

A Submission to the Inquiry into Native Title Representative Bodies

by the

**NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT
ISLANDER LAND FUND COMMITTEE
(JPC 2004/5)**

from the

**Yamatji Marlpa Barna Baba Maaja
Aboriginal Corporation**

February 2005

CONTENTS

| | |
|---|-----------|
| EXECUTIVE SUMMARY..... | 3 |
| ABOUT YMBBMAC..... | 7 |
| PERFORMANCE..... | 10 |
| FUNDING OF NATIVE TITLE REPRESENTATIVE BODIES..... | 19 |
| LIST OF ANNEXURES..... | 27 |

EXECUTIVE SUMMARY

KEY POINTS

1. The high standard of work provided by YMBBMAC has led to significant achievements for claimants.
2. Strategically, the organisation aims to build relationships in order to improve outcomes for its clients. Illustrating this, YMBBMAC is a member of the WA Chamber of Minerals and Energy and the WA Chamber of Commerce and Industry.
3. Working groups provide a system of decision-making that is effective, resilient, and has a high degree of community ownership.
4. Funding continues to limit the potential of the organisation. YMBBMAC can improve its performance and achieve agreed outcomes, with additional funding.
5. High level of activity in the Pilbara is demanding considerable resources from the organisation. In order to meet fully the demands of this historic expansion, YMBBMAC requires additional funding.

ABOUT YMBBMAC

The Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (YMBBMAC) is the native title representative body (NTRB) for native title claims in the Pilbara, Murchison and Gascoyne representative areas of Western Australia.

WORKING GROUPS

The use of working groups has set YMBBMAC apart in terms of its ability to operate efficiently, its support from its membership and its ability to produce successful, lasting agreements.

Working groups provide a means of speaking directly with traditional owners. They function as a window or 'entry-point' into existing systems of Indigenous decision-making, based on traditional Aboriginal law and custom. They comprise twelve to sixteen people who are authorised by communities to make decisions in accordance with this law and custom.

The working group structure is not only used for native title claims, but also for a number of other purposes, including land management. They also provide a viable means for government agencies and stakeholders to communicate with traditional owners through an authorised decision making process.

BUILDING PARTNERSHIPS

The importance of building solid relationships with stakeholders is a key tenet of YMBBMAC's operations. The new approach involves balancing attention to relationships with a pursuit of legal rights.

YMBBMAC has developed and fostered mutual trust and respect between the organisation, its staff, members and clients. The organisation understands that more will be achieved for its claimants through effective, supportive partnership and it will do its utmost to work with government and other parties to gain more for the Aboriginal people it represents. Accordingly, in working with industry, the organisation has pursued a number of mutually beneficial agreements.

PERFORMANCE

A RECORD OF SUCCESS

Among NTRBs and others concerned with the advancement of Aboriginal people's interests, YMBBMAC is highly regarded and is considered, by some, to be the benchmark of good performance in the field.

YMBBMAC prides itself on working at the highest standards, with its activities and direction determined by its strategic plan. The organisation is committed to maintaining and improving its operational standards in the promotion of its clients' best interests. Additionally, it strives to uphold a transparent and professional manner in the course of its operations.

1. A MEDIATION APPROACH

YMBBMAC seeks to resolve native title matters through agreement, in accordance with the wishes of its clients, the Yamatji and Pilbara people. In comparison with adversarial dispute resolution, mediation is private, quicker and cheaper, more accessible, more flexible, produces solutions which are more durable and preserves continuing relationships.

1.1 Complexities of agreement making

Yet, in the native title context, agreement-making is a complex process. Native title alternative dispute resolution is not merely a matter of resolving competing interests in narrow geographical or economic terms, but takes place in a broader social, political, historical and legal context. Native title mediations are also complex as a consequence of their magnitude. They are invariably time-consuming processes involving large numbers of parties.

1.2 Advantages of agreement-making

Despite the limitations and tensions associated with resolving native title through agreement, mediation and negotiation have a greater capacity than litigation to effect the recognition of native title and the resolution of native title issues. Effective negotiation enables the identification and comprehensive protection of a broad spectrum of claimant interests and non-native title outcomes.

1.3 Resourcing issues impede agreement-making

While collaborative approaches to resolving native title issues are cost-efficient comparative to litigation, the complexity and significance of native title within Indigenous communities, compounded by a protracted but demanding negotiating timeframe and the requirements of the legislative regime, render agreement-making a resource-intensive process for NTRBs.

Unless NTRBs are resourced to approach mediations or negotiations in a manner which is responsive to the needs of Indigenous communities, sustainable outcomes cannot be assured.

2. AGREEMENT-MAKING

YMBBMAC's mediatory approach to native title issues engages communities, mining companies and government, facilitating innovative and comprehensive outcomes both within and beyond the future act process. Its commitment to mediation in the context of complicated future act issues has resulted in outcomes which have redefined the parameters of native title agreements, addressed the distinctive needs of particular Indigenous communities and engaged all stakeholders within a partnership approach to native title.

2.1 Future Act Agreements

YMBBMAC's prioritisation of strategic mediation within the future act process has facilitated resolution of future act issues in agreements which benefit all parties, providing certainty to the mining and resource industry while protecting the native title and heritage concerns of Indigenous people.

2.2 Other Agreements

YMBBMAC's commitment to agreement-making is not limited to the immediate outcomes associated with the future act regime. Instead, YMBBMAC understands that a mediatory approach is fundamentally about relationships between stakeholders in the native title process. The organisation works to build long-term and constructive relationships which enable government, industry and Indigenous communities to work as partners to establish goals and agree shared responsibilities.

FUNDING OF NATIVE TITLE REPRESENTATIVE BODIES

Inadequate commonwealth funding interferes with the ability of NTRBs to fulfil their statutory role. Insufficient funding also hinders NTRBs in the execution of their broader responsibilities of consultation, negotiation and representation of native title interests.

1. INADEQUATE FUNDING OF NTRBs AFFECTS INDIGENOUS RIGHTS AND INTERESTS

NTRBs are the only body in the native title process with the exclusive responsibility of advancing and protecting Indigenous rights and interests. Failure to fund NTRBs to fulfil their obligations in relation to the native title process means that NTRBs cannot always ensure that the native title process operates to the benefit of Indigenous people.

2. NTRBs PERFORMANCE OF FUNCTIONS RESTRICTED BY FUNDING INADEQUACIES

Funding constraints restrict the capacity of NTRBs to fulfil their statutory functions and strategic objectives in a complicated and challenging operating environment. As a consequence, the effective and efficient operation of the native title process is impeded.

2.1 Funding has not increased despite increased responsibilities under the amended NTA

Under the NTA there is increased demand for conflict resolution, utilisation of Indigenous Land Use Agreements (ILUAs) and other agreements, and accountability of NTRBs. A particular problem is the increased number of future act notifications under commonwealth and state regimes, which strain NTRB resources. NTRBs are "obliged under the NTAA to evaluate every future act notice for their area and assess its potential threat to native title interests." Lack of funding negatively affects the ability of NTRBs to assess the impact of future acts on claimants' native title interests.

2.2 Inadequate funding hinders a proactive approach to native title claims

Lack of adequate funding can make it difficult for NTRBs to take a proactive approach to native title claims. If NTRBs are forced through lack of funding to take a responsive, rather than proactive approach to their workload, the interests of native title claimants must suffer.

2.3 Inadequate funding limits the possibilities available to NTRB's in strategic planning

Since the NTAA, there is increased emphasis on conflict resolution between parties. However NTRBs

are yet to receive the necessary increases in funding commensurate to the increases in obligations under the amended NTA. Perhaps most concerning is the need for NTRBs to prioritise one claim over another due to funding limitations, even though both claimant groups are entitled to recognition of native title rights.

Inadequate NTRB funding can result in an inequitable negotiation processes between proponents of an agreement. Lack of adequate funding to NTRBs adversely impacts on the ability of NTRBs to negotiate effectively in order to protect claimant interests.

