affected enormously by factors such as distance and the presence or absence of communication infrastructure, or the reliance on desert tracks which become impassable with even moderate rains. They are also affected by the customary practices of the native title claimant groups – the degree to which decisions can be delegated to working groups or Applicants as opposed to being made in large claimant group meetings, for example.

KEY QUESTIONS AND CHALLENGES FOR NTRBS

One of the most complex tasks faced by NTRBs is the gathering of information and evidence which is designed to establish the connection of claimant groups to country. These research efforts may be geared to either producing “connection reports” for the purposes of mediation, or to formal litigation processes in the Federal Court. Within the Ngaanyatjarra Council area of responsibility, the assembly of this material is increasingly gathered on the assumption that matters will eventually find their way into litigation. This is viewed as the only prudent approach in a mediation environment which has proved to be quite difficult in recent years. One measure of this complexity is that the State Government guidelines for establishing connection for the purposes of mediation have become increasingly technical, demanding and prescriptive, to the point that it is arguable that they impose a higher threshold for a negotiated settlement than would be required by the Federal Court for a determination. Operating to this level requires a level of work by the NTRB which goes beyond that required to reliably identify the group and provide a straightforward indicative factual basis for its claims to native title. Rather, it involves a high degree of reliance on highly-paid expert anthropologists and legal counsel. Huge effort and resources are invested in simply establishing the rights, with few resources left at the end of the process to develop constructive ways of applying those rights for the benefit of the group.

A key factor in considering the workload of NTRBs engaged in facilitation and assistance processes is the fact that Federal Court litigation and Tribunal mediation processes often occur in parallel. Experience has shown that consent determinations of native title rarely eventuate from mediation processes unless there is a further impetus for the non-native title parties to conclude negotiations. This is because the respondents rights are generally established through the future act regime, protected in accordance with the principle established in Wik, and will inevitably prevail if there is a clash with the native title rights. Accordingly, these parties often have nothing to gain through the conclusion of the consent determination. Indeed, it is arguably to the advantage of these parties in day to day future act negotiations to withhold their consent to a determination for as long as possible while seeking concessions in return for the sign off on a consent determination. It is often only the prospect of expensive litigation which provides the incentive to settle. This reality of the operating environment means that NTRBs must engage in mediation while preparing for litigation and strategically using the Federal Court processes to maintain the momentum of negotiations. While this is an effective strategy for advancing mediation or negotiation, it imposes a substantial burden on the NTRB.

STRUCTURE AND FUTURE ROLES

The question of whether NTRBs are properly structured and resourced begs the question “for what?”.

The roles and functions are set out in the NTA, but the potential roles extend beyond. Indeed in the case of Ngaanyatjarra Council, the role of NTRB (over approximately 30% of WA) is ancillary to the pre—existing roles of the Council as a service provider in a

variety of other forms, in the more confined area of the Ngaanyatjarra Lands. In respect of the wider area, the role is purely as an NTRB. This difference in areas of responsibility creates further complexity in governance, politics, and service delivery arrangements.

A difficulty arises because there is no clarity about the long term future of NTRBs as they currently exist. If they are temporary structures whose existence ceases once the determinations are made, and the ILUAs and other agreements are reached, then long term structural issues may not be as critical. However this does assume that either PBCs will be functional and self sustaining, or else that there will be some other form of technical professional support for PBCs provided through the State or Commonwealth. The potential range of agreements which NTRBs can help bring about will themselves generate a need for various kinds of expertise, in areas such as land management, heritage protection and economic development. This ongoing assistance could be provided either by direct resourcing of PBCs or through some kind of regional support centre network. No such political intention currently exists and the prospects of the vast majority of PBCs in WA having the cash flow, professional capacity, and resources to operate unaided and be self-sustaining are virtually nil in the short to medium term. Indeed, there appears to be a stand off between the Commonwealth and the States about who will assist PBCs post-determination. In this scenario the only way to maintain a functional native title process for the ongoing conduct of future acts or other native title related business in the foreseeable future, is to specifically equip existing NTRBs to provide ongoing assistance. The standing ATSI guidelines only allow NTRBs to assist PBCs up to the point of the first AGM. If this edict is followed, numerous PBCs will collapse quite quickly, the native title holders will be unable to give effect to their legitimate, and hard won rights, and third parties such as miners will be confronted with a business environment characterised by legal uncertainty, paralysis, and chaos. By way of further explication on this subject I attach a copy of a current draft paper dealing with this issue and referring to a specific example of a PBC within the region.

CAPACITY OF NTRBs

Ngaanyatjarra Council Native Title Unit has had some success in establishing native title over the past several years. The unit has fifteen full time staff and eight people in part time capacities. It provides native title services to a very large area. Its workload is evident in the attached operational plan. The quality of the staff is very high, and for an organization of its type, staff turnover is relatively low. This is despite the fact that one external reviewer found that the individual workloads of staff were generally quite high. The Council enjoys a generally good reputation and relationship with the people it serves, as evidenced by the level of cooperation it receives, and the low levels of disputation about its decisions and operation.

The organisation has made some significant achievements with the resources available, however it is not able to address all the identified needs and legitimate requests for assistance. The Unit has been forced to prioritise demands, and this means that the Unit is required to be reactive rather than pro-active in its approach to many urgent matters.

The mission of an NTRB can be characterised as follows:

- To assist Aboriginal people to establish native title and the range of agreements and benefits which flow from those rights:
- To assist Native Title Holders, post-determination to establish structures and build capacity to give effect to those rights, as a platform for economic and social development.

Ngaanyatjarra Council could be doing more in both these areas. The ideas and the will exist, but the Ngaanyatjarra Council cannot do more with the existing resources.