2.4 Funding levels fail to recognise obligations outside NTRB control

Under the NTA, NTRBs have the responsibility of responding to non-claimant applications to prevent native title from being extinguished. NTRBs may need to prepare a native title claim for an area to prevent a non-claimant application from interfering with Indigenous rights and interests in land. If negotiation fails, the matter may proceed to litigation. The NTRB involved will then be responsible for the expense of a claim process it did not initiate.

2.5 Cross-cultural costs

Commonwealth funding levels fail to take into account that NTRBs facilitate the interaction of two different systems of law.

2.6 Litigation costs

There is immense cost associated with proving a native title claim in the courts. Requirements of proof of claimant connection with the land involve translating traditional laws and customs so that they may be processed by the non-Indigenous legal system.

3. EFFECT OF NTRB FUNDING LEVELS ON STAKEHOLDERS

Inadequate funding to NTRBs frustrates the NTRBs, the native title claimants and other stakeholders in the native title process, including local governments, state governments and industry.

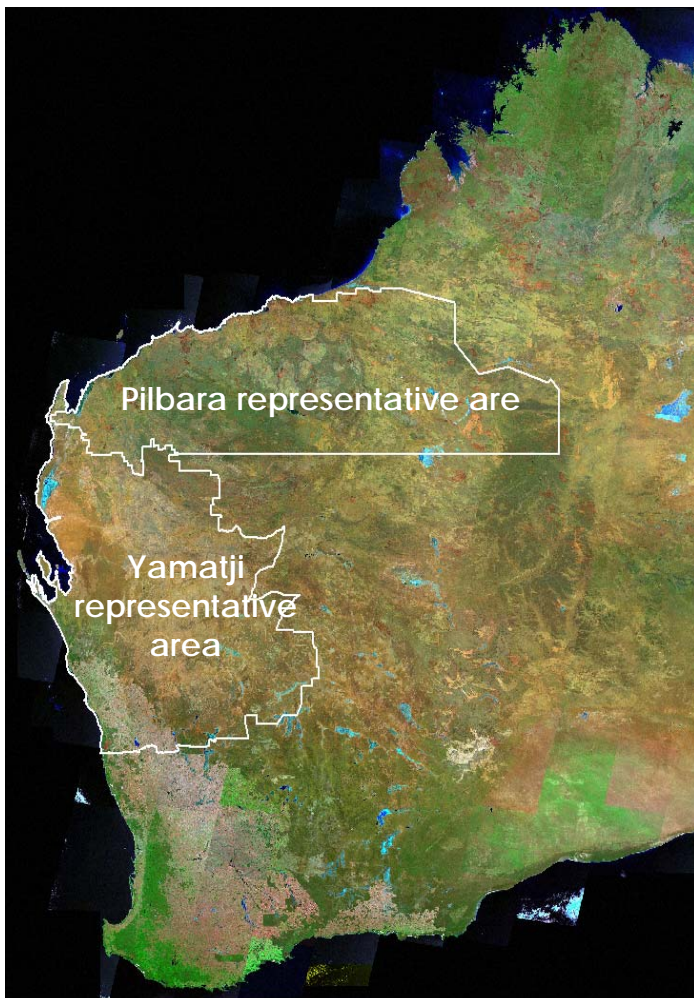
ABOUT YMBBMAC

The Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (YMBBMAC) is the native title representative body (NTRB) for native title claims in the Pilbara, Murchison and Gascoyne representative areas of Western Australia. The organisation has two divisions: the Pilbara Native Title Service (PNTS) and the Yamatji Land and Sea Council (YLSC).

The organisation has a representative area of almost one million square kilometres - around 21 times the size of Switzerland – which includes the 30 claims that the organisation currently represents (see Annexures 1 and 2 for maps of claims in the regions and Annexure 3 for a list of claims).

YMBBMAC was first recognised as an NTRB for the Yamatji region in December 1994. At the time, the Aboriginal Legal Service also offered native title representation in the area, but YMBBMAC became the sole NTRB for the region in April 2000, in accordance with requirements of the 1998 amendments to the *Native Title Act*. Later that year, it also assumed responsibility as the NTRB in the Pilbara region.

YMBBMAC is open to all adult Yamatji people and all adult Pilbara Aboriginal people. It has a current membership of almost 900 Aboriginal people, though its activities as a native title representative body impact on the interests of the majority of the approximately 10,000 Aboriginal people across both



areas. As residency is not a requirement of native title, its membership also includes people who live outside of the representative areas but who have a traditional connection to the land.

The organisation has a multi-layered representative structure, made up of a governing committee and two regional committees. Regional committees are empowered to make decisions about operational and policy matters in their areas. Members of the Pilbara Regional Committee are nominated from each PNTS claim group. Representatives on the Yamatji Regional Committee are elected from the eligible YLSC membership, most of whom come from claims represented by the organisation.

Overall policy direction for YMBBMAC is provided by the Governing Committee, which is comprised of six representatives from each of the regional committees.

YMBBMAC's organisational structure is provided as Annexure 4 and Annexure 5 provides a list of committee members.

WORKING GROUPS

One of the most significant challenges facing NTRBs is taking instructions from a community of traditional owners. The primary way that YMBBMAC has addressed this is through the establishment of working groups (see Annexure 6 for further information on working groups).

The use of working groups has set YMBBMAC apart in terms of its efficient operation, its support from its membership and its ability to produce successful, lasting agreements. The working group system is unique to YMBBMAC, although it is based on a similar and very effective process used in the Kimberley.

Working groups provide a means of speaking directly with traditional owners. Although elders are included within them, the groups are not only a collection of elders. Members are nominated and authorised by the native title claim group at a community or claimant meeting. These meetings are widely advertised so that all claimants have the opportunity to participate actively in the decision-making process. Commonly a working group will consist of a dynamic mix of young people and elders - as well as both men and women.

Working groups function as a window or 'entry-point' into existing systems of Indigenous decision-making, based on traditional Aboriginal law and custom. They comprise twelve to sixteen people who are authorised by communities to make decisions in accordance with this law and custom.

The groups are a highly convenient entry-point for communicating with traditional families and communities. They meet regularly, have a stable membership and can communicate with (or advise about) the appropriate family groups and representatives with which to speak. They can potentially provide invaluable assistance in facilitating ways to overcome apparent factional community divisions and self-appointed community spokespersons who may not, in reality, enjoy the authority of the broader community.

A working group has authority from the community to make decisions on its behalf. However, it must follow the instruction of the wider claim group to achieve a fully representative decision. These groups are cohesive, functioning, and autonomous; they have their own traditional laws and customs, so each has a uniquely tailored decision-making process. While working groups receive legal, technical, and secretarial support from the organisation, the groups direct the lawyers and consultants – and not the other way around.

The working group structure is not only used for native title claims, but also for a number of other purposes, including land management. This has enormous implications for both the Commonwealth and State Governments, which are looking for new frameworks in the wake of ATSIC.

Working groups are also a viable means for government agencies and stakeholders to be able to communicate with traditional owners through an authorised decision making process.

BUILDING PARTNERSHIPS

The importance of building solid relationships with stakeholders is a key tenet of YMBBMAC's operations. The organisation has adopted a creative and positive corporate focus under its new Executive Director, Simon Hawkins. This approach involves balancing attention to relationships with a pursuit of legal rights. This means that YMBBMAC seeks to engage government and mining companies constructively in relation to traditional owners' needs and concerns arising from development.

In working with industry, the organisation has pursued a number of mutually beneficial agreements. A real illustration of this is the process agreements YMBBMAC has reached with Rio Tinto, BHP Billiton, and Fortescue Metal Groups (FMG). These agreements entrench mutual obligations between claimants, YMBBMAC, and mining companies which will provide the best shared outcomes for all parties. This relationship has also manifest itself in the organisations membership of both the Western Australian Chamber of Minerals and Energy and the Western Australian Chamber of Commerce and Industry.

YMBBMAC has also developed and fostered mutual trust and respect between the organisation, its staff, members and clients. The organisation understands that more will be achieved for its claimants through effective, supportive partnership and it will do its utmost to work with government and other parties to gain more for the Aboriginal people it represents.

YMBBMAC is taking a positive step towards improving the negotiating environment for traditional owners in the short term, and developing a more mature and mutually beneficial relationship between traditional owners, YMBBMAC, government and mining proponents in the longer term.

PERFORMANCE

1 A RECORD OF SUCCESS

YMBBMAC has sought to achieve the most beneficial future act outcomes for claimants and has achieved relative success in its activities. Among NTRBs and others concerned with the advancement of Aboriginal peoples' interests, YMBBMAC is highly regarded and is considered, by some, to be the benchmark of good performance in the field (see Annexure 7 for media coverage of YMBBMAC success in 2004). Specifically, achievements include:

- Negotiations with major resource companies regarding a significant expansion of iron ore operations in the Pilbara region of WA in response to unprecedented demand driven by production growth in China. Memorandums of understanding, which outline the way in which upcoming negotiations will take shape, were entered between a number of PNTS claimant groups and Hope Downs Management Services, Fortescue Metals Group, and Rio Tinto.
- Various claims groups agreed to adopt the standard heritage agreements but with the instruction that the YMBBMAC-developed standard agreement would be used in preference.
- A number of future act agreements were reached during the period.
- Some key overlap issues were resolved.
- The Ngarla connection report was submitted to the State in April 2004.
- The Kariyarra connection report was submitted to the State in May 2004.

The first half of this financial year has also seen considerable activity. Achievements include:

- A number of new future act agreements have been reached across both regions.
- The Thudgari connection report was submitted to the State.
- A memorandum of understanding was signed by YMBBMAC, the Department of Indigenous Affairs (WA) and the Aboriginal Lands Trust.
- Walga Rock was returned to the custodial care of the traditional owners.
- The Wajarri Elders and Ngoonooru Wadjari claims were combined to become the Wajarri Yamatji claim.
- Permission has been granted by the Wajarri Yamatji People for tests to be carried out on their country as part of Australia's bid to host a square kilometre array telescope.

Over the past few years, YMBBMAC has achieved considerable success in its negotiated outcomes, some of which are presented in the following table.

TABLE OF AGREEMENTS 2002 – 2004

| YEAR | AGREEMENT | NEGOTIATED OUTCOME |
|------|--|--|
| 2004 | Heritage agreement between PNTS and Rio Tinto Iron Ore and Rio Tinto Exploration | <ul style="list-style-type: none"> - Separate agreements were reached between the two companies. The agreements govern the procedures and conduct of heritage surveys, funding arrangements and heritage information between the Rio Tinto companies and PNTS. |
| | Memorandum of understanding between YMBBMAC, the DIA and the ALT | <ul style="list-style-type: none"> - The MOU will provide YMBBMAC clients, through their traditionally approved working groups, with the chance to work with the Department of Indigenous Affairs and the Aboriginal Lands Trust to determine more effective methods of processing the ALT Land Transfer Program. |
| | Agreement to return Walga Rock to the custodial care of its traditional owners | <ul style="list-style-type: none"> - Walga Rock is a site of profound cultural significance not only to its traditional owners, the Wajarri Elders, but to Aboriginal people throughout the mid-west and across the western desert regions of Western Australia. - The agreement acknowledges the Wajarri Elders as traditional owners of the sites; supports vesting of Walga Rock in the Wajarri Elders; and recognises that their permission is required for any future development of the sites. |
| | Agreement between the Kariyarra People and Range River and Bullion Minerals | <ul style="list-style-type: none"> - The agreement concerns a proposed gold mine at the Indee Gold Project near Whim Creek, located in the Pilbara region of Western Australia, 1,645 kilometres north of Perth, and inside Kariyarra country. - It includes a commitment by the joint venture to initiatives including training, employment and business development and a modest financial compensation package for the Kariyarra people. |
| | Agreement between the Nanda People and Gunson Resources | <ul style="list-style-type: none"> - The agreement concerns a proposed mineral sands mining project in the Murchison region - 250 kilometres north of Geraldton. It was negotiated for the Nanda People by a working group which has been successfully representing its people since 1998. - While the deal includes a range of financial, cultural, and heritage agreements, the public recognition by Gunson Resources of the traditional ownership of the Nanda People is a significant achievement. - As part of the agreement, the Nanda People and Gunson Resources will develop a cross-cultural education program, designed to break down any prejudices that may exist within the mining operations and to ensure that Aboriginal people feel welcome and included within the working environment. |
| | Agreement between BGC Contracting Ltd, Elazac Pty Ltd, and the Kariyarra People | <ul style="list-style-type: none"> - The agreement provided a number of benefits for the Kariyarra people, including financial compensation, employment and contracting opportunities, training opportunities, and business development and assistance. There are also access to land, cross-cultural, and monitoring and compliance provisions. |
| | ARC Energy agreement with Naaguja Peoples | <ul style="list-style-type: none"> - The Naaguja people entered into a heritage protection agreement in relation to the application for petroleum exploration permit with a consortium comprising ARC Energy Ltd (as the project operator), CalEnergy Gas (Australia) Ltd and Westranch Holdings Pty Ltd. - In order to deal with the growing number of petroleum exploration permit applications in their claim area, the Naaguja people appointed a 'negotiation team' authorised to conduct the negotiations on the claim's behalf. |
| | Victoria Diamond and Grange Court Agreement with Naaguja and Hutt River Peoples | <ul style="list-style-type: none"> - Heritage protection agreements were entered into between Victoria Diamond and Grange Court with both the Hutt River and Naaguja peoples. The agreements provide for, among other things Aboriginal heritage protection, compensation, environmental protection and rehabilitation. |

| | | |
|------|---|---|
| | The Standard Heritage Agreement | <ul style="list-style-type: none"> - The SHA was negotiated between YMBBMAC, the Western Australian Office of Native Title, the Chamber of Minerals and Energy and the Association of Mining and Exploration Companies. - It came into being in response to a government initiative to make heritage agreements compulsory for all new mining and exploration tenement applications. It is not the only option for heritage agreements between traditional owners and mining companies. |
| | Fortescue Metals Group Negotiation Protocol | <ul style="list-style-type: none"> - FMG agreed to negotiation protocols with the Niyiyaparli, Martu Idja Banyjima, and Palyku peoples in March 2004 and the Kariyarra People. - These protocols recognise the declarations made by each of the claimant groups about the principles needing to be met for each group, as traditional owners, to negotiate with FMG. - The protocols recognise that each of the groups belong to their own country, spiritually, culturally, and materially. It also recognises that the groups have rights as traditional owners and Indigenous people as well as legal rights on the grant of the FMG project titles. The protocols also establish commercial and negotiation rights held by FMG. - The protocols cover matters including representation from the native title claimant groups; FMG representatives; the content of negotiations; practical and logistical aspects of negotiation meetings; negotiation assistance; the provision of notices; non-opposition to native title by FMG; Aboriginal heritage issues; and reasonable costs for travel, accommodation, and meals. |
| 2003 | Rio Tinto Negotiation Protocol | <ul style="list-style-type: none"> - A negotiation protocol was agreed between Rio Tinto Iron Ore and the Central Negotiating Committee (CNC), which acts on behalf of each of the Ngarluma Injibandi, Yindjibarndi, Martu Idja Banyjima, Innawonga Bunjima Niapali, Kuruma Marthudunera, Gobawarrarrah Minduarra Yinhawanga, Niyiyaparli, Innawonga, Puutu Kunti Kurrama Pinikurra and Ngarlawonga native title groups. - The negotiation protocol covers a range of matters relevant to the negotiations between Rio Tinto and the CNC - including principled negotiation; resources for the negotiations; and how the negotiations will be conducted. |
| | Memorandum of understanding between YMBBMAC and Department of Planning and Infrastructure | <ul style="list-style-type: none"> - The MOU recognises the positive relationship between the two parties. - It provides a mechanism by which YMBBMAC and DPI can meet and work cooperatively. - The MOU has established a committee that meets at least quarterly to discuss these matters. |
| | Newcrest agreement with Kariyarra, Ngarla, Njamal, Warrarn and Birrimaya | <ul style="list-style-type: none"> - After two years' consultation, the Kariyarra, Ngarla, Njamal, Warrarn and Birrimaya native title claimants each finalised an agreement with Newcrest Mining Ltd regarding the construction of a gas pipeline and communication facilities between Port Hedland and Newcrest's gold mine at Telfer. - The pipeline will provide additional energy for the purpose of power generation in the expansion of the Telfer gold mine. - The agreements address the individual heritage concerns of each of the native title claim groups and provide monetary compensation and community benefits for the effect of the grant of land tenure and the effect of the gas pipeline on the native title rights and interests including Aboriginal heritage of the native title claimants. |
| | Telfer Infrastructure Corridor Agreement | <ul style="list-style-type: none"> - Individual heritage concerns of claimants groups addressed - Monetary compensation and community benefits in recognition of industry impact on native title interests - Provision of training programs to maximise claimant employment in industry |
| | Peak Hill Manganese Agreement | <ul style="list-style-type: none"> - Company recognition of native title rights and interests over 45 000 sq/km |

| | | |
|------|---|---|
| | | <ul style="list-style-type: none"> - Financial compensation, employment opportunities and Aboriginal Heritage Protection - Required environmental clean-up and rehabilitation of region by industry - Industry recognition and protection of sites of cultural significance |
| | Mount Gibson Iron Project Agreement | <ul style="list-style-type: none"> - Industry conducted heritage survey in conjunction with claimant elders and provided heritage monitoring - Exclusion zones were placed around culturally significant sites - The Indigenous community to receive royalty payments for the life of the mine - Employment, training and economic development opportunities - Support for education, law and culture of the Indigenous community - Recognition of traditional ownership of the region |
| | Burrup Agreement | <ul style="list-style-type: none"> - The Pilbara Native Title Service led the negotiations on behalf of the Ngarluma Yindjibarndi native title claimants with the State of Western Australia in relation to the compulsory acquisition of native title over areas of land on and around the Burrup Peninsula. - The agreement, one of the most comprehensive of its kind, was reached in highly challenging circumstances which included the existence of three overlapping and partially heard native title claims; the acquisition involving an area of great Aboriginal and world heritage significance; the time frame being compressed because of the deadlines of the five international companies which had expressed interest in taking leases in the proposed industrial estate. - The Burrup Agreement was not made subject to any confidentiality restriction and the benefits contained in the agreement endure regardless of whether any of the native title parties were determined by the Federal Court to hold native title over the Burrup or Maitland areas. - In exchange for the native title parties' agreement to the surrender and permanent extinguishment of native title on the industrial land on the Burrup and Maitland Estates and the land required for the State for residential and commercial purposes in Karratha, the native title parties received Burrup non-industrial land; Karratha commercial and residential land; financial compensation; ongoing annual payments; State funding for an approved body corporate; employment, training and contracting; education. |
| 2002 | Gindalbie Gold Agreement with Badimia People | <ul style="list-style-type: none"> - Recognition of cultural entitlements of the Badima people in a formal agreement - Aboriginal claimants ensured tenement access and monetary compensation - Provision of employment opportunities for Badima people - Commitment to conduct cultural awareness on site |
| | Mining and Cooperation Agreement | <ul style="list-style-type: none"> - Process ensuring Aboriginal Heritage concerns are addressed in a manner least disrupting to industry |
| | St Barbara Agreement with Puutu Kurnti Kurruma Pinikura | <ul style="list-style-type: none"> - The agreement includes a process ensuring the Aboriginal heritage concerns of the PKKP native title claimants are addressed in a manner minimising disruption to the exploration and mining activities of Taipan Resources NL. - It provides compensation for the effect of Taipan's mining operations on the Aboriginal heritage and native title rights and interests of the PKKP native title claimants. |

2 A MEDIATION APPROACH

YMBBMAC seeks to resolve native title matters through agreement,¹ in accordance with the wishes of its clients, the Yamatji and Pilbara people. An elder of the Badimia people, Albert Little, has stated:

I do not wish to stop exploration activities but I do want grantee parties to consult with the Badimia people before they start exploring. The area of the proposed tenement lies within the Badimia claim and this is our traditional country. We know that we have to share our country and we can all learn to share together if we talk to each other.²

Similarly, Alum Cheedy, a Yindjibarndi man has stated:

Wouldn't it be much better for all concerned if Aboriginal people were also beneficiaries of this latest boom? We know it's our country. It has always been our *Ngurra*. We also know that we will never get whitefellas out of our country. So at least let's hope that through the proposed negotiations, something comes back to the traditional owners.³

The High Court has also commented upon the desirability of negotiating agreements:

If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issue, the court and the likely parties to the litigation are saved a great deal in time and resources. Perhaps more importantly, if the persons interested in the determination of issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers.⁴

It is a common theme of state and territory native title policies to seek to determine native title issues by consent.⁵ In Western Australia, the State Government has undertaken to resolve native title issues through agreement.⁶ In comparison with adversarial dispute resolution, mediation is private, quicker and cheaper, more accessible, more flexible, produces solutions which are more durable and preserves continuing relationships.⁷

2.1 Complexities of agreement making

Yet, in the native title context, agreement-making is a complex process. Native title alternative dispute resolution is not merely a matter of resolving competing interests in narrow geographical or economic terms, but takes place in a broader social, political, historical and legal context. As the Australian Law Reform Commission has noted, native title mediations cannot be separated from:

¹ The NTA refers to mediation as the means of resolving some or all of the issues raised by native title claims and other native title issues in ss4, 43A, 44F, 44G, 79A, 86A, 86B, 86C, 86D, 86E, 108, 123, 131A, 131B, 136A, 136D, 136G, 136H, 183

² NNTT matter WO01/183 between: ALBERT LITTLE AND ORS ON BEHALF OF THE BADIMIA PEOPLE, THE STATE OF WESTERN AUSTRALIA AND GIRALIA RESOURCES NL; Affidavit of Albert Victor Little 26/9/2002

³ See Annexure 9, Speech by Alum Cheedy for 2004 National Native Title Conference.

⁴ HONS BRENNAN CJ, DAWSON, TOOHEY, GAUDRON & GUMMOW JJ in *North Ganalanja Aboriginal Corporation and the Waanji People (the Waanji case)* 185 CLR 595 AT 617; ALR 225 AT 236.

⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, p 103.

⁶ See <www.premier.wa.gov.au/policies/native_title.pdf>.

⁷ Butterworths, *Native Title LooseLeaf Service*, para 2625.

- The impact of colonial and state and territory property law legislation and its juxtaposition with the concept of communal title;
- Complex land issues such as how native title rights and interests can be exercised consistently with existing commonwealth, state, territory and local government land management systems;
- The existence of related disputes including overlapping and sometimes conflicting native title claim boundaries and conflicting interests and power balances between land users and/or different commonwealth, state, territory and local government agencies;
- The difficulties and complexities involved for claimants in preparing to meet the evidentiary burden, and complex factual investigations incumbent, on them; and
- The complexity of the legislative scheme, including the enactment of state and territory native title legislation and the relative novelty of the Federal Court and Tribunal native title processes and practice.⁸

Native title mediations are also complex as a consequence of their magnitude. They are invariably time-consuming processes involving large numbers of parties. The protracted nature of mediations entails a constant shifting of the goal posts brought about through court decisions; changes of government and policy; shifts in inter-departmental relations; commercial amalgamations and takeovers; and the death of key participants, both Indigenous and non-Indigenous.⁹

The agreement-making process does not only involve balancing competing interests between Indigenous and non-Indigenous parties, but among Indigenous communities themselves. As researchers from the Indigenous Facilitation and Mediation Project at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) note:

In native title, Indigenous people are left to compete over the scraps of a landscape once entirely theirs in search of individual and group recognition within a complex legal, social and commercial environment. They often bring their whole beings to the native title process, including old but still seeping wounds, historical arguments, inter-generational trauma, internalised pain and the effects of community violence and alcoholism. Intricate, multi-layered and multi-directional interpersonal, family and ‘community’ dynamics are overlaid by, and interwoven with, complex and sometimes substantially financially rewarding commercial negotiations. If not appropriately managed, ‘low-key rivalries and unspoken grievances’ may be transformed into ‘serious dispute ‘business’”.¹⁰

In order to ensure the representativeness of the mediation or negotiation process, NTRBs must “secure appropriately constituted groups who are authorized and able to make informed decisions within budgetary constraints.”¹¹ YMBBMAC seeks to manage the complicated community dynamics associated with native title process by operating through the working group model (The Working Group: Bridging the gap between traditional owners, government and stakeholders briefing, provided as Annexure 6, explains more about YMBBMAC’s unique and successful working groups) which builds upon existing structures within Indigenous groups to facilitate decision-making and dispute resolution at the claimant level.

⁸ Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report No 89 2000, para 7.42

⁹ Edmunds, Mary ‘Whose Dispute? Mediating Native Title’, AIATSIS <<http://www.aiatsis.gov.au>> at 6.

¹⁰ Bauman, Toni and Williams, Rhian, ‘The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputed in Land’, AIATSIS Research Discussion Paper No.13, <<http://www.aiatsis.wa.gov.au>> at 11-12.

¹¹ Bauman, Toni and Williams, Rhian, ‘The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputed in Land’, AIATSIS Research Discussion Paper No.13, <<http://www.aiatsis.wa.gov.au>> at 12

The legalised, bureaucratic, time-constrained and multi-agenda driven processes associated with alternative dispute resolution under the native title regime create pressures for Indigenous claimants and the NTRBs whose role it is to facilitate and assist their involvement in the process. These pressures are compounded by the reality that native title mediations do not always produce ‘win-win’ outcomes.¹² Rather –

agreements on many of these matters necessarily involve compromise, and therefore lesser or greater loss, by one or more of the parties. It is misleading to suggest that this will not be the case. If mining is to go ahead, for example, it will destroy country.¹³

Indigenous claimants face agonising decisions as to “what level of compromise, if any, is possible and, if there is to be compromise, a willingness to accept responsibility, both now and for future generations about what is to be sacrificed.”¹⁴ An NTRB cannot simply give narrow legal advice in relation to defined priorities over an area of land, but must engage with complicated community and cultural dynamics to ensure that it is obtaining informed instructions and providing appropriate advice:

Because native title is at the core of Indigenous identity, every native title claim will have a complex social dimension and significant social consequences. As a result, the claimants will be unlikely to be able to produce a neat list of wishes and wants to present to the parties at mediation.¹⁵

2.2 Advantages of agreement-making

Despite the limitations and tensions associated with resolving native title through agreement, mediation and negotiation have a greater capacity than litigation to effect the recognition of native title and the resolution of native title issues. Effective negotiation enables the identification and comprehensive protection of a broad spectrum of claimant interests and non-native title outcomes. Through their engagement in the negotiation process, traditional owners who are unlikely to meet the legal requirements for native title obtain recognition and protection of their traditional laws and customs irrespective of native title jurisprudence. The Aboriginal and Torres Strait Islander Social Justice Commissioner has observed that:

preference for negotiation over litigation provides an invaluable opportunity for governments and traditional owner groups to ensure that native title determinations respond as far as possible to the development needs of the native title claim group rather than just the demands of the legal system.¹⁶

YMBBMAC advocates a collaborative approach to determining native title rights and interests as it provides a mechanism for addressing the distinctive needs of particular communities, while ensuring joint responsibility for the implementation of solutions. The agreement process brings tenement applicants and traditional owners together in a non-adversarial context. YMBBMAC’s commitment to agreement-making forges new relationships between Indigenous and non-Indigenous people. It lays the groundwork for co-operation towards a common goal of culturally appropriate mineral exploration.

Resolution of native title through agreement rather than litigation indirectly promotes the legitimacy of Aboriginal relationships to land. Agreement-making removes native title issues from the

¹² Edmunds Mary ‘Whose Dispute? Mediating Native Title’, AIATSIS <<http://www.aiatsis.gov.au>> at 5.

¹³ Edmunds, Mary ‘Whose Dispute? Mediating Native Title’, AIATSIS <<http://www.aiatsis.gov.au>> at 5.

¹⁴ Edmunds, Mary ‘Whose Dispute? Mediation Native Title’, AIATSIS <<http://www.aiatsis.gov.au>> at 5.

¹⁵ Dodson, Mick ‘Power and Cultural Difference in Native Title Mediation’ (1996) 3 (84) *Aboriginal Law Bulletin* 8-11.

¹⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003* at 103.

confrontational arena of litigation. It is replaced with a process in which the traditional connection to land held by Aboriginal people is normalised for non-Indigenous parties to the negotiations.

YMBBMAC's policy of programming matters in mediation rather than litigation is also a consequence of the cost-efficiency of taking a collaborative approach to native title issues.

2.3 Resourcing issues impede agreement-making

While collaborative approaches to resolving native title issues are cost-efficient comparative to litigation, the complexity and significance of native title within Indigenous communities, compounded by a protracted but demanding negotiating timeframe and the requirements of the legislative regime, render agreement-making a resource-intensive process for NTRBs. The 2001 Wand Review¹⁷ found that negotiation and mediation of native title applications is a costly exercise involving compilation of connection reports, identification of claimant objectives and providing for attendance of claimants at negotiation and mediation meetings.¹⁸

The capacity of NTRBs to facilitate and assist the agreement-making process is fundamental to the capacity of Indigenous people to engage in that process. It is also fundamental to ensuring that the agreements reached are durable and workable. Ultimately, "mediation will only save costs if it produces a workable agreement"¹⁹. Otherwise, the consequential litigation will only create another layer of expenditure over that associated with mediation.

Unless NTRBs are resourced to approach mediations or negotiations in a manner which is responsive to the needs of Indigenous communities, sustainable outcomes cannot be assured. Indeed, the majority of 'landmark' agreements negotiated by NTRBs, such as the Burrup Agreement negotiated by YMBBMAC, are contingent upon the funding of the NTRB's participation through contributions by proponent groups. Taken in isolation, the current levels of funding provided to NTRBs obstruct the agreement-making process by precluding the involvement of NTRBs.

3 AGREEMENT-MAKING

YMBBMAC's mediatory approach to native title issues engages communities, mining companies and government, facilitating innovative and comprehensive outcomes both within and beyond the future act process.²⁰ YMBBMAC's commitment to mediation in the context of complicated future act issues has resulted in outcomes which have redefined the parameters of native title agreements, addressed the distinctive needs of particular Indigenous communities and engaged all stakeholders within a partnership approach to native title.²¹

An emphasis upon relationships, within a long-term perspective, has resulted in YMBBMAC moving outside of conventional native title agreements to pursue constructive relationships with government and industry through a variety of agreements and protocols.²²

¹⁷ Wand, P., and Athanasiou, C., *Review of the Native Title Claim Process in Western Australia*, Report to the Government of Western Australia, September 2001.

¹⁸ Wand, P., and Athanasiou, C., *Review of the Native Title Claim Process in Western Australia*, Report to the Government of Western Australia, September 2001, p121.

¹⁹ Butterworths, Native Title LooseLeaf Service, para 2715

²⁰ See Part C 2.4(a) Future Acts for an outline of the future act regime.

²¹ See 3.1 below.

²² See 3.2 below

3.1 Future Act Agreements

YMBBMAC's prioritisation of strategic mediation within the future act process has facilitated resolution of future act issues in agreements which benefit all parties, providing certainty to the mining and resource industry while protecting the native title and heritage concerns of Indigenous people.

3.2 Expedited Procedure Future Act Matters

YMBBMAC's mediation-centred approach extends to the extensive number of expedited procedure future act matters which are generated within the Yamatji and Pilbara regions. The YMBBMAC Future Act Division has a record of dealing with these matters through a comprehensive system of lodging objections to protect Indigenous interests and then achieving agreements expeditiously without resorting to litigation. Since 2002, YMBBMAC has been actively involved in the Heritage Protection Working Group process, developing the new standard heritage agreement which is currently being rolled-out throughout the Yamatji and Pilbara regions.

3.3 Other Agreements

YMBBMAC's commitment to agreement-making is not limited to the immediate outcomes associated with the future act regime. Instead, YMBBMAC understands that a mediatory approach is fundamentally about relationships between stakeholders in the native title process. The organisation works to build long-term and constructive relationships which enable government, industry and Indigenous communities to work as partners to establish goals and agree shared responsibilities. As a consequence, YMBBMAC has been able to negotiate innovative agreements beyond the confines of native title which provide a framework for the development of lasting relationships.

YMBBMAC's commitment to building relationships with key participants in the native title process is reflected in its associate membership of the Chamber of Minerals and Energy. YMBBMAC also participates in the Chamber's Aboriginal Affairs Committee (AAC). Other members of the Committee include Rio Tinto, Argyle Diamonds, BHP Billiton and Newmont Australia. The purpose of the AAC "is to formulate and implement Aboriginal affairs policy; develop programs to build positive relations with Aboriginal communities and advise members on issues affecting the industry"²³. YMBBMAC has entered into three heritage protection agreements with major mining companies which provide framework for exploration which is responsive to community concerns.

YMBBMAC also seeks to develop strong working relationships with government through engaging in discussions towards entering into memorandums of understanding with key government departments, such as the Water Corporation, the Department of Indigenous Affairs and the Department of Infrastructure and Planning. YMBBMAC has also signed landmark agreements with five Murchison shires in order to work together on native title, heritage, cultural and economic issues.

²³ At <http://cmewa.com>

FUNDING OF NATIVE TITLE REPRESENTATIVE BODIES

Inadequate commonwealth funding interferes with the ability of native title representative bodies to fulfil their statutory role, as prescribed by section 203B of the *Native Title Act 1993*. Insufficient funding also hinders NTRBs in the execution of their broader responsibilities of consultation, negotiation and representation of native title interests (including non-claimant and future applications).

NTRBs are the only bodies whose primary function is the protection of native title interests, and the work of NTRBs in protecting clients' and constituents' native title rights and interests is compromised by lack of funding. If NTRBs are restricted in operation due to insufficient funding, the protection and recognition of native title interests is jeopardised.

More broadly, inadequate funding to NTRBs frustrates industry by slowing the negotiation and resolution of native title claims. The Howard Government has recognised the importance of NTRBs to the smooth functioning of the NTA yet inadequate funding of NTRBs is a consistent factor which limits the resolution of native title issues. This is a major concern, which has been acknowledged by state and commonwealth inquiries, the Federal Court, industry and NTRBs.

SUMMARY OF RELEVANT REPORTS

There has been a variety of reports that have considered the impact of NTRB funding on the efficiency of the native title process. Criticism of inadequate funding is explicit in reports directly concerned with the operation of NTRBs, as well as reports into other fields such as resource investment, industry viability and the general operation of the native title process in Australia. Refer to Annexure 10 for a detailed summary of various findings and recommendations of these reports with regards to NTRB funding levels.

The Love-Rashid Report

In 1999, ATSIC commissioned a review into the impact of funding levels on the function of NTRBs under the NTAA. The resulting report, *Review of Native Title Representative Bodies* ('Love-Rashid Report') examines the general adequacy of funding of NTRBs, and calls for NTRBs to be funded so that they can 'fulfil their core functions, prioritise between competing service demands of their constituents and maintain appropriate standards of corporate governance.'²⁴

The Wand Review

In 2001, the Western Australian State Government commissioned a review into the support for negotiation rather than litigation of native title claims. The results of the review were published in the *Report to the Government of Western Australia of Review of the Native Title Claim Process in Western Australia* ('Wand Review') in September 2001.

The HREOC Reports

In 2001, the Aboriginal and Torres Strait Islander Social Justice Commissioner investigated equality within the native title process in the *Native Title Report* (2001 HREOC Report). The *Native Title Report 2003* (2003 HREOC Report) by the Aboriginal and Torres Strait Islander Social Justice Commissioner also evaluated native title policies and government practices throughout Australia.

²⁴ Recommendation 1, page 1.

The PJC Inquiries

In 2001, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund conducted an inquiry into the use of Indigenous Land Use Agreements under the NTA (PJC Inquiry 2001). In 2003, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund conducted an inquiry into the effectiveness of the National Native Title Tribunal (PJC Inquiry 2003).

Industry Reports – The Bowler Report and the Prosser Inquiry

In 2002, the *Ministerial Inquiry into Greenfields Exploration in Western Australia* ('Bowler Report') was commissioned by the Western Australian Minister for State Development, The Hon. Clive Brown MLA. The inquiry was designed to investigate reasons for decreasing investment in greenfields exploration in WA, and to recommend ways in which the State Government could ensure a sustainable future for the resource industry.

In 2003, The House of Representatives Standing Committee on Industry and Resources investigated impediments to resource exploration investment in Australia. The inquiry delivered its findings in September 2003 in its report *Exploring: Australia's Future – Impediments to increasing investment in minerals and petroleum exploration in Australia* ('Prosser Inquiry'). The Prosser Inquiry recommended additional resources be provided to NTRBs,²⁵ and that resources be 'targeted and limited to support activities that facilitate negotiation processes.'²⁶

1. INADEQUATE FUNDING OF NTRBS AFFECTS INDIGENOUS RIGHTS AND INTERESTS

NTRBs are the only body in the native title process with the exclusive responsibility of advancing and protecting Indigenous rights and interests. Failure to fund NTRBs to fulfil their obligations in relation to the native title process means that NTRBs cannot always ensure that the native title process operates to the benefit of Indigenous people.

Western Australian Deputy Premier Eric Ripper MLA commented that by inadequately funding the native title process, "the Federal Government is making it more difficult for Indigenous people to secure recognition of their rights and to exercise them under Australian law."²⁷ The inability of NTRBs to represent a native title claim due to insufficient funding is inconsistent with the purpose of the NTA in recognising Indigenous native title.

The 2001 HREOC Report calls for funding to NTRBs to reflect Australia's human rights obligations to Indigenous peoples.²⁸ In particular, the report recommends that native title funding should ensure:

- Indigenous people have full and effective participation in decisions that affect them, including funding distribution and service delivery;²⁹
- Native title operates as an expression of inherent Indigenous rights; and
- Indigenous culture is adequately protected.

The Report on Indigenous Funding by the Commonwealth Grants Commission recommended a long term approach to funding to reflect Indigenous needs and to provide a 'secure context for setting

²⁵ Standing Committee on Industry and Resources, *Exploring Australia's Future – Impediments to increasing investments in minerals and petroleum exploration in Australia*, 2003, p96.

²⁶ *Ibid*, p96.

²⁷ Deputy Premier, Treasurer, Minister for Energy The Hon. Eric Ripper MLA, Media Statement 27/09/02.

²⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, p85.

²⁹ Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, Commonwealth of Australia, 2001, paragraph 21, pxix.

goals.³⁰ At present, funding to NTRBs is discretionary and based upon annual grants. The funding regime is consistent with a community service program, which fails to reflect native title as a permanent measure and reflection of inherent Indigenous rights.³¹

Recognising the human rights implications of inadequate funding to NTRBs, the 2001 HREOC report suggested that the “funding of representative bodies to perform their statutory functions to a high professional standard must also be a key priority of the funding process.”³²

2 NTRBS PERFORMANCE OF FUNCTIONS RESTRICTED BY FUNDING INADEQUACIES

Funding constraints restricts the capacity of NTRBs to fulfil their statutory functions and strategic objectives in a complicated and challenging operating environment. As a consequence, the effective and efficient operation of the native title process is impeded. In the 2003 Human Rights and Equal Opportunity Native Title Report (2003 HREOC Report) the Aboriginal and Torres Strait Islander Social Justice Commissioner found “where land councils are unable to properly perform their functions then little progress can be expected on any matter dealing with native title.”³³

2.3 Funding has not increased despite increased responsibilities under the amended NTA

Inadequate funding limits the ability of NTRBs to fulfil increased statutory functions under the 1998 amendments to the NTA. The 1999 Love-Rashid Report³⁴ found “NTRBs will not be capable of professionally discharging their functions under the new regime within the current funding framework.”³⁵

Under the NTA there is increased demand for conflict resolution, utilisation of Indigenous Land Use Agreements (ILUAs) and other agreements, and accountability of NTRBs.³⁶ A particular problem is the increased number of future act notifications under commonwealth and state regimes, which strain NTRB resources. NTRBs are “obliged under the NTAA to evaluate every future act notice for their area and assess its potential threat to native title interests.”³⁷ The Love-Rashid Report found:

Given the deluge of future act notifications received by some NTRBs, circumstances may well arise where there have been insufficient resources available to examine a future act proposal to be able to say with any certainty what the effect on native title might be...³⁸

Lack of funding negatively affects the ability of NTRBs to assess the impact of future acts on claimants’ native title interests.

In the Human Rights and Equal Opportunity Commission Native Title Report 2001 (2001 HREOC Report) the Aboriginal and Torres Strait Islander Social Justice Commissioner found that “despite the 1998 NTA Amendments, there has been no proportionate increase in the funding to representative

³⁰ Ibid, paragraph 21, pxix.

³¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, p84.

³² Ibid, p85.

³³ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, p92.

³⁴ Senatore Brennan Rashid, *Review of Native Title Representative Bodies*, March 1999.

³⁵ Senatore Brennan Rashid, *Review of Native Title Representative Bodies*, March 1999, p43.

³⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, p73.

³⁷ Senatore Brennan Rashid, *Review of Native Title Representative Bodies*, March 1999, p38.

³⁸ Ibid, p32.

bodies.”³⁹ The funding levels of NTRB’s remains virtually at their 1995 levels, with the small increase in the 2000-2001 budget of \$2.9 million in native title funding was not directly accessible by NTRBs. The 2003 HREOC Report found that government funding remains less than the amount called for by the Parker Report in 1995.⁴⁰ It is broadly acknowledged that inadequate funding significantly hinders the ability of NTRBs to effectively respond to the increased obligations arising from the amendments to the NTA.

2.4 Inadequate funding hinders a proactive approach to native title claims

Lack of adequate funding can make it difficult for NTRBs to take a proactive approach to native title claims. The Love-Rashid Report found that if NTRBs are not funded properly, they will “under perform” and “spiral down into a cycle of immediacy”. The report described the cycle of immediacy as NTRBs being forced to:

- Defer strategic decisions;
- Externalise costs;
- Forgo opportunities for negotiation and settlement;
- Limit dealings to current demands for attention; and
- Take on roles that deliver achievements as best they can.⁴¹

If NTRBs are forced through lack of funding to take a responsive, rather than proactive approach to their workload, the interests of native title claimants must suffer.

2.5 Inadequate funding limits the possibilities available to NTRB’s in strategic planning

The 2003 HREOC report has criticised under-funding of NTRBs in relation to the ability of NTRBs to freely choose between avenues of litigation and mediation depending on what is most appropriate in the circumstances. The Aboriginal and Torres Strait Islander Social Justice Commissioner found:

The under-funding of NTRBs means that, in representing the native title claim group, they are compelled to put their scarce resources into the immediate demands of the native title system rather than fully engage in the various levels of negotiation triggered by the native title process.⁴²

Since the NTAA, there is increased emphasis on conflict resolution between parties.⁴³ However NTRBs are yet to receive the necessary increases in funding commensurate to the increases in obligations under the amended NTA.

If NTRBs choose to pursue a mediation or negotiation path, resource shortages significantly interfere with their ability to negotiate and mediate native title claims effectively. The 2001 Wand Review⁴⁴ found that negotiation and mediation of native title applications is a costly exercise involving compilation of connection reports, identification of claimant objectives and providing for attendance of claimants at negotiation and mediation meetings.⁴⁵

³⁹Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, p73.

⁴⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, p91.

⁴¹Senatorore Brennan Rashid, *Review of Native Title Representative Bodies*, March 1999, p3.

⁴² Ibid, p159.

⁴³Ibid, p73.

⁴⁴ Wand, P., and Athanasiou, C., *Review of the Native Title Claim Process in Western Australia*, Report to the Government of Western Australia, September 2001.

⁴⁵ Wand, P., and Athanasiou, C., *Review of the Native Title Claim Process in Western Australia*, Report to the Government of Western Australia, September 2001, p121.

The Federal Court has recognised the strain the native title process places on NTRBs. In *Tucker for Narnoobinya Family Group v ATSIC*⁴⁶ Justice French acknowledged that associated functions of the NTA, including negotiation and arbitration, are “notoriously demanding” on NTRB resources. His Honour also noted the “harsh practical realities of resource limitations on all parties”⁴⁷ to the native title process and that “many respondents do not have the time or resources to engage directly at all stages of the mediation process.”⁴⁸

While negotiation may be the preferred method of resolution of native title claims for many NTRBs, agreement negotiation and title determination remain complementary mechanisms in the native title process.⁴⁹ NTRBs are entitled to choose the manner of claim resolution that best suits the needs of their constituents. The 2001 HREOC Report found:

The determination process enables the traditional owners in a particular region to be legally recognised as the native title holders of the land and agreement-making enables the participation of those title holders in the economic development of their land.⁵⁰

If NTRBs have insufficient funds to facilitate both determination *and* negotiation, one process must be preferred over the other. If determination is chosen over negotiation of agreement, native title groups “are denied the opportunity to obtain immediate benefits from their land.”⁵¹ If negotiation is chosen over determination of title, “funds are directed away from giving native title holders title over their land.”⁵² Clearly, the interests of native title parties suffer as a result of funding limits of NTRBs. In particular, inadequate funding inhibits the ability of NTRBs and claimant groups to choose the manner of claim resolution most appropriate to community needs

Perhaps most concerning is the need for NTRBs to prioritise one claim over another due to funding limitations, even though both claimant groups are entitled to recognition of native title rights. Even more alarming is the Noongar Land Council statement that “certain claims are going to have to drop out of the system, simply because there is no money available.”⁵³

To facilitate agreement, NTRBs may seek negotiation costs from proponents of agreements. In the 2001 HREOC Report, the Aboriginal and Torres Strait Islander Social Justice Commissioner found that if representative bodies rely upon the proponents of a project funding negotiation, proponents may obtain an ‘upper hand in negotiations.’⁵⁴ In submissions to the Parliamentary Joint Committee Inquiry on ILUAs (PJC Inquiry 2001), the Kimberly Land Council stated:

On the one hand, we are dealing with a company on a commercial basis to talk about settling an agreement and, on the other hand, our hands are tied behind our backs as to the negotiations because we cannot negotiate fairly in order to settle matters.⁵⁵

Inadequate NTRB funding can result in an inequitable negotiation processes between proponents of an agreement. Lack of adequate funding to NTRBs adversely impacts on the ability of NTRBs to effectively negotiate in order to protect claimant interests.

⁴⁶ [2004] FCA 134.

⁴⁷ *Frazier v Western Australia* [2003] FCA 351 at 32.

⁴⁸ *Ibid.*

⁴⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, p78.

⁵⁰ *Ibid.*

⁵¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, p78.

⁵² Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, p78.

⁵³ Mr Pearce, CEO Noongar Land Council, *Joint Committee Hansard – Inquiry into ILUAs*, 2 July 2001, p383.

⁵⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, p79.

⁵⁵ Mr Gunning, *Hansard*, 2 July 2001, p392.

2.6 Funding levels fail to recognise obligations outside NTRB control

Under the NTA, NTRBs have the responsibility of responding to non-claimant applications to prevent native title from being extinguished. NTRBs may need to prepare a native title claim for an area to prevent a non-claimant application from interfering with Indigenous rights and interests in land. If negotiation fails, the matter may proceed to litigation. The NTRB involved will then be responsible for the expense of a claim process it did not initiate.

In addition, non-claimant applicants receive commonwealth funding. The 2003 HREOC Report found that:

Commonwealth funding support provided to non-claimant and the funding to NTRBs reflects the consistent pattern of inequality within the native title system which fails to provide equal or even adequate support to the rights and interests of native title holders.⁵⁶

While responding to non-claimant applications draws significant resources away from initiating claims by native title parties it is necessary for NTRBs to respond in order to protect the rights and interests of their constituent claimant groups, despite the shortfalls in funding faced by the NTRBs.

The obligation of NTRBs to non-claimant applications illustrates that however effectively managed, it is not possible for NTRBs to adequately budget for applications that cannot be anticipated in advance, as such, the suggestion that management rather than funding hinders NTRBs is difficult to sustain.

2.7 Cross-cultural costs

Commonwealth funding levels fail to take into account that NTRBs facilitate the interaction of two different systems of law. The 2001 HREOC Report outlines the additional expenses involved in:

Assuring the non-Indigenous legal system that all the individual members of the group had authorised the claimants to an application for determination or that an agreement had the consent of all the members of the group.⁵⁷

The Noongar Land Council in their submission to the Parliamentary Joint Committee on Native Title⁵⁸ in 2001 (PJC Inquiry 2001) outlined the difficulty of gaining claimant consent:

If somebody could work out how I am to inform – and get the consent of – 30 000 people to enter into those agreements, I would very much like the information and, in fact, the resources to do it.⁵⁹

Queensland Liberal Senator Mason recognised that in relation to gaining consent for an agreement “the process that is in place is too expensive for what, in many cases, shire councils need.”⁶⁰ There is also cost associated with ensuring that any benefit from a native title claim or agreement is shared among community members.

⁵⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, p95.

⁵⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, p81.

⁵⁸Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund Report, Inquiry into Indigenous Land Use Agreements (ILUAs), 2001.

⁵⁹ Mr Pearce, *Hansard*, 2 July 2001, p384-385.

⁶⁰ Mr Moharich, *Hansard*, 21 March 2001, p196.

2.8 Litigation costs

More broadly, there is immense cost associated with proving a native title claim in the courts. Requirements of proof of claimant connection with the land involve translating traditional laws and customs so that they may be processed by the non-Indigenous legal system. Reports need to be compiled by anthropologists and other experts. The cost of preparing a connection report (without the cost of time and staff) has been estimated at between \$25 000 to \$200 000.⁶¹

The Federal Court has noted the funding constraints experienced by native title claimants in attempting to prepare litigation in a timely manner. Justice Hely in *Wilson on behalf of the Bandjalang People v Department of Land & Water Conservation*⁶² recognised that due to economic limitations, native title “claims are ‘prioritised’ in terms of funding.”⁶³ Cases such as *Sampi v Western Australia*⁶⁴ and *Frazer v Western Australia*⁶⁵ deal with the way in which inadequate NTRB funding results in the slowing down of the native title determination process. The costs of either negotiating agreements or pursuing claim through the courts are not reflected in the current funding arrangements allocated to NTRBs.

3. EFFECT OF NTRB FUNDING LEVELS ON STAKEHOLDERS

Inadequate funding to NTRBs frustrates the NTRBs, the native title claimants and other stakeholders in the native title process, including local governments, state governments and industry. The Wand Review identified resource shortages as the “primary impediment to a timely resolution of native title applications in Western Australia.”⁶⁶ The review called for Commonwealth action to provide adequate funding of NTRBs⁶⁷ - this was now three years ago.

The 2001 HREOC Report found that industry, local government and state governments are “impeded in their efforts to promote or engage in economic development as a result of the inefficient operation of native title processes.”⁶⁸ Such impediment was found by the Human Rights and Equal Opportunity Commission’s Aboriginal and Torres Strait Islander Social Justice Commissioner to be a direct result of the under-resourcing of NTRBs.⁶⁹

The frustration of major industry engaged in the native process was clearly expressed in Rio Tinto Pty Ltd’s submission to the Parliamentary Joint Committee on Native Title⁷⁰ (PJC Inquiry 2003). Throughout their submission Rio Tinto Pty Ltd reiterated that “the most significant restraint on the effectiveness of the NNTT is the inadequate funding of representative bodies to carry out their functions.”⁷¹ Additionally, Rio Tinto stated that in their opinion, commonwealth funding fails to reflect the greater workload of NTRBs since the NTAA.⁷²

⁶¹ Finlayson, J, ‘Anthropology and Connection Reports in Native Title Claim Applications’, in *Land, Rights, Laws: Issues of Native Title* (Vol 2, No 9) Australian Institute of Aboriginal and Torres Strait Islander Studies, 2001, p3 (quoted in 2001 HREOC p 82).

⁶² [2003] FCA 307.

⁶³ [2003] FCA 307.

⁶⁴ [2000] FCA 1018.

⁶⁵ [2003] FCA 351.

⁶⁶ *Ibid.*

⁶⁷ Wand, P., and Athanasiou, C., *Review of the Native Title Claim Process in Western Australia*, Report to the Government of Western Australia, September 2001, Recommendation 1.1.8 and 1.1.19, p8.

⁶⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, p69.

⁶⁹ *Ibid.*, p69.

⁷⁰ Inquiry into the Efficiency of the National Native Title Tribunal, 2003.

⁷¹ Mr Harvey, Chief Adviser Aboriginal and Community Relations, Rio Tinto Pty Ltd, Submission 17 to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund Report, *Effectiveness of the National Native Title Tribunal*, October (2002) Recommendation 2.1, p 6.

⁷² *Ibid.*, p 18.

In submission to the Prosser Inquiry, the CEO of the Western Australian Chamber of Minerals and Energy Tim Shanahan commented on the backlog of tenement applications in the State. He argued:

Clearly something is not operating correctly for there to be that degree of backlog and we would submit that it is a frustration that is shared by the mining companies and the Indigenous people and their representative bodies.⁷³

Similarly, William George of the Amalgamated Prospectors and Leaseholders Association of WA submitted that under funding of NTRBs results in tenement backlog and “lost opportunity in terms of discovering resources and employing people.”⁷⁴

The Government of Western Australia is also concerned about the impact of inadequate NTRB funding on industry. The Deputy Premier of Western Australia, Eric Ripper, called for increased funding to NTRBs. He made the observation that “by starving the native title process of funds, the Federal Government has made it more difficult for the negotiating partners of land councils – such as governments, mining companies, local authorities, and pastoralists.”⁷⁵

In 2002 the Ministerial Inquiry into Greenfields Exploration in Western Australia was established to investigate ways in which the State Government could encourage and sustain resource investment and activity in Western Australia. The inquiry’s report (the Bowler Report) made several key recommendations, relating to the management of native title, to prevent tenement backlog. Specifically, Recommendation 12 called for the State Government to continue its representations to the Federal Government demanding “adequate funding for NTRBs.”⁷⁶

The Bowler Report also suggested that the backlog could be reduced by placing additional resources with NTRBs to “deal with the processing of future act notices relating to mineral tenement and land title applications.”⁷⁷ While there has been some limited funding provided by the State in acknowledgment of this problem, there has been no additional funding provided by the Commonwealth and the resourcing remains grossly inadequate.

Due to insufficient commonwealth funding, NTRBs seek resources from industry to enable participation in negotiations. Rio Tinto Pty Ltd argued that “representative bodies and native title parties should have access to appropriate resources and appropriately qualified people to assist in the negotiation of right to negotiate agreements.”⁷⁸ While industry contribution may be welcome relief for under-funded NTRBs, it will only be available where industry has development interest in a native title claim area. In claim areas without lucrative resources, NTRBs may not be able to seek funding from industry, further undermining the ability of NTRBs to effectively engage in negotiation rather than litigation.

⁷³ House Committee Hansard *Industry and Resources*, 30/10/2002, Perth, p150.

⁷⁴ House Committee Hansard *Industry and Resources*, 31/10/2002, Perth, p221.

⁷⁵ The Hon. Eric Ripper MLA, Statement Released 9 October 2003.

⁷⁶ The Ministerial Inquiry into Greenfields Exploration in Western Australia, November 2002.

⁷⁷ Ibid, p 88.

⁷⁸ Submissions of Rio Tinto to the Joint Parliamentary Committee on the National Native Title Tribunal (2003), Recommendation 6.4, p 20.

LIST OF ANNEXURES

1. NNTT map of Pilbara claims
2. NNTT map of Yamatji claims
3. Table of native title claims represented by YMBBMAC, in both the Pilbara and Yamatji regions
4. YMBBMAC organisational structure
5. Membership of the Governing Committee, Pilbara Regional Committee and Yamatji Regional Committee
6. The Working Group: Bridging the gap between traditional owners, government and stakeholders briefing
7. Media coverage of YMBBMAC achievements in 2004
8. YMBBMAC Strategic Plan
9. Speech by Alum Cheedy, 2004 National Native Title Conference, Adelaide.
10. Table of reports and inquiries referencing NTRBs' funding shortfalls
11. YMBBMAC Annual Report 2